Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Morgan and Australian Building and Construction Commissioner [2020] AATA 651 (18 March 2020)

Division:	**FREEDOM OF INFORMATION DIVISION**
File Number:	**2018/1031**
Re:	**Gary Morgan**
	APPLICANT
And	**Australian Building and Construction Commissioner**
	RESPONDENT

DECISION

Tribunal:	**Deputy President S A Forgie**
Date of decision:	18 March 2020
Place:	**Melbourne**

The Tribunal decides to:

affirm the decision of the Australian Information Commissioner dated 2 February 2018 made under s 55K of the *Freedom of Information Act 1982* affirming a decision of the respondent dated 24 February 2017 refusing access to documents requested by the applicant on 12 December 2016.

.....[sgd].....
Deputy President S A Forgie

Catchwords
FREEDOM OF INFORMATION - FREEDOM OF INFORMATION – access refused under s 24 (practical refusal reason) of the Freedom of Information Act 1982 – whether request would substantially and unreasonably divert resources of agency – whether reasons of applicant for request can be considered – no public interest in fulfilling request – decision affirmed.

Legislation
Building and Construction Industry (Improving Productivity) Act 2016
Fair Work Act 2009; s 10; s 12; s 39; s 545
Freedom of Information Act 1982; s 11; s 11B; s 24; s 24AA; s 24AB; Part IV; s 42; s 47C
Judiciary Act 1903; Appendix B: The Commonwealth's Obligation to Act as a Model Litigant
Workplace Relations Act 2006

Cases
Alexandra Private Geriatric Hospital Pty Ltd v Blewett [1984] FCA 223; (1984) 2 FCR 368; 56 ALR 265
Australian Competition and Consumer Commission v Mandurvit Pty Ltd [2014] FCA 464
Australian Securities and Investment Commission v Hellicar [2012] HCA 17; (2012) 247 CLR 345; 286 ALR 501; 88 ACSR 246
Beckett v New South Wales [2013] HCA 17; (2013) 248 CLR 432; 297 ALR 206
British Steel Corporation v Granada Television Ltd [1981] AC 1096
Chapel Road v ASIC [2006] NSWSC 1014; (2006) 203 FLR 322
D'Orta-Ekenaik v Victoria Legal Aid [2005] HCA 12; (2005) 223 CLR 1; 214 ALR 92
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577; 2 ALD 60; 46 FLR 409
Johansen v City Mutual Life Assurance Society Ltd (1904) 2 CLR 186
Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate [2015] FCAFC 99; (2015) 240 FCR 578
Linkhill Pty Ltd v The Director of the Fair Work Building Industry Inspectorate [2015] HCA Trans 340
Little v Law Institute of Victoria (No 3) [1990] VicRp 25; [1990] VR 257
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299
Re Secretary, Department of Prime Minister and Cabinet and Wood and Asher [2015] AATA 945
Repatriation Commission v Smith [1987] FCA 260; 15 FCR 327; 74 ALR 537; 7 AAR 17
Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354
Sinclair v Maryborough Mining Warden [1975] HCA 17; (1975) 132 CLR 473
Whitehorn v The Queen [1983] HCA 42; (1983) 152 CLR 657; 49 ALR 448

Secondary materials
Chambers 21st Century Dictionary (1999), reprinted 2004
FOI Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982

REASONS FOR DECISION

Deputy President S A Forgie

1. Linkhill Pty Ltd (Linkhill), of which Mr Gary Morgan is a director, manages buildings used by the Roy Morgan Group of companies (Roy Morgan Group) and has operated a restaurant and an art gallery. Some years ago, the Director of the Fair Work Building Industry Inspectorate (FWBII), which is the predecessor of the Australian Building and Construction Commission (ABCC) began investigations into allegations that Linkhill had been engaged in sham contracting in relation to ten workers engaged over different periods between 2007 and 2010 at four different sites. If Linkhill had done so, FWBII alleged that Linkhill had, to various extents, underpaid those ten workers wages, allowances, leave, redundancy/severance pay and superannuation. FWBII sought civil penalties for the alleged contraventions under the *Workplace Relations Act 2006* (the WR Act) and the *Fair Work Act 2009* (FW Act) and orders that respondent pay unpaid amounts.

2. The FWBII's investigations led it to institute civil penalty claims in the Federal Magistrates' Court, which is now the Federal Circuit Court (FCC) on 20 October 2011.[1] After various hearings and judgments on interlocutory matters, the FCC found that Linkhill had contravened various provisions of the WR Act as well as a number of industrial instruments made under that legislation. The FCC made the declarations and orders necessary to give effect to its findings and went on to consider and impose penalties in a separate proceeding. Those proceedings led to a finding that Linkhill was liable and to the imposition of penalties. Linkhill's appeal to the Full Court of the Federal Court was unsuccessful[2] as was its application to the High Court for special leave to appeal from the judgment of the Full Court.[3]

3. Mr Morgan has made three requests under the *Freedom of Information Act 1982* (FOI Act). This matter is concerned with the request that he made on 12 December 2016 for documents from 1 November 2011 to 6 December 2016 relating, in broad terms, to the FWBII's investigation and the subsequent litigation. The ABCC refused his request on 24 January 2017 under s 24 of the FOI Act on the basis that a practical reason existed i.e. that the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations within the meaning of s 24A(1)(a)(i). Its decision was affirmed by the Australian Information Commissioner (AIC) on 2 February 2018. I have affirmed the decision.

[1] Proceedings No. MLG1514/2011 lodged in the then Federal Magistrates' Court leading to an appeal to the Full Court of the Federal Court on 26 February 2014 in VID129/2014
[2] *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99; (2015) 240 FCR 578; North, Bromberg and White JJ
[3] *Linkhill Pty Ltd v The Director of the Fair Work Building Industry Inspectorate* [2015] HCATrans 340; Nettle and Gordon JJ

LEGISLATIVE BACKGROUND

4. Subject to two very important qualifications, the FOI Act gives every person a legally enforceable right to obtain access to a document of an agency and to an official document of a Minister other than an exempt document. The first of the two qualifications is that the right is given "*subject to this Act*" being the FOI Act. The second is that it is a right to obtain access "*in accordance with this Act*".[4] I will come back to both qualifications but, before I do that, the terms of the right also require teasing out.

5. A document is a "*document of an agency*" if it is in the possession of an agency, whether it was created in the agency or received by it, or if the agency has taken contractual measures to comply with s 6C of the FOI Act to ensure that it receives the document from a contracted service provider under a Commonwealth contract.[5] There is no issue in this case that the documents sought by Mr Morgan are documents in the possession of the ABCC or that the ABCC is an agency within the meaning of s 4(1) of the FOI Act.[6]

6. As I said, the right of access is "*subject to this* Act" The right of access does not extend to every document of an agency because it does not extend to an "*exempt document*". In the case of an agency, an "*exempt document*" is a document that is exempt for the purposes of Part IV as well as a document in respect of which an agency is exempt from the operation of the FOI Act by s 7 or an official document of a Minister that does not contain matter relating to the affairs of an agency or Department of State.[7] Only documents exempt for the purposes of Part IV are relevant in this case.

7. Part IV provides for two avenues by which a document may be exempt for its purposes. They are:

> "*(a) it is an exempt document under Division 2; or*

[4] FOI Act; s 11(1)
[5] FOI Act; s 4(1)
[6] An "*agency*" is a Department or a prescribed authority or a Norfolk Island authority: FOI Act; s 4(1). Subject to certain exceptions that are not relevant, a "*prescribed* authority" is a body, corporate or unincorporated, established for a public purpose by, or in accordance with, the provisions of an enactment or an Order-in-Council. The ABCC is the body that was established under s 26J of the *Fair Work (Building Industry) Act 2012* as the Office of the Fair Work Building Industry Inspectorate and continued in existence by s 29 of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). The staff of the ABCC and those of the ABC Commissioner constitute a statutory agency, the ABCC, with the ABC commissioner as its Head: BCIIP Act; s 30. The functions of the ABC Commissioner, and so of the ABCC, include the promotion of the object of the BCIIP Act, monitoring and promoting appropriate standards of conduct of building industry participants, investigating suspected contraventions of the Act, designated building laws or the Building Code and disseminating information about the BCIIP Act and facilitating ongoing discussions with building participants: BCIIP Act; ss 16 and 29(3)(d). These are public purposes within the meaning of the definition of the expression "*prescribed authority*" set out in s 4(1) of the FOI Act. As the ABCC is a statutory authority established for a public purpose, it is a prescribed authority and so an "*agency*" as that term is defined in s 4(1).
[7] FOI Act; s 4(1)

> *(b) it is conditionally exempt under Division 3, and access to the document would, on balance, be contrary to the public interest for the purposes of subsection 11A(5).*"[8]

No provision of Part IV by which a document is exempt or conditionally exempt is to be construed as limited in its scope or operation in any way by any other provision of that Part by virtue of which a document is exempt or conditionally exempt.[9]

8. If a document is an exempt document at a particular time, the agency or Minister is not required to give access to it in response to a request at that time.[10] Among the exemptions provided for in Division 2 of Part IV is legal professional privilege. Section 42 provides:

> "***Documents subject to legal professional privilege***
>
> *(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
>
> *(2) A document is not an exempt document because of subsection (1) in the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.*
>
> *(3) A document is not an exempt document under subsection (1) by reason only that:*
>
> *(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and*
>
> *(b) the information is operational information of an agency.*
>
> *Note: For* **operational information***, see section 8A.*"

9. Part II of the FOI Act establishes an Information Publication Scheme (IPS) for agencies. The IPS requires agencies to publish a range of information, including operational information, on a website but is not required to publish exempt matter or information whose publication is prohibited by another enactment. Section 8A explains what is meant by "*operational information*":

> "***Information to be published – what is* operational information*?***
>
> *(1) An agency's* **operational information** *is information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities).*
>
> *Example: The agency's rules, guidelines, practices and precedents relating to those decisions and recommendations.*
>
> *(2) An agency's* **operational information** *does not include information that is available to members of the public otherwise than by being published by (or on behalf of) the agency.*"

[8] FOI Act; s 31B
[9] FOI Act; s 32
[10] FOI Act; s 11A(4)

10. If a document is a conditionally exempt document at a particular time, the agency or Minister must give access to it unless, in the circumstances, access at that time would, on balance, be contrary to the public interest. That is the effect of s 11A(5). Section 11B addresses how to work out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under s 11A(5). Division 3 of Part IV provides for documents to be conditionally exempt.

11. I will return now to the two qualifications to the right to access given by s 11. One qualification I identified is that it is a right to obtain access "*in accordance with this Act*". That is also the subject of Part III of the FOI Act. Examples are found in the form in which a person may be given access to a document requested.[11] In some cases, access may be deferred if the circumstances set out in s 21 are applicable

12. The other qualification is that it is "*subject to this Act*" and, therefore, subject to certain exceptions found in Part III. Section 12 provides an example when it states that, unless the document contains personal information, a person is not entitled to obtain access to a document under Part III to a document, or a copy of a document, which is, under the *Archives Act 1983*, within the open access period.[12] Section 13 excludes certain documents from being accessed under the FOI Act by deeming them not to be documents of an agency. Documents in the memorial collection within the meaning of the *Australian War Memorial Act 1980* are an example.[13] At a more procedural level, the right to access given by s 11 is subject to a person's requesting access and complying with ss 15(2) and (2A).[14]

13. Of relevance in this case is the power given by s 24 to an agency or Minister to refuse to give access in accordance with a request. That section provides:

> "*(1) If an agency or Minister is satisfied, when dealing with a request for a document, that a practical refusal reason exists in relation to the request (see section 24AA), the agency or Minister:*
>
> *(a) must undertake a request consultation process (see section 24AB); and*
>
> *(b) if, after the request consultation process, the agency or Minister is satisfied that the practical refusal reason still exists – the agency or Minister may refuse to give access to the document in accordance with the request.*
>
> *(2) For the purposes of this section, the agency or Minister may treat 2 or more requests of a single request if the agency or Minister is satisfied that:*

[11] FOI Act; s 20
[12] FOI Act; s 12(1)
[13] FOI Act; s 13(1)(a)
[14] FOI Act; s 15(1)

(a) the requests relate to the same document or documents; or

(b) the requests relate to documents, the subject matter of which is substantially the same."

14. For the purposes of s 24, a "*practical refusal reason*":

> "*… in relation to a request for a document if either (or both) of the following applies:*
>
> *(a) the work involved in processing the request:*
>
> *(i) in the case of an agency – would substantially and unreasonably diver the resources of the agency from its other operations; or*
>
> *(ii) in the case of a Minister – would substantially and unreasonably interfere with the performance of the Minister's functions;*
>
> *(b) the request does not satisfy the requirement in paragraph 15(2)(b) (identification of documents).*"[15]

15. For the purposes of deciding whether a practical refusal reason exists, an agency or Minister must have regard to s 24AA(2):

> "*Subject to subsection (3), but without limiting the matters to which the agency or Minister may have regard, in deciding whether a practical refusal reason exists, the agency or Minister must have regard to the resources that would have to be used for the following:*
>
> *(a) identifying, locating or collating the documents within the filing system of the agency, or the office of the Minister;*
>
> *(b) deciding whether to grant, refuse or defer access to a document to which the request relates, or to grant access to an edited copy of such a document, including resources that would have to be used for:*
>
> *(i) examining the document; or*
>
> *(ii) consulting with any person or body in relation to the request;*
>
> *(c) making a copy, or an edited copy, of the document;*
>
> *(d) notifying any interim or final decision on the request.*"

16. While s 24AA(2) does not limit the matters to which an agency or Minister may have regard, s 24AA(3) does do so when it provides:

> "*In deciding whether a practical refusal reason exists, an agency or Minister may not have regard to:*
>
> *(a) any reasons that the applicant gives for requesting access; or*
>
> *(b) the agency's or Minister's belief as to what the applicant's reasons are for requesting access; or*
>
> *(c) any maximum amount specified in the regulations, payable as a charge for processing a request of that kind.*"

[15] FOI Act; s 24AA(1)

17. The "*practical consultation process*", which the agency or Minister is required to undertake under s 24(1)(a) before making a decision under s 24, is set out in s 24AB.[16] It is set out in s 24AB(2):

> "*The agency or Minister must give the applicant a written notice stating the following:*
>
> *(a) an intention to refuse access to a document in accordance with a request;*
>
> *(b) the practical refusal reason;*
>
> *(c) the name of an officer of the agency or a member of staff of the Minister (the* **contact person***) with whom the applicant may consult during a period;*
>
> *(d) details of how the applicant may contact the contact person;*
>
> *(e) that the period (the* **consultation period***) during which the applicant may consult with the contact person is 14 days after the day the applicant is given the notice.*"

18. If the applicant contacts the contact person during the consultation period in accordance with the notice, the agency or the Minister must take reasonable steps to assist him or her to revise the request so that the practical refusal reason no longer exists.[17] What is meant by "*reasonable steps*" for the purposes of s 24AB(3) is explained in s 24AB(4):

> "*… **reasonable steps** includes the following:*
>
> *(a) giving the applicant a reasonable opportunity to consult with the contact person;*
>
> *(b) providing the applicant with any information that would assist the applicant to revise the request.*"

19. The decision that an agency or Minister makes on a request under the FOI Act may be reviewed. In the first instance, it may be reviewed by the AIC under Part VII. In a case such as this, the ABCC had the onus of establishing that the decision it made in respect of the request was justified.[18] It carries the same onus in these proceedings in the Tribunal.[19]

BACKGROUND

20. In this section of my reasons, I will set out the course of events that form the background to Mr Morgan's request under the FOI Act.

[16] FOI Act; s 24AB(1)
[17] FOI Act; s 24AB(3)
[18] FOI Act; s 55D(1)
[19] FOI Act; s 61(1)(b)

Proceedings between Linkhill and the Office of the Fair Work Building Industry Inspectorate[20]

21. The Roy Morgan Group of companies (Roy Morgan Group) includes Elazac Pty Ltd, the Roy Morgan Research Centre Pty Ltd, Roy Morgan Research Limited and Linkhill. Linkhill has managed buildings used by the Roy Morgan Group and has also operated a restaurant and an art gallery. In the course of these businesses Linkhill engaged workers to do renovation and refurbishment at 384-386 Flinders Lane, Melbourne, and other like work at three other sites. The FWBII investigated various allegations against Linkhill including an allegation that it had engaged in sham contracting in relation to ten workers engaged over different periods between 2007 and 2010 in contravention of the WR Act and the FW Act.

22. The FWBII's investigations led to a number of proceedings, both interlocutory and substantive, in the Federal Magistrates' Court, now the Federal Circuit Court (FCC), dealing first with liability. Ultimately, the FCC found that Linkhill had contravened various provisions of the WR Act and of the FW Act as well as of a number of industrial instruments made under that legislation. It made declarations and orders necessary to give effect to the findings and considered and imposed penalty in a separate proceeding. Following the conclusion of the FCC proceedings, Linkhill's appeal to the Full Court of the Federal Court was dismissed. Proceedings concluded when Linkhill applied unsuccessfully to the High Court for special leave to appeal against the judgment of the Full Court.[21]

Mr Morgan's FOI request dated 17 March 2014 (2014 request)

23. In a letter dated 17 March 2014, Mr Morgan requested access to the following documents:

> "• *All correspondence, emails, attachments to emails, minutes from meetings, briefings, notes and minutes from briefings, memorandums, analysis, calculations, any documents relating to any consideration or assessment or decision, to or from, or copied to:*
>
> - *any employee or contractor or office holder of the Fair Work Building and Construction Inspectorate (or any of its predecessors at law); or*
> - *any employee, contractor or office holder of the Office of the Fair Work Ombudsman (or any of predecessors at law); or*
> - *any industrial union (including but not limited to the CFMEU, and the ETU); or*
> - *the Office of any Federal or State Minister of the Crown; or*
> - *the Victorian or Federal Police;*
>
> *in respect of or in connection with the investigation, prosecution or litigation, of:*
>
> - *Elazac Pty Ltd; or*

[20] These facts in this section of my reasons are drawn from the judgments of the Federal Circuit Court and of the Full Court of the Federal Court.
[21] [2015] HCA Trans 340

- *Linkhill Pty Ltd; or*
- *Roy Morgan Research Ltd; or*
- *Gary Morgan; or*
- *Michele Levine; or*
- *Ryan Lowery; or*
- *Stephen Etheredge; or*
- *Paul Gillen; or*
- *Joel Elliott; or*
- *Nathan Lovell; or*
- *Matthew Walker; or*
- *Alex Najdoski; or*
- *Robert Hunter; or*
- *Cyrille Darrigrand; or*
- *Julio Cabrera;*

Or in respect of or in connection with:

- *384 Flinders Lane, Melbourne; or*
- *386 Flinders Lane, Melbourne; or*
- *401 Collins Street, Melbourne; or*
- *193 George Street, East Melbourne; or*
- *building or other work allegedly conducted at 384 or 386 Flinders Lane, or 401 Collins Street, Melbourne, or 193 George Street, East Melbourne; or*
- *any union attendance at 384 or 386 Flinders Lane, or 401 Collins Street, Melbourne,*

from 1 January 2007 until today [being 17 March 2014]."[22]

24. FWBII responded on 14 April 2014 by issuing a notice under s 24AB(2) of the FOI Act of its intention to refuse access on the basis that there was a practical reason to do so under s 24(1). The practical reason was that processing the request would substantially and unreasonably divert the resources of the FWBII from its other operations as specified in s 24AA(1)(a)(i) of the FOI Act. The FWBII then set out its reasons for regarding the request as substantial and unreasonable:

> ""*Following initial enquiries, we estimate that 333 hours of processing time is required to deal with this request (excluding the time required to search for and retrieve electronic documents).*
>
> *The reasons for this are as follows:*
>
> - *We estimate that there are a minimum of 10,000 documents relevant to your request as presently framed, comprising approximately 5,700 primary documents and 3,500 emails.*

[22] T documents; T3 at 176-177

- *A significant number of the documents originate from third parties. We anticipate consultation will be required with at least 10 individuals prior to releasing many of the documents falling within the scope of the request.*
- *A significant number of the documents requested exist in electronic and paper form and it is expected that a large amount of duplication will be identified.*
- *The nature of the documents will require that various FWBC personnel assess all the documents associated with the request before a decision is made on them by the decision maker.*

In other words, if one person were to dedicate themselves to processing this request full time, it would take approximately 10 weeks. Accordingly, we are satisfied that this is a 'substantial' request."[23]

25. The FWBII went on to explain why the substantial resource burden of processing Mr Morgan's request would be unreasonable. In doing so, it adopted the name by which it was commonly known: Fair Work Building & Construction (FWBC):

"
- *The number and content of emails held by FWBC officers potentially relevant to your request may be significant. Each officer will be required to search and copy each of the emails which will be expected to render a number of duplicates. FWBC has identified a number of duplicates. FWBC has identified at least 25 officers who may be in possession of documents relevant to the request. There is no way of knowing the extent of the duplication save for downloading and analysing each electronic document against other electronic documents and the paper documents on file.*
- *Many of the documents sought in your request will necessitate consultation with third parties.*
- *There is a public interest in the non-disclosure of many of the documents you are seeking, on the basis that they unreasonably reveal personal information of individuals involved in investigations conducted by the FWBC (see section 47F).*
- *FOI Act recognises a legitimate interest in individuals seeking access to information about themselves, a significant proportion of the material you seek is not of that nature. The significant possibility that a narrowed scope of request could satisfactorily meet your legitimate interest in seeking access to the documents requested, for example, if duplicate emails were excluded from your request and the time period for which documents are requested were limited to the date of the complaint on 2 October 2009 to the completion of the FWBC's investigation on 20 May 2010."*[24]

26. Mr Morgan responded on 5 May 2014 that he was prepared, at that stage, to confine his request to documents created or received by the FWBC up until 31 October 2011. He also stated that he did not require access to documents that were provided by Linkhill under Notices to Produce issued by the FWBC as part of its investigation.[25]

[23] T documents; T4 at 179-180
[24] T documents; T4 at 180
[25] T documents; T5 at 182-183

27. The FWBC began to process Mr Morgan's request but, on 6 May 2014, asked under s 15AA for his consent to extend the time for that processing by 30 days.[26] Mr Morgan consented to a further extension and the Office of the Australian Information Commissioner (OAIC) to another to 4 July 2014. On that day, the FWBC decided to release 686 documents in full, 148 documents in part and to claim that 618 documents were exempt from disclosure. Exemptions were claimed under ss 42 (legal professional privilege), 47E(d) (substantial adverse effect on operations of agencies) and 47F (personal information).[27]

28. With regard to the FWBC's claim for legal professional privilege, Mr Morgan wrote to the FWBC on 21 April 2016. The FWBC understood that Mr Morgan was suggesting that, had the litigation not been on foot when it made its decision on his request on 4 July 2014, it would have waived the legal professional privilege it had in the relevant documentation. The FWBC advised him in a letter dated 29 April 2016 that, while the ongoing litigation had been a compelling reason for it not to waive its privilege in 2014, it did not follow that it would do so now that the litigation had concluded. The FWBC stated that it would not waive its privilege and any request Mr Morgan might make would be refused.[28]

Mr Morgan's FOI request dated 13 October 2016 (2016 request)

29. In a letter dated 13 October 2016, Mr Morgan requested access to the following documents:

> "• *All correspondence, emails, attachments to emails, minutes from meetings, briefings, notes and minutes from briefings, memorandums, analysis, calculations, any documents relating to any consideration or assessment or decision, to or from, or copied to:*
>
> - *any employee or contractor or office holder of the Fair Work Building and Construction (or any of its predecessors at law); or*
> - *any employee, contractor or office holder of the Office of the Fair Work Ombudsman (or any of predecessors at law); or*
> - *any industrial union (including but not limited to the CFMEU, and the ETU); or*
> - *the Office of any Federal or State Minister of the Crown; or*
> - *the Victorian or Federal Police;*
>
> *in respect of or in connection with the investigation, prosecution or litigation, of:*
>
> - *Elazac Pty Ltd; or*
> - *Linkhill Pty Ltd; or*
> - *Roy Morgan Research Ltd; or*

[26] T documents; T6 at 184
[27] T documents; T7 at 185-281
[28] T documents; T8 at 282

- *Gary Morgan; or*
- *Michele Levine; or*
- *Ryan Lowery; or*
- *Stephen Etheredge; or*
- *Paul Gillen; or*
- *Joel Elliott; or*
- *Nathan Lovell; or*
- *Matthew Walker; or*
- *Alex Najdoski; or*
- *Robert Hunter; or*
- *Cyrille Darrigrand; or*
- *Julio Carera;*

Or in respect of or in connection with:

- *384 Flinders Lane, Melbourne; or*
- *386 Flinders Lane, Melbourne; or*
- *401 Collins Street, Melbourne; or*
- *193 George Street, East Melbourne; or*
- *building or other work allegedly conducted at 384 or 386 Flinders Lane, or 401 Collins Street, Melbourne, or 193 George Street, East Melbourne; or*
- *any union attendance at 384 or 386 Flinders Lane, or 401 Collins Street, Melbourne,*

from 1 January 2007 until today's date [October 13, 2016].

You may exclude from the document categories identified above:

- *documents that originated from Linkhill Pty Ltd, or Roy Morgan Research Limited, or Elazac Pty Ltd, that do not contain annotations;*
- *unannotated copies of documents tendered in court proceedings MLG1514/2011 and VID2015/13;*
- *unannotated duplicate copies of documents, with the exception of emails where the duplicate occurs or is created as a result of the document being forwarded, replied to, or copied to another person;*
- *documents that were provided to FWBC by Linkhill Pty Ltd pursuant to Notices to Produce Documents issued by FWBC as part of its investigation into Linkhill Pty Ltd, unless the documents have been annotated.*"[29]

30. On receiving the request, the FWBII referred to Mr Morgan's request dated 17 March 2014 (2014 request). Mr Morgan and the FWBII had reached an agreed resolution of that request and the FWBII gave him access to documents in accordance with it. The FWBII invited Mr Morgan to narrow his 2016 request so that it did not cover documents that did

[29] T documents; T9 at 283-284

not form part of the 2014 request. As Mr Morgan's would still cover a five year period, the FWBII also invited him to consider reducing his request to assist it in processing it efficiently.[30]

31. Mr Morgan responded pointing out that, at the time of his 2014 request, there was current or pending litigation between Linkhill and the ABCC. That led to the ABCC's claiming exemption for certain documents on the basis that they were subject to legal professional privilege. Now that there was not current pending litigation, Mr Morgan requested access to those parts of the documents that had been redacted in response to his 2014 request on the basis that they were subject to legal professional privilege. He referred to the FOI Guidelines published by the OAIC under s 93A of the FOI Act to the effect that agencies should not claim legal professional privilege unless real harm would result from disclosure. There could be no real harm now that litigation had come to an end and all avenues of appeal had been exhausted. Other than those documents, which the ABCC had identified in response to his 2014 request, Mr Morgan wrote that "… *the number of documents relevant to this request are created after 1 November 2011*."[31] Mr Morgan did not consider his request unnecessarily broad given that all of the documents related to a single matter and the ABCC's investigations had been completed by that time.

32. By letter dated 10 November 2016, the ABCC advised Mr Morgan under s 24AB(2) of the FOI Act that it intended to refuse access to the documents he had requested because a practical refusal reason existed under s 24(1). The practical reason was that the work involved in processing his request would substantially and unreasonably divert the resources of the ABCC from tis other operations as specified in s 24AA(1)(a)(i). The ABCC set out its reasons for coming to that view and invited Mr Morgan to clarify the documents he requested.[32] When it did not receive a response from Mr Morgan with 14 days, the ABCC noted that his request was taken to have been withdrawn by virtue of the operation of s 24(7). The ABCC advised him of that in a letter dated 28 November 2016.[33]

Mr Morgan's FOI request dated 12 December 2016 (second 2016 request)

33. On 12 December 2016, Mr Morgan made a further request to the ABCC. Except for the omission of the last paragraph that appeared in his 2014 request and the change in date range to 1 November 2011 to 6 December 2016, the terms of the request were identical to those of his earlier request.[34]

[30] T documents; T10 at 285
[31] T documents; T11 at 286
[32] T documents; T12 at 289
[33] T documents; T13 at 292
[34] T documents; T14 at 293-294

34. As before, the ABCC gave Mr Morgan notice under s 24AB(2) of its intention to refuse his request because a practical refusal reason existed under s 24(1) of the FOI Act. It did so in a letter dated 23 December 2016 and advised him that it regarded his request as substantial. The basis for its doing so was explained in its letter:

> "*Following initial enquiries, we conservatively estimate that at least 120 hours of processing time would be required to deal with this request (excluding the time required to search for and retrieve electronic documents).*
>
> *The reasons for this are as follows:*
>
> - *We estimate that there are, at a minimum, over 10,000 pages of documents relevant to your request.*
> - *A significant number of relevant documents originate from third parties. We anticipate consultation will be required with numerous individuals prior to releasing many of the documents falling within the scope of the request.*
> - *A significant number of the documents requested exist in electronic and paper form and it is expected that a large amount of duplication will be identified.*
> - *The nature of the documents will require that various ABCC personnel assess all the documents associated with the request before a decision is made on them by the decision maker.*
>
> *In other words, if one person were to dedicate themselves to processing this request full time, it would take them several weeks. Accordingly, we are satisfied that this is a 'substantial' request.*"[35]

35. The ABCC went on to explain why the substantial resource burden of processing Mr Morgan's request would be unreasonable:

> "
> - *The number and content of emails held by ABCC officers potentially relevant to your request may be significant. Each officers will be required to search and copy each of the emails which will be expected to render a number of duplicates. ABCC has identified a number of duplicates. ABCC has identified a number of officers who may be in possession of documents relevant to the request. There is no way of knowing the extent of the duplication save for downloading and analysing each electronic document against other electronic documents and the paper documents on file.*
> - *Many of the documents sought in your request will necessitate consultation with third parties.*
> - *There is a public interest in the non-disclosure of many of the documents you are seeking, on the basis that they unreasonably reveal personal information of individuals involved in investigations conducted by the ABCC (see section 47F).*"[36]

36. The ABCC invited him to narrow his request or to provide further clarification of the documents he sought.[37] It further explained:

[35] T documents; T15 at 297
[36] T documents; T15 at 297
[37] T documents; T15 at 295-299

"*The current request, while reduced in scope by four years from your previous request, covers a period of five years during which there was substantial litigation which generated voluminous quantities of documentation. Each page of the documentation will need to be located, examined and considered to ascertain whether it falls within the scope of your request, and whether, for instance, any exemptions or conditional exemptions apply, whether consultation should occur with third parties, and whether it may be disclosed in whole or in part. This would be, in my view, an onerous and time consuming task that is within the contemplation of s 24AA of the FOI Act.*

Your request covers a broad range of documents. For instance, it includes court documents, statements, emails, briefs to counsel, legal advices, affidavits, submissions, judgments, authorities. It may be possible for you to narrow this in some way.

What should you do?

The ABCC suggests that you give consideration to revising your request. Brian Dargan is the contact officer with whom you may consult, with a view to making the request in a form that would remove the ground for refusal. You can contact Mr Dargan by email at …

Please note that even if you do modify your request, it is possible that a practical refusal reason under subsection 24AA(1)(a)(i) may still exist or ABCC may need further time to process your revised request – this will depend upon the terms of your final request. As far as is reasonably practicable, we are happy to provide with further information to assist you in making your request in such a form that removes the practical refusal ground.

If you are able to pinpoint the specific documents within your request, or clarify more particularly the information you are seeking, that would assist. We have identified below some specific aspects of the request that could be revised which may remove the practical refusal reason specified in subsection 24AA(1)(a)(i) of the FOI Act, including:

- *To consider excluding particular types of documents such as duplicates and draft documents contained within correspondence. Or confine your request to specific documents.*
- *To exempt or exclude particular material; for example if you were to agree not to seek access to the personal information of third parties, contained within the documents this would remove the need to undertake consultation.*
- *To limit the time period for which the documents are requested.*

We would be pleased to discuss with you in greater detail how your request might be appropriately revised. "[38]

37. The letter went on to advise Mr Morgan that he had 14 days to withdraw his request, make a revised request or indicate that he did not wish to revise it. Mr Morgan declined to narrow his request when he replied on 6 January 2017 saying, in part:[39]

"*Your estimate of 120 hours required to process our FOI application is nonsense and cannot be substantiated. Given the exclusions identified to documents requested in our application, the numbers of documents relevant to our request will*

[38] T documents; T15 at 298
[39] T documents; T16 at 300-301

be nowhere near 10,000 documents, and is more likely to be considerably less than 5,000 documents.

In respect of our 2014 FOI application to FWBC, on April 14, 2014, you informed us, in writing that at that time you also estimated that there were likely to be 10,000 documents relevant to our request. As it turned out, you produced only 836 documents. Clearly your estimates of potentially relevant documents are extremely unreliable, inflated, and intended to assist you to avoid your obligations under FOI legislation.

Further, the majority of documents will not originate from third parties, but will be documents produced by FWBC, as was the case with the 836 documents provided by FWBC in 2014. To this end, your assertion that 'many of the documents sought in your request will necessitate consultation with third parties' *is, again, dishonest and untenable.*

In respect of your concern about 'large amounts of duplication being identified'*, and the seemingly serious assertion that* 'Your request covers … court documents, statements, emails, briefs to counsel, legal advices, affidavits, submissions, judgments, authorities'*, it appears that you have not even properly read our FOI application, or considered the documents we have said you may exclude. ..*"[40]

38. In its response dated 24 January 2017, the ABCC made a number of responses to issues raised by Mr Morgan:

- The ABCC confirmed that Mr Morgan had not requested disclosure of unannotated copies of any documents tendered in High Court proceeding No. M189/2015. It noted, however, that no documents had been tendered during the hearing of the application to the High Court for special leave to appeal and that the documents in the Appeal Books would have been tendered in the lower courts. Therefore, the ABCC appreciated Mr Morgan's exclusion of the documents but regarded its effect to be limited at best.
- It noted that it had not referred in its letter of 23 December 2016 to 10,000 documents but to 10,000 pages of documents. The distinction is important.
- In relation to Mr Morgan's 2014 request, the ABCC noted that it had initially estimated that 10,000 relevant documents would be encompassed in his request. It made that estimate before Mr Morgan reduced the outer limit of the time frame from 2014 to 2011 and excluded certain material.
- Mr Morgan's reference to 836 documents was a reference to those documents that were released to him in whole or in part in response to his 2014 request (i.e. 688 in whole and 148 in part). When regard is had to the 618 documents, to which Mr Morgan was refused access in full, the number of documents identified as relevant to his request was 1,454. They form part of a much larger number of documents that were considered for relevance.
- Mr Morgan's request is very broadly stated and his exclusions are of limited application. Exclusion of documents originating from one or other of three named companies requires reasonable enquiries and analysis to be undertaken to identify the source of hundreds of documents. That source may not be apparent on the face of those documents. With regard to the second category of exclusion, the ABCC explained that:

  "*… To ascertain whether particular documents were tendered in court proceedings is not straightforward. As you would be aware,*

[40] T documents; T16 at 300

> *documents may be collected or produced to the parties, annexed to affidavits in the course of litigation, and referred to, produced, handed up or marked for identification in court, without actually being tendered in evidence. Assuming that a complete list of documents tendered in evidence in the relevant court proceedings is in our possession, a process would then be undertaken to locate and collate the relevant documents, which would be considerable in number, and match them against the description in the lists to ensure that the compilation is accurate. If such a list of documents tendered in court proceedings is not in our possession or is incomplete, then this exclusion would be ineffective to that extent.*
>
> *Further, it could be expected that there would be overlap among the exemptions, so there scope of overall operation would be reduced.*
>
> *On a fair reading of the exclusions and a consideration of how they would operate in practice, the collation, matching and analysis involved adds to the complexity and time consuming nature of the task and increases the scope for error. As a matter of practicality, and of principle, the process that would be required goes beyond the reasonable expectations of the FOI Act in our view."*[41]

Mr Morgan's request dated 6 January 2017 (2017 request)

39. In a letter dated 6 January 2017, Mr Morgan made a request to the ABCC for access to the following documents:

> "*All correspondence, emails, attachments to emails, minutes from meetings, briefings, notes and minutes from briefings, memorandums, analysis, calculations, any documents relating to any consideration or assessment or decision, to or from, or copied to any employee or contractor or office holder of the Australian Building and Construction Commission (ABCC), the successor to the Fair Work Building and Construction (FWBC) (or any of its predecessors in law) in respect of or in connection with inquiries made to determine, in respect of my FOI application dared December 6, 2016 that:*
>
> *a. at least 120 hours of processing time would be required to deal with my request (excluding the time required to search for and retrieve electronic documents);*
>
> *b. there are, at a minimum, over 10,000 pages of documents relevant to my request;*
>
> *c. a significant number of relevant documents originate from third parties;*
>
> *d. a large amount of duplication will be identified;*
>
> *e. if one person were to dedicate themselves to processing my request full time it would take them several weeks;*
>
> *f. you are satisfied this is a substantial request;*
>
> *g. my request would necessitate a substantial resource burden; and*
>
> *h. my request would necessitate an unreasonable recourse burden.*
>
> *You may exclude from the document categories identified above unannotated duplicate copies of documents, with the exception of emails where the duplicate*

[41] T documents; T17 at 303-304

occurs or is created as a result of the document being forwarded, replied to, or copied to another person."[42]

40. The ABCC responded on 27 January 2017 to the effect that search and retrieval would take one hour and decision-making seven hours. The total charge would be $55.00.[43] Mr Morgan proceeded with his request and the ABCC made a decision on 17 February 2017. The ABCC's letter setting out its decision advised him that it had identified 12 documents coming within the scope of the request and that it had decided that each was exempt from access under the FOI Act. It claimed two exemptions. One was s 42 on the basis that each was subject to legal professional privilege because it had been created by a practising legal practitioner employed by the ABCC for the dominant purpose of providing legal advice.[44] The other exemption was s 47C on the basis of that disclosure of the documents would disclose deliberative matter that has taken place in the course of, or for the purposes of, deliberative processes involved in the ABCC. As s 47C is a conditional exemption, consideration was also given to the public interest. On balance, the ABCC decided, the public interest factors weighed against disclosure because the documents contained notes prepared in confidence by a practising lawyer to assist the internal deliberations of, and the formulation of an opinion by, the ABCC.[45]

Mr Morgan's request for internal review of the decision dated 24 January 2017 relating to his second 2016 request

41. By letter dated 27 January 2017, Mr Morgan sought internal review of the ABCC's decision dated 24 January 2017 relating to his second 2016 request. A delegate of the Australian Building and Construction Commissioner responded on 24 February 2017 advising that he had "*… decided to refuse …* [Mr Morgan's] *request on this basis*" i.e. that processing the request would substantially and unreasonably divert the resources of the ABCC from its other operations within the meaning of s 24AA(1) of the FOI Act.[46]

Mr Morgan's request dated 27 January 2017 to the AIC for review of the decision dated 24 January 2017 relating to his second 2016 request

42. In a decision dated 2 February 2018, the AIC affirmed the ABCC's decision that a practical refusal reason exists for the purposes of s 24(1)(b) of the FOI Act. In reaching that decision, the AIC considered both the time to process the request and the diversion of the ABCC's resources in doing so. Both are relevant issues, he noted.

[42] T documents; T18 at 307
[43] T documents; T19 at 309-311
[44] T documents; T20 at 313-14
[45] T documents; T20 at 314
[46] T documents; T23 at 320-323

43. The AIC referred to the list of documents prepared by the ABCC recording the documents coming within the scope of the request and demonstrating that there are 12,867 pages within it. The ABCC's estimate of 120 hours for processing the request equates to 33.57 seconds of processing time per page. The AIC noted that he had previously found that estimates between 30 seconds and five minutes per page have been reasonable estimates. He considered the ABCC's estimate of 33.57 seconds per page to be reasonable in light of its submission that the documents relate to an investigation of an alleged breach of workplace law and at least some documents would contain sensitive information. The ABCC had not provided any estimate of the additional time it would take to search for and retrieve documents, prepare a schedule, remove duplicates, undertake third party consultations and prepare the decision letter.

44. As to the ABCC's resources that would be required to process Mr Morgan's request, the AIC observed that Mr Morgan had declined three invitations to narrow the scope of his request. The invitations had suggested his excluding documents subject to legal professional privilege, reducing the period for which documents were sought and excluding documents containing personal information. Mr Morgan suggested that he would pay the reasonable cost of the ABCC's engaging a dedicated FOI officer to process his request and that the ABCC could process it over a period longer than that provided for under the FOI Act. The AIC considered Mr Morgan's offers not to be relevant to the issue that he had to decide i.e. whether a practical refusal reason exists and processing the request would involve a substantial and unreasonable diversion of the ABCC's resources from its other operations.[47]

CONSIDERATION

45. Submissions made on behalf of Mr Morgan were to the effect that the ABCC had exercised its discretion to refuse Mr Morgan access to the documents without first having compelling evidence that the criteria in s 24 have not been met. It could not be "*satisfied*" that that the criteria had been met in the absence of those compelling reasons.

46. I am satisfied that the ABCC complied with the consultation process set out in s 24AB and required to be undertaken by s 24(1)(a) of the FOI Act. It did so in its letter dated 23 December 2016. That letter complied with each of the requirements in s 24AB(2). It advised Mr Morgan of its intention to refuse access to the document and told him the nature of the practical refusal reason i.e. that the work involved in processing the request would substantially and unreasonably divert the resources of the ABCC from its other operations as specified in s 24AA(1)(a)(i). The ABCC set out the basis on which it had come to that

[47] T documents; T2 at 175

view. Mr Brian Dargan's name was given as the person whom Mr Morgan could contact and with whom he might consult with a view to modifying his request in a way that would remove that practical reason. Mr Dargan's email was included in the ABCC's letter. Mr Morgan was advised that he had 14 days within which he might consult with Mr Dargan. He was also advised that if, as he did, indicate that he did not wish to revise the request, the ABCC would proceed to make a decision on whether to refuse the request on resource grounds under s 24(1).

47. Section 24(1) required the ABCC to consider if it was "*satisfied that the practical refusal reason still exists …*". Being "*satisfied*" is a state of mind reached after a consideration of all of the relevant information be it called by that or some similar name or, as in the Tribunal, evidence. The relevant state of mind was considered by Beaumont J in *Repatriation Commission v Smith*[48] in the context of s 120(4) of the *Veterans' Entitlements Act 1986* (VE Act). That provision used the words "*reasonable satisfaction*" but the passage from the judgment of Beaumont is no less pertinent to the standard of proof described, as it is, in s 24(1)(b) of the FOI Act, as "*satisfied*". His Honour said:

> "… [Section]*120(4) speaks in terms of a reasonable satisfaction. This expression has a settled meaning, at least in a curial context. In* Briginshaw v. Briginshaw *[1938] HCA 34; (1938) 60 CLR 336, Dixon J., dealing with the civil standard of persuasion, said (at p 362): '...it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been* proved to the reasonable satisfaction *of the tribunal. In such matters* "reasonable satisfaction" *should not be produced by inexact proofs, indefinite testimony, or indirect inferences.' (emphasis added)*
>
> *Similarly, in* Rejfek v. McElroy *[1965] HCA 46; (1965) 112 CLR 517, the Full High Court spoke of the civil standard of proof (at p 521):* 'No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied...' *(emphasis added).*
>
> …
>
> *The foregoing is, of course, dealing with the standard required in court proceedings where the rules of evidence are applicable. The Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks fit (Administrative Appeals Tribunal Act 1975 s.33(1)(c);* McDonald v. Director-General of Social Security [1984] FCA 57; (1984) 1 FCR 354). *Yet, whilst the Tribunal was not bound by the technical evidentiary rules, especially the exclusionary rules, natural justice may require that it act on material that is relevant and logically probative …*"[49]

[48] [1987] FCA 260; (2017) 15 FCR 327; 74 ALR 537; 7 AAR 17; Northrop, Beaumont and Spender JJ
[49] [1987] FCA 260; (2017) 15 FCR 327; 74 ALR 537; 7 AAR 17 at 334-335; 546-547; 25-26;

48. Only if a request consultation process has been undertaken and I am satisfied that the "*practical reason still exists*" "*may*" I refuse to give access. In the context of s 24(1), the word "*may*" carries with it the implication of discretion. I am not required to refuse access. The factors that guide the discretionary decision must be determined in light of s 24(1) itself but also in the wider context of the FOI Act.[50]

49. I will come to those factors in the course of these reasons but note that, even if an agency or Minister were to come to the view that the request might properly be refused, that agency or Minister might decide not to refuse access. For that reason, nothing is to be gained by having regard to previous decisions made by an agency or a Minister. In this case, the ABCC took the position that it had decided not to refuse the 2014 request even though it felt that it could. Whatever decision the ABCC made in relation to that request, it must also be remembered that the "*practical refusal reason still exists*"[51] i.e. at the time the decision on the particular request is made.

50. Decisions on a request may be made by the principal officer of an agency. If the principal officer has made arrangements, an officer of the agency acting within the scope of his or her authority in accordance with those arrangements and subject to any regulations may make the decision.[52] An "*officer*" in relation to an agency includes a member of the agency or a member of staff of the agency.[53] Therefore, even if the ABCC were to choose to engage external resources as Mr Morgan has suggested he could assist with,[54] those persons could conduct searches for relevant documents but could not make decisions regarding exemptions or exclusions under the FOI Act unless they were members of the agency or members of staff to whom the principal officer had delegated authority.

51. On the basis of the statement of Ms Jillian Jepson, who is the Deputy Commissioner of the Code and Corporate Division of the ABCC, I find that there are three legal officers within the Office of the General Counsel (OGC) of the ABCC have delegated authority. The FOI officer does not have delegated authority. Those three legal officers provide FOI support but also have responsibilities for matters such as privacy, public interest disclosures, corporate and Human Resources matters as well as the ABCC's regulatory work.

[50] *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* [1984] FCA 223; (1984) 2 FCR 368; 56 ALR 265 at 375; 272 per Woodward J and see also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299; Gibbs CJ, Mason, Brennan, Deane and Dawson JJ at 39-40; 308-309 per Mason J with whom Gibbs CJ and Dawson J agreed. See also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 2 ALD 60; 46 FLR 409; Bowen CJ, Smithers and Deane JJ at 589; 68, 419 per Bowen CJ and Deane J and see also at 599; 77; 429-430 per Smithers J
[51] FOI Act; s 24(1)(b)
[52] FOI Act; s 10A. Regulations have not been made.
[53] FOI Act; s 4(1)
[54] Exhibit 4

What is a substantial and unreasonable diversion of resources?

52. In deciding whether a request would substantially and unreasonably divert the ABCC's resources from its other operations, I must have regard to those matters set out in s 24(3) but am not limited to them. I must also bear in mind that I am making the decision in the context of a request made under the FOI Act. The object of that legislation is to give members of the public rights of access to official documents of Ministers and documents of agencies.[55] By those objects, Parliament intended:

> "*… to promote Australia's representative democracy by contributing towards the following:*
>
> *(a) increasing public participation in Government processes, with a view to promoting better-informed decision-making;*
>
> *(b) increasing scrutiny, discussion, comment and review of the Government's activities.*'[56]

53. The objects were intended to increase recognition of information held by Government as a national resource managed for public purposes.[57] Parliament also intended that the "… *functions and powers given by the FOI Act were to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost.*"[58] At the same time, Parliament recognised that the right for access to information that it had created was not without its boundaries and I have referred to them above.

54. With these matters in mind, I have considered the ordinary meanings of the words "*substantially*" and "*unreasonably*". The meaning of the word "*substantial*" applicable in the context of s 24A is that of "*…considerable in amount, extent, importance, etc. …*".[59] That of the word "*unreasonable*" is "*… immoderate; beyond what is reasonable or fair. …*".[60] Therefore, the question I must ask myself in the context of s 24AA is: Would the work involved in processing the request be considerable having regard to all the steps that must be taken to do so and would it be beyond what is reasonable or fair having regard to the objects underpinning the FOI Act under which that request is made and its other operations?

[55] FOI Act; Preamble and s 3(1)
[56] FOI Act; s 3(2)
[57] FOI Act; s 3(3)
[58] FOI Act; s 3(4)
[59] Chambers 21st Century Dictionary (1999), reprinted 2004 (Chambers)
[60] Chambers

Would the work involved in processing the second 2016 request substantially divert the ABCC's resources?

A. Submissions

55. On Mr Morgan's behalf, Mr Catlin of counsel submitted that the ABCC's submissions deal, in the main, with hypotheticals that could be applied to any request for access to documents. Its submissions do not engage with the specific document categories generated by a prosecution of this type at all. The ABCC has engaged in speculation which generates outcomes that themselves increase its estimate of the time required to process Mr Morgan's request. The material that the ABCC has put forward falls below that required by the Tribunal to determine whether processing Mr Morgan's request would be a substantial and unreasonable diversion of resources.

56. Mr Catlin cast doubt on the credibility of the evidence given in support of the ABCC's case. He contrasted the precise numbers of documents – 1,454 documents – identified by the ABCC in response to Mr Morgan's 2014 request for documents between 2007 and 2011 with the estimate of documents given by the ABCC in response to Mr Morgan's second 2016 request. Given that the documents had been located in response to his 2014 request, it was not credible that the search for the later documents should take a couple of weeks as asserted by the ABCC. Apart from the Court Books, the ABCC's documents are largely digitised. Software is available to show word, line and page counts. Page numbers, Mr Catlin submitted, are a simple computational exercise. As the FOI Guidelines state, incompetent or inefficient filing systems are not a proper basis on which to base an argument that an agency's resources will be unreasonably diverted.[61] Evidence regarding the way in which the 2014 request had been processed would have been relevant in understanding the estimates given in relation to the 2016 request.

57. Mr Catlin submitted that an examination of the ABCC's schedule of documents prepared in response to the 2014 request showed that the bulk of its investigatory work into Linkhill had been completed by October 2011. The estimate of 10,000 documents given by ABCC in response to that request must, if not invented, have been estimated without any real care, for they were reduced to 1,454 documents. If the estimate of 10,000 documents was correct for the November 2011 to 17 March 2014 period, an extrapolation of the ABCC's calculations[62] must mean that there must be an additional 34,000 pages for the remaining period of the second 2016 request up to 6 December 2016. Unless the ABCC used electronic search methods to form its estimates, they should be disregarded as unreliable and nothing more than guess work. He refuted the ABCC's submission that it had intended

[61] FOI Guidelines at [3.150]
[62] T documents; T32 at 361-362

to refer to 10,000 pages rather than to 10,000 documents. Given that the number had been broken into two types of documents – primary and email – Mr Catlin submitted that the ABCC's submission was an unlikely explanation.

58. Mr Catlin referred to the ABCC's Annual Report showing that it dealt with some 21 requests under the FOI Act each year. The FOI section of the agency has two officers. In Mr Catlin's submission, there may be no diversion of resources at all if the tasks that otherwise engage the officers in the FOI section consume very little of their time.

59. Mr Catlin refuted the ABCC's submission that it could not process Mr Morgan's second 2016 request in the time allowed under s 15AA of the FOI Act even when it was extended. Mr Morgan is content to wait a reasonable period for the documents.

B. Consideration

60. On the basis of his statement dated 15 February 2019, I find that Mr Dargan was employed by the ABCC from October 2016 to May 2017 as a lawyer in its FOI section. Before he joined the ABCC, Mr Dargan had spent a brief period of retirement in 2015. Until his retirement, he had worked as a lawyer with the Deputy Crown Solicitor and its successor, the Australian Government Solicitor (AGS), and, later, the National Crime Authority (NCA) and its successor, the Australian Crime Commission (ACC). While at the NCA and the ACC, Mr Dargan spent approximately 12 months as its FOI officer. He attended training courses on FOI run by the AGS.

61. On the basis of the statement of Ms Jillian Jepson, I find that the ABCC has one dedicated FOI officer. Unlike Mr Dargan, who previously occupied the position, the officer is not legally qualified and is employed at the APS4 level. The FOI officer is primarily responsible for co-ordination and working with line area staff to collate and collect material relevant to FOI requests, in preparing tables of documents that are potentially relevant, undertaking preliminary reviews of materials and liaising with those in the ABCC who have authority to make decisions i.e. the ABCC's principal officer or officers of the ABCC under the arrangements approved by its principal officer to make decisions under the FOI Act.[63] Those persons do not include the ABCC's FOI officers. Other than the principal officer, those who are authorised to make decisions on behalf of the ABCC are legal officers located within the ABCC's Office of General Counsel.

62. On the basis of Mr Dargan's evidence and that of Ms Jepson, I find that the ABCC receives FOI requests in the order of 21 or 22 in each year. In addition to duties relating to those

[63] FOI Act; s 10A

requests, I find on the basis of Ms Jepson's evidence that the FOI officer has a responsibility in respect of privacy and a notification/co-ordination function in respect of applications made by building industry participants in the Fair Work Commission.

63. On the basis of the evidence of both Mr Dargan and Ms Jepson, I find that the FOI officer's role is to identify and search for sources of material that may come within the scope of the request. In undertaking that task, the FOI officer liaises with those officers in OGC, who hold delegations from the principal officer. The task requires early identification of those of the ABCC's officers who were involved in the Linkhill investigation and subsequent proceedings. However sophisticated filing and retrieval systems may be, the knowledge of those involved in a matter cannot be underestimated when searching for documents be they files, emails or other documents that may not be found using manual and electronic searches. On the basis of Ms Jepson's statement, I find that approximately 24 of the ABCC's employees have been involved in some way with the Linkhill Litigation in the relevant period covered by the second 2016 request. Approximately 13 of those employees are no longer employed by the ABCC. In addition to its employees, the ABCC engaged Clayton Utz to provide legal assistance. Approximately four of its lawyers were involved in the matter at the time.

64. In the case of Mr Morgan's request, Mr Dargan identified three locations where he considered such material would be. He identified:

    (1) a file called "*Linkhill FOI*" on the ABCC's electronic document storage facility known as the "*I Drive*";

    (2) a disk containing documents relating to the investigation, prosecution or litigation referred to in the request; and

    (3) folders and files of archived material located in six boxes relating to those matters.[64]

65. It is apparent from this list of documents that Mr Dargan was yet to complete his searches for emails are an obvious source that needs to be interrogated in the modern world. Having identified the employees engaged in the Linkhill matter, I accept that their archived emails must be searched and retrieved. In the case of the ABCC, the evidence, which is not contradicted, is that the ABCC does not archive its own emails. They must be retrieved by the Department of Jobs and Small Business[65] after it has received a request from the IT section in the ABCC. Ms Jepson estimated that the request was likely to return thousands

[64] Exhibit 1 at [10]
[65] The Department of Jobs and Small Business was known as the Department of Employment, Skill, Small and Family Business following the amendments to the Administrative Arrangements Order (AAO)made on 29 May 2019. Further amendments made to the AAO on 5 December 2019 have led to its now being known as the Department of Employment of Education, Skills and Employment.

of emails. She explained in response to Mr Catlin in cross-examination that, in searching for emails:

> "*… the search terms would have to be very broad, and so it actually - the difficulty is not typing the search terms, it's actually the volume of the data and how do you contain the data and make sure the data is relevant that's delivered. So the search term and the breadth of the search is really the challenge, to try and actually make sure that you've got some - not every document, but the relevant documents.*
>
> *And does the data that you've retrieved - let's just say that you do an email search, and one would anticipate there are multiple emails which might have a particular key term, does that data self-assemble in front of you by index and date, or are you just given a lump of data? --- With regards to emails, we would actually have to put a request into the department because we don't store the emails with the ABCC. So we would have to put in a range of search terms, and they would deliver us a data dump, ostensibly, where you would be able to organise and, I guess, sort out the data according to the terms that you want to sort by.*"[66]

66. In addition to the documents identified by Mr Dargan, Ms Jepson said that there would have to be further searches within the ABCC for hard copy files relating to the Linkhill matter. Some of those searches would have to be made on the electronic case management system of cases being investigated and run at the ABCC. Records the ABCC is required to keep are stored on an electronic document records management system (EDRMS), which is known either as "*TRIM*" or as "*HPCM*". Older documents are kept on what Ms Jepson described as "*legacy systems*". The Linkhill matter would probably not be held on current data bases as it is no longer "*operational*" but it would be on TRIM. Both TRIM and the legacy systems are searchable. In addition, there are databases of centralised documents held by the ABCC.[67] In re-examination, Ms Jepson acknowledged that she was not an expert in searching TRIM but thought that there would be some difficulty in framing search requests that excluded, for example, documents that had originated from Mr Morgan.[68]

67. Ms Jepson has also identified text messages as documents that come within the scope of the request. Mr Catlin submitted that they do not come within the terms of the request. It is my view that they are captured by the reference to "*correspondence*" in the request. The word "*correspondence*" is used in reference to communication by letters[69] but, in the modern world, I would have understood it to extend to text messages, which are used by people to communicate, and so correspond, with each other.[70] In view of Mr Catlin's elucidation of the terms of the request, I will disregard any work connected with the location of text messages.

[66] Transcript at 64
[67] Transcript at 62-63
[68] Transcript at 65
[69] Chambers
[70] Chambers

68. Ms Jepson also referred to records held by Clayton Utz.[71] It was her belief that many of those would be subject to claims of legal professional privilege, which has not been waived by the ABCC. Whether they were subject to privilege would have to be decided on a case by case basis.

69. Mr Dargan made his assessment of the workload based solely on the documents that he had located. He did it this way:

> "*(a) Identifying the number of folders, files or documents which fell within the date range of the Request;*
>
> *(b) Counting the pages of documents manually or, where the material was voluminous:*
>
> *i. Selecting either a random sample of documents within the relevant folder or subfolder or, in the case of the Boxes, a random sample of the folders and files within each Box, representing 10% or more of the documents within that folder or Box; and*
>
> *ii. Counting either the number of pages in each document in that sample or, in the case of the Boxes, up to the first 100 pages in each folder or file in the sample; and*
>
> *iii. Using either an average of the number of pages in each document in the sample to estimate the number of pages in the other documents in the relevant folder or subfolder or, in the case of the Boxes, visually comparing the size of the page count for the sample with the size of the remaining folders and files in each Box to estimate the number of pages in each of those folders and files.*"[72]

70. Mr Dargan went on to add:

> "*With each random sample of documents, I ensured that the size of each document in the sample was a fair representation of the documents within the relevant folder by not including documents that were very small or large in size.*
>
> *I reduced my count of the number of pages of documents in some of the folders and subfolders to account for the possibility that some of the documents in those folders and subfolders fell outside of the date range of the Request. In addition, I did not take into account the fact that many of the pages had content on both sides. As a result, my count of the number of pages in each of the 3 locations was conservative.*"[73]

71. He was yet to search the further locations. I also accept that he did not include within his assessment the time to conduct the further searches that were required, the assembly of a table of documents, identification of duplicate documents and carry out consultations under s 27A of the FOI Act and prepare a letter of a decision. He had not sought approval of a legal officer within the ABCC to approve his consulting each of the persons named in the documents and who might reasonably wish to contend that the document is exempt under

[71] These would be documents of the ABCC as they would come within s 6C of the FOI Act.
[72] Exhibit 1 at [11]
[73] Exhibit 1 at [12]-[13]

s 47F in so far as it contains personal information about them. Mr Dargan had not yet taken steps to find such people. When he did, he would need to prepare a bundle of copies relevant documents highlighting the personal information and contact them informally. If they had concerns, he would take formal steps to consult and obtain their responses. That required the preparation of a formal consultation letter that would be settled by a senior legal officer.

72. Having regard to the evidence and to the nature of the proceedings that led to eight written judgments in the Federal Magistrates' Court or the Federal Circuit Court and the Federal Court both before a single Judge and the Full Court, the volume of documents described by the ABCC as coming within Mr Morgan's request is persuasive. So too is the evidence regarding the searches that must be made for those documents, the consultations regarding personal privacy that must be made and the consideration of the content of each document.

73. While I fully understand that Mr Morgan thought that he was narrowing the scope of his request by excluding four categories of documents, it does not lessen the task of identifying them in the material that is found on manual or electronic searches and then removing them. Each document that is identified as a duplicate of another, for example, has to be examined to identify whether it was a copy or was created as a result of its being forwarded, replied to or copied to another person. If it is the latter, it does not fall within the category of excluded documents. Similarly, documents originating from Linkhill, Roy Morgan Research Limited or Elazac Pty Ltd are excluded unless they contain annotations. Again, each has to be examined to ascertain whether or not it does contain annotations. The same is true of documents tendered in the court proceedings. Mr Morgan's exclusions do not reduce the workload to any significant degree, if at all.

74. I also understand the point made by Mr Morgan that his 2014 request resulted in a total of 1,454 documents being identified as relevant to his request. He points to this as an indication that the ABCC's estimate of 10,000 pages in relation to his second 2016 request is unbelievable. While that is true, I also note that the ABCC advised him initially that it estimated that 10,000 documents came within his request. Whether that was 10,000 documents or pages, it is not unreasonable that, after review of the documents that potentially came within his request, the final number was 1,454. Of those, he was given access to 688 in their entirety and 148 with redactions while access to a further 618 was refused. That is not unexpected given that searches cannot always be conducted with the particularity that one might like. One only has to compare Austlii with the Federal Register of Legislation (FRL) to know that, to some extent, the FRL permits searches of legislation to

be made with the exclusion of words or phrases but Austlii does not. Although it is common to think that information technology can do anything, I accept that the ABCC's searches cannot be made with the degree of particularity required to be able to identify, for example, the categories of documents excluded by Mr Morgan from his request.

75. On the basis of Ms Jepson's oral evidence, I find that the ABCC engaged external lawyers according to the Commonwealth's multi-user list at an approximate cost of $40,000.[74] Ms Jepson has said that the ABCC does not have the internal resources to process Mr Morgan's request. I accept that. Mr Catlin points to the ABCC's $75 million annual budget but that budget must cover all of the ABCC's operations. Processing FOI requests is an obligation it must perform under the FOI Act but it must carry out all of the functions and exercise all of the powers under the BCIIP Act. The functions of the ABCC include those of the ABC Commissioner referred to in s 16 of that legislation.[75] Together, the ABC Commissioner and the ABCC are responsible for regulating building industry participants who perform building work. They investigate, monitor and promote compliance with this BCIIP Act, the Building Code and specified workplace relations laws and industrial instruments. Unlawful industrial action and unlawful picketing are prohibited by the BCIIP Act and the ABC Commissioner, ABCC and inspectors may obtain information and investigate alleged breaches. The ABC Commissioner can intervene in, or institute court proceedings and has other powers to enforce compliance with the BCIIP Act.

76. It is in the context of these operations, and not simply those of the FOI section and its 21 or 22 requests, that Mr Morgan's request must be viewed. I have found that the workload extends well beyond the FOI officer in the ABCC. I am satisfied that the work load would substantially divert the resources of the ABCC from its other operations that it is required to carry out under the BCIIP Act.

Would processing the request unreasonably divert the ABCC's resources from its other operations?

77. In order for a practical refusal reason to exist within the meaning of s 24AA(1)(a)(i) of the FOI Act, the diversion of the ABCC's resources from its other operations must not only be substantial but must also be unreasonable. The reason put forward by Mr Morgan for his request is that the ABCC did not tell either the Federal Circuit Court or the Full Court of the Federal Court that the over award hourly rate paid by Linkhill more than compensated the ten workers named in the proceedings for non-payment of allowances.

[74] Transcript at 59-60
[75] BCIIP Act; s 29(2)(d) and see FN 6

78. Section 24AA(3)(a) of the FOI Act makes it clear that the ABCC must not have regard to any reasons that Mr Morgan may have for requesting access. In his submissions, Mr Catlin accepted that restriction but referred to the FOI Guidelines. Part 3 is concerned with processing and deciding requests for access. In the context of s 24AA, it refers to a number of matters that may be relevant in deciding whether a practical reason exists and that are not referred to in the section itself. They are the subject of [3.117], which states:

> "*Other matters that are relevant in deciding if a practical refusal reason exists include:*
>
> - *the staffing resources available to an agency or minister for FOI processing*
> - *whether the processing work requires the specialist attention of a minister or senior officer, or can only be undertaken by one or more specialist officers in an agency who have competing responsibilities*
> - *the impact that processing a request may have on other work in an agency or minister's office, including FOI processing*
> - *whether an applicant has cooperated in framing a request to reduce the processing workload*
> - *whether there is a significant public interest in the documents requested*
> - *other steps taken by an agency or minister to publish information of the kind requested by the applicant*
> - *as to a request to a minister – other responsibilities of the minister and demands on the minister's time, and whether it is open to the minister to obtain assistance from an agency in processing a request*"

79. The essence of the motivation for Mr Morgan's second 2016 request is set out at [8] in his Statement of Facts and Contentions lodged in these proceedings:

> "*The purpose of its FOI request (to identify documents suspected to show misconduct by the Respondent in its conduct of litigation against Linkhill Pty Ltd) is known to the Respondent and necessarily required the terms of its document request to be very broad in nature.*"

80. The misconduct that Mr Morgan alleges the FWBII engaged in was that it knew during the litigation that the hourly rate that Linkhill paid to each of the ten workers in question was significantly more than the hourly rate, to which each would have been entitled under the applicable industrial award. On behalf of Mr Morgan, Mr Catlin rejected the ABCC's submission that he could not use the proceedings as a forum to make his allegations and to complain about the conduct of the FWBII and, later, the ABCC. There is a public interest, Mr Catlin submitted, in proper prosecutorial conduct. One important facet of that conduct is that evidence going to culpability not be withheld. The ABCC implies that the courts had the relevant information, Mr Catlin submitted, but refuses to give any tribunal the benefit of information, which "*it certainly possesses*" regarding the extent of the overpayment by Linkhill to the ten people. It is false to assert, he continued, that the courts had that

information and were able to consider it. No court has ever deliberated the overpayment issue or any consequential set off issue except as an issue relating to its application for leave to appeal.

81. Mr Catlin also framed his submission regarding the public interest in terms of the need for the proceedings between FWBII and Mr Morgan to be scrutinised with regard to bad faith. Transparency is required given the significance of the matter that led to the parties spending a total well in excess of a million dollars when regard is had to both costs and the penalties imposed.

82. On behalf of the ABCC, Ms Walsh of counsel submitted that Mr Morgan's complaints and allegations did not give rise to any proper argument of public interest outweighing the unreasonable diversion of the ABCC's resources. She referred to the FOI Guidelines, which made general observations on what is meant by the public interest in the context of the application of the public interest test in s 11B applicable to conditional exemptions. At [6.5] and [6.6], the FOI Guidelines set out some general principles regarding what:

> "*The public interest is considered to be:*
>
> - *something that is of serious concern or benefit to the public, not merely of individual interest* …[*British Steel Corporation v Granada Television Ltd [1981] AC 1096*]. *The 1979 Senate Committee on the FOI bill described the concept of 'public interest' in the FOI context as: 'a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern.' Senate Standing Committee on Constitutional and Legal Affairs, Report on the Cth Freedom of Information Bill 1978, 1979, paragraph 5.25.*]
> - *not something of interest to the public, but in the interest of the public …* [*Johansen v City Mutual Life Assurance Society Ltd (1904) 2 CLR 186*]
> - *not a static concept, where it lies in a particular matter will often depend on a balancing of interests…* [*As explained by Forgie DP in Re Secretary, Department of Prime Minister and Cabinet and Wood and Asher [2015] AATA 945 at [54] citing McKinnon v Secretary, Department of Treasury [2005] FCAFC 142; (2005) 145 FCR 70; 220 ALR 587; 88 ALD 12; 41 AAR 23 at [231]; 139; 78; 92 per Jacobson J with whom Tamberlin J agreed, citing Sankey v Whitlam [1978] HCA 20; (1978) 140 CLR 1 at 60 per Stephen J.*]
> - *necessarily broad and non-specific, …* [Because what constitutes the public interest depends on the particular facts of the matter and the context in which it is being considered.]
> - *related to matters of common concern or relevance to all members of the public, or a substantial section of the public. …*[*Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 480 (Barwick CJ).]
>
> *It is not necessary for a matter to be in the interest of the public as a whole. It may be sufficient that the matter is in the interest of a section of the public bounded by geography or another characteristic that depends on the particular situation. A matter of particular interest or benefit to an individual or small group of people may also be a matter of general public interest.*"

A. Whether work involved would not unreasonably divert ABCC's resources from its other operations because access in the public interest

83. Mr Morgan has made his request for reasons that are closely related to his being a director of Linkhill. I am prohibited from having regard to his reasons as such but, if his reasons also reflect the public interest, I may have regard to them in the context of considering whether or not the work involved in processing his request would be unreasonable as well as substantial. Mr Catlin has referred to prosecutorial practice of the FWBII under the WR Act and the FW. His language is consistent with the role of a prosecutor bringing criminal charges against a person, be it an individual or other body. The role of a prosecutor was considered in *Whitehorn v The Queen*.[76] In the course of his consideration, Deane J said:

> " *Under the adversary system which operates in a criminal trial in this country, it is for the Crown and not the judge to determine what witnesses are called by the Crown. That is not to say that the Crown is entitled to adopt the approach that it will call only those witnesses whose evidence will assist in obtaining a conviction. Prosecuting counsel in a criminal trial represents the State. The accused, the court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one. …*"[77]

84. Of the Judge's role, Dawson J observed:

> " *A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations.*"[78]

85. The analogy with civil proceedings is that the Commonwealth will act as a model litigant. That means that a non-corporate entity such as the FWBII or the ABCC is obliged to handle claims and litigation in accordance with Directions on *The Commonwealth's Obligation to Act as a Model Litigant* (Model Litigant Directions) set out at Appendix B to the *Judiciary Act 1903* (Judiciary Act) and made under s 55ZF of that legislation.[79] These directions are in addition to any instructions that the Attorney-General might make about handling claims or the conduct of litigation either generally or in relation to a particular matter.[80]

86. The nature of the model litigant obligation is set out in paragraph 2 to the Model Litigant Directions:

[76] [1983] HCA 42; (1983) 152 CLR 657; 49 ALR 448; Gibbs CJ, Murphy, Brennan, Deane and Dawson JJ
[77] [1983] HCA 42; (1983) 152 CLR 657; 49 ALR 448 at 663-664
[78] [1983] HCA 42; (1983) 152 CLR 657; 49 ALR 448 at 682
[79] Judiciary Act; Schedule 1; paragraph 4.2
[80] Judiciary Act; Schedule 1; paragraph 4.1

> " *The obligation to act as a model litigant requires that the Commonwealth and Commonwealth agencies act honestly and fairly in handling claims and litigation brought by or against the Commonwealth or a Commonwealth agency …*"

Notes 2 to 5 to that paragraph both reinforce the obligation but also sketch its boundaries:

> "*Note 2:* *In essence, being a model litigant requires that the Commonwealth and Commonwealth agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards. The expectation that the Commonwealth and Commonwealth agencies will act as a model litigant has been recognised by the Courts …*
>
> *Note 3:* *The obligation to act as a model litigant may require more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations.*
>
> *Note 4:* *The obligation does not prevent the Commonwealth and Commonwealth agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and Commonwealth agencies and testing or defending claims against them. It does not preclude pursuing litigation in order to clarify a significant point of law even if the other party wishes to settle the dispute. The commencement of an appeal may be justified in the public interest where it is necessary to avoid prejudice to the interests of the Commonwealth or a Commonwealth agency pending the receipt or proper consideration of legal advice, provided that a decision whether to continue the appeal is made as soon as practicable. In certain circumstances, it will be appropriate for the Commonwealth to pay costs (for example, for a test case in the public interest.)*
>
> *Note 5:* *The obligation does not prevent the Commonwealth from enforcing costs orders or seeking to recover its costs.*"

87. Bodies such as the FWBII and the ABCC are subject to these obligations but that does not mean that the context in which they exercise their powers under the former WR Act and the current FW Act is irrelevant. Taking Chapter 4 of the FW Act as an example, it makes provision for compliance and enforcement.[81] Part 4-1 is concerned with civil remedies. The FWBII had alleged that Linkhill had acted contrary to s 357(1)[82] by representing that the contract of employments under which each of the ten people named in the proceedings would be employed was a contract of services under which each person would work as an independent contractor. That was a civil remedy provision and a Fair Work Inspector appointed under s 700 of the FW Act (Inspector)[83] might, subject to certain qualifications, apply to a specified court in relation to its contravention.[84] The orders that the relevant

[81] The equivalent in the WR Act was Part 14; Division 3
[82] The equivalent in the WR Act was s 900
[83] FW Act; s 12
[84] FW Act; s 539; Item 11

court might make are the subject of Subdivision B of Division 2 of Part 4-1 of Chapter 4 of the FW Act. In the case of the Federal Court or the Federal Circuit Court, they may make any order they consider appropriate if the court is satisfied that a person has contravened, or proposed to contravene a civil remedy provision[85] provided they do not make an order in relation to an underpayment relating to a period more than six years before the proceeding commenced. On an application, the Federal Court and the Federal Circuit Court may also order a person to pay a pecuniary penalty that the person considers appropriate.

88. Another part of the context in which the obligations of the FWBII and the ABCC must be viewed relates to their roles as including, among others, the provision of assistance and advice to building industry participants, disseminating information about designated building laws and the Building Code and other matters affecting building industry participants, making submissions and providing information to the Independent Assessor under the FW Act as well as investigating acts or practices that may be contrary to a designated building law, a safety net contractual entitlement or the Building Code and commencing court proceedings or making applications to the Fair Work Commission relating to enforcement.[86]

89. Given its diverse functions, the role of the FWBII and its successor, the ABCC, are more akin to the wider powers of a body such as the Australian Competition and Consumer Commission (ACCC). Those powers were summarised in submissions made to McKerracher J in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*[87] and his Honour considered the distinction between the role of a prosecutor in criminal proceedings and that of the ACCC in civil penalty proceedings:

> " *The parties jointly contend that the relevant differences between the ACCC's role as a civil litigant and the role of a criminal prosecutor include:*
>
> *(a) the provisions of the CCA and the ACL confer on the ACCC a range of administrative, advisory, investigative and enforcement powers and functions. Many of these powers and functions are of a different character, purpose and scope than the powers and functions of a prosecutor. For example, criminal prosecutors perform no function that is analogous to the ACCC's power to accept court enforceable undertakings under s 87B CCA. The ACCC's role requires it to engage with, educate, research and consult with market participants in accordance with the specific objects of the CCA and ACL. The ACCC's civil enforcement role is closely related to these other functions. The ACCC generally investigates the conduct that gives rise to the proceedings. It may have conducted that investigation, and commenced proceedings according to its own enforcement priorities, which may be affected by its analysis of particular market conduct or function. Those enforcement priorities may cause it to settle proceedings on a compromise basis rather than proceed to trial. The outcome of enforcement actions has an impact on the ACCC's other roles and vice versa. This gives*

[85] FW Act; s 545
[86] FW Act; s 10
[87] [2014] FCA 464

> *the ACCC a particular interest as a party to civil enforcement proceedings, particularly in relation to the quantum of penalty, because the deterrent effect of a penalty is a powerful tool in securing the regulator's goal of compliance. By contrast, a criminal prosecutor representing the State in a criminal trial must act with fairness and detachment being concerned with the attainment of justice, not the securing of convictions: Whitehorn v The Queen [1983] HCA 42; (1983) 152 CLR 657 (at 663-664) per Deane J and* McCullough v The Queen *[1982] TASRp 7; (1982) 6 A Crim R 274 (at 285);*
>
> *(b) both the nature of the relief sought and the litigant's role in seeking it are relevantly and materially different in the criminal and civil penalty spheres. The ACCC must choose to plead and pursue the particular relief (including pecuniary penalties) it seeks in the application. By contrast, the prosecutor does not seek a sentence as the relief to which it, as a party, claims to be entitled. Rather, the prosecution presents the case that may result in a conviction, and the Court passes sentence as a consequence of that outcome. Thus, the ACCC has a more engaged role in relation to the pecuniary penalty than a prosecutor has in relation to a sentence. This should afford a different approach in relation to the submissions that address that relief.*
>
> *While I largely accept these contentions, it is not to be forgotten that just as a prosecutor has well-established duties, the ACCC is also expected to function as a 'model litigant' even though it is involved in civil litigation by which it seeks to advance and discharge its statutory function. …*"[88]

90. The wider range of functions given to the FWBII and the ABCC provides background to choices that either might have made in deciding whether to commence proceedings for breach of civil remedy provisions and the submissions that either might make as to the nature of the orders sought if the court accepts that those provisions have been breached. As the plurality said in *Australian Securities and Investment Commission v Hellicar*[89] (*Hellicar*), "*…* the regulatory authority seeks the remedy it does for public and not its own private purposes. …"[90] Having made a choice as to its course of action, the FWBII and the ABCC were both obliged to act as model litigants. In *Hellicar*, Heydon J accepted the submission of the Solicitor General for the Commonwealth that:

> "*… the duty to act as a model litigant requires the Commonwealth and its agencies, as parties to litigation, to act fairly, with complete propriety and in accordance with the highest professional standards, but within the same procedural rules as govern all litigants. But the procedural rules are not modified against model litigants – they apply uniformly.*"[91]

91. The Australian Securities and Investments Commission (ASIC), is a regulatory body, *albeit* in a different field of activity, as are the ACCC, FWBII and the ABCC. Of ASIC's role in

[88] [2014] FCA 464 at [71]-[72] Section 98 of the BCIIP Act gives the ABCC power to accept an undertaking where he or she reasonably believes that a person has contravened a civil remedy provision.
[89] [2012] HCA 17; (2012) 247 CLR 345; 286 ALR 501; 88 ACSR 246; French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ
[90] [2012] HCA 17; (2012) 247 CLR 345; 286 ALR 501; 88 ACSR 246 at [155]; 409; 541; 286
[91] [2012] HCA 17; (2012) 247 CLR 345; 286 ALR 501; 88 ACSR 246 at [240]; 435; 561; 306

bringing civil penalty proceedings under s 1337B(2) of the *Corporations Act 2001* for pecuniary penalty orders, compensation orders and disqualification orders against eight directors of a listed public company on the basis that each had breached his or her duty as a director by releasing to the Australian Stock Exchange an announcement that was misleading. ASIC alleged that they had but the directors denied its allegation. Heydon J said of ASIC's duty in the proceedings that followed:

> "… [I]*t is not ASIC's duty to arrive at a final conclusion regarding the truth of the evidence it tenders about the facts in issue. ASIC must, after making proper inquiries, believe that it has reasonable and probable cause to institute the proceedings, and to tender the items of evidence said to support the 'facts' alleged to be 'true'. But it is for the judiciary to decide what 'actually occurred' and what 'facts' are 'true. Contrary to what the respondents appeared at times to submit, performance of that judicial task is not preconditioned on the performance of the same task by the executive.*"[92]

His Honour repeated the same principles a little later in his reasons for judgment:

> "*…the regulatory agency need not do more, after making proper inquiries, than consider, with reasonable and probable cause, that its case represents 'the truth'. The second sentence is not correct: it is enough for ASIC to satisfy the court that facts sufficient for liability exist, albeit to a* Briginshaw *standard. …* [T]*he strength and quality of the evidence is material to whether the standard of proof is satisfied. But nothing more has been acknowledged in the case law.*"[93]

92. There is no basis in either the WR Act or the FW Act that leads me to conclude that the role of the FWBII was any different in the proceedings against Linkhill. That was its duty. If it did not comply with its duty, that would be contrary to the public interest. I will return to that but, first, I will look at a second public interest that is equally applicable. That public interest is that there be finality in the judicial system. This was explained in the judgment of the plurality in *D'Orta-Ekenaik v Victoria Legal Aid*:[94]

> " *A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry … and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud …. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding …. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding ….*
>
> *The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there,*

[92] [2012] HCA 17; (2012) 247 CLR 345; 286 ALR 501; 88 ACSR 246 at [228]; 431; 558; 303
[93] [2012] HCA 17; (2012) 247 CLR 345; 286 ALR 501; 88 ACSR 246 at [241]; 436; 562; 307
[94] [2005] HCA 12; (2005) 223 CLR 1; 214 ALR 92; Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ

the importance of finality pervades the law. Restraints on the nature … and availability of appeals, rules about what points may be taken on appeal … and rules about when further evidence may be called in an appeal (in particular, the so-called 'fresh evidence rule …) are all rules based on the need for finality. As was said in the joint reasons in Coulton v Holcombe …: *'[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial'.*

The rules based on the need for finality of judicial determination are not confined to rules like those mentioned above. Those are rules which operate between the parties to a proceeding that has been determined. Other rules of law, which affect persons other than the parties to the original proceeding, also find their justification in considerations of the need for finality in judicial decisions. And some of those rules are rules of immunity from suit."[95]

93. Having regard to the principles in these cases, the public interest would seem to lie in regarding the proceedings between the FWBII or the ABCC and Linkhill as at an end. The Full Court of the Federal Court considered whether Linkhill should be permitted to raise an argument that it had not pursued in the Federal Circuit Court at trial. That argument was that payments it had made to ten workers should be off-set against award entitlements, which the court below had found Linkhill was obliged to pay. The Full Court considered the argument and began by considering whether there was an explanation justifying the failure of Linkhill to raise the argument at trial:

> " *The Director contended that the circumstances suggested that Linkhill's legal advisors made a forensic choice not to raise the argument.*
>
> *Linkhill led no evidence from its legal advisors to explain why the set-off argument was not raised. Counsel who appeared on the hearing of the appeal did not appear as counsel at the trial. He did not know why the argument was not raised at the trial. There was no suggestion that the previous counsel was not available to give evidence about the reason that the argument was not raised at trial. Linkhill's failure to provide an explanation leaves open the possibility that it now seeks to agitate an issue which it deliberately did not agitate before the primary judge. That circumstance provides a basis for not permitting Linkhill to now raise the set-off argument.*
>
> *Linkhill submitted that the Director was aware of the availability of the set-off argument and deliberately concealed it from the Court. Although Linkhill did not go so far as to contend that the alleged concealment by the Director was the reason Linkhill was not aware of the availability of the argument, Linkhill did argue that the alleged concealment was a reason why it was expedient in the interests of justice that Linkhill should be granted leave to raise the argument on appeal.*
>
> *The facts, however, do not support the contention that the Director concealed any material matter.*
>
> *The ASOC pleaded the source of the claimed award entitlements. T hen, it particularised the underpayments of award entitlements in respect of each of the ten employees. The pleading at [91] relating to Mr Etheredge illustrates the way the claim was made …*

[95] [2005] HCA 12; (2005) 223 CLR 1; 214 ALR 92 at [34]-[36]; 17-18; 100 per Gleeson CJ, Gummow, Hayne and Heydon JJ

Schedule 5 to the ASOC commenced with a summary page setting out the entitlements claimed and a description of the method used to calculate each of them. The balance of Schedule 5 comprised 14 pages of spreadsheets which set out the detailed calculation of the amounts claimed in accordance with the method discussed in the summary. The calculations showed that the amounts paid by way of hourly rates by Linkhill were taken into account in calculating the amount due for ordinary time and overtime under the awards. The calculations also showed that the amounts paid by Linkhill were not taken into account as deductions from the amounts due under the awards for other entitlements including for crib time, meal allowances, travel allowances, superannuation, annual leave, annual leave loading and redundancy/severance pay.

Detailed schedules following the same pattern were annexed to the ASOC for each of the ten employees.

Linkhill's Defence denied the contraventions such as those pleaded in [91] of the ASOC, but did not expressly take issue with the method of calculation of the figures.

Then, in extensive written submissions, the Director again explained in detail the method of calculation of the underpayment of award entitlements. As to the claim for overtime entitlements, the written submissions stated at [307]:

> *The above amounts for each respective worker are determined by:*
>
> *(a) first, calculating the difference between:*
>
> *(i) the amount the respective workers should have been paid under the 2000 Award for the hours worked each week based upon the invoices they provided by the respective workers and having particular regard to the hours worked in excess of 8 hours per day, Monday to Friday and/or in excess of 38 hours per week, on weekends and on public holidays; and*
>
> *(ii) what the workers were actually paid by Linkhill for those hours worked each week; and*
>
> *(b) secondly, adding together the above weekly amounts (as recorded in the various columns titled "difference" in the relevant spreadsheets in Part 2 of the relevant Schedule for each worker) for the duration of the relevant period of coverage of the 2000 Award. This identifies the total underpayment of penalty rates for each worker for the total period as set out in paragraph 306 above.*

[Emphasis added.]

The submissions explained how in contrast, for instance, meal allowance entitlements were calculated without taking into account the payments of hourly rates made by Linkhill, as follows at [315]:

> *The above total amounts for each respective worker are determined by multiplying the applicable meal allowance amount (as set out in paragraph 311 above) by the number of meals due (as recorded in the column titled 'meal's due' in Part 2 of the relevant Schedules) for the duration of the relevant period of coverage of the 2000 Award.*

The Federal Circuit Court adopted the calculations formulated by the Director in the schedules to the ASOC. This course was not challenged by Linkhill at the trial as explained by the Federal Circuit Court as follows at [372] to [375] …

Thus, from the facts set out at [73] to [79] above, it is clear that the Director explained the way the underpayment of award entitlements was claimed. The explanation showed that payments made by Linkhill were deducted from the claim for overtime but not from the claims for other allowances. There was no concealment by the Director.

> *On the other hand, the failure of Linkhill to explain why there was no objection to the calculations is a factor militating against allowing Linkhill leave to raise the new argument on appeal because it leaves open the possibility that Linkhill made a deliberate forensic choice at the trial to accept the calculations contained in the schedules to the ASOC.*
>
> *Linkhill had the schedules to the ASOC from December 2012, that is to say, three months before the trial began and ten months before final submissions were made. There was ample opportunity for Linkhill to challenge the calculations. And, indeed, some aspects of the schedules were challenged. In particular, Linkhill contended that if the workers were employees they were to be classified as casuals under the awards. Further, Linkhill contended that some work was undertaken at locations outside the purview of the awards. Linkhill also raised issues about which classifications applied to the ten employees under the awards. Each of these arguments questioned a basis on which the calculations in the schedules were made. But no challenge was made to the quantification of the entitlements detailed in the schedules. Nor was there any argument that payments of hourly rates by Linkhill to the employees had not been taken into account*."[96]

94. I cannot go behind the judgment of the Full Court of the Federal Court. By their nature, the proceedings in the Federal Circuit Court were adversarial. Implicit in the judgment of the Full Court is the proposition that Linkhill had its chance to tender evidence supporting its argument that the hourly rate that Linkhill paid to each of the ten workers in question was significantly more than the hourly rate, to which each would have been entitled under the applicable industrial award. Linkhill did not take issue with the calculations before the Federal Circuit Court and it was too late to raise it on appeal. There is nothing to suggest that the FWBII did not carry out its responsibilities in instituting the proceedings with reasonable and probable cause. Given that fact and the public interest in the finality of proceedings, I think that it is too late to raise the set off issue as a matter of public interest in the context of ascertaining what is an unreasonable diversion of resources within the meaning of s 24AA of the FOI Act.

95. That leaves one other argument arising from the submissions. I mentioned earlier that, FWBII's duty in instituting the proceedings against Linkhill was to believe, after making proper inquiries, that it had reasonable and probable cause to institute the proceedings, and to tender the items of evidence said to support the "*facts*" alleged to be "*true*". If it did not, it might be arguable that Linkhill would have grounds to institute proceedings for the tort of malicious prosecution. This was not an argument expressly advance by Mr Morgan at the hearing but I will mention it briefly as it is consistent with the tenor of his concerns regarding the actions of the FWBII in instituting the proceedings if not implicit in the submissions made on his behalf. The elements of the tort of malicious prosecution were

[96] [2015] FCAFC 99; (2015) 240 FCR 578 at [69]-[80]; 595-598; North and Bromberg JJ

summarised in *Beckett v New South Wales*[97] in the context of criminal proceedings as requiring a plaintiff to:

> "*… four things: (1) the prosecution was initiated by the defendant; (2) the prosecution terminated favourably to the plaintiff; (3) the defendant acted with malice in bringing or maintaining the prosecution; and (4) the prosecution was brought or maintained without reasonable and probable cause.*"[98]

96. Assuming that the FWBII could be regarded as a public office[99] and assuming that the tort is equally applicable to civil proceedings relating to the imposition of a penalty as to criminal proceedings,[100] it would seem that Linkhill could not meet the second criterion i.e. that the proceedings terminated favourably to it. They did not for they terminated with the orders requiring Linkhill to pay compensation to those found to be employees and the imposition of civil penalties. In these circumstances, I have concluded that there is no relevant public interest to which I must have regard in deciding whether the work involved in processing Mr Morgan's request would be an unreasonable diversion of resources within the meaning of s 24AA. In the absence of a relevant public interest, I find that the diversion of ABCC's resources from its other functions would be unreasonable.

B. Whether work involved would not unreasonably divert ABCC's resources from its other operations because access accords with FOI Act's objects

98. I have also considered whether the work involved in processing Mr Morgan's request would be an unreasonable diversion of resources given the objects of the FOI Act. In summary, those objects are to make information available to the public so that there can be increased public participation leading to better-informed decision-making and increased scrutiny and review of the government's activities. The FOI Act itself requires me to balance those objects against the public interest in ensuring that government may function effectively and efficiently. That is at the heart of the qualification in ss 24 and 24AA to the right of access. In this case, I consider that the balance lies in my finding that the workload in processing the request would substantially and unreasonably divert the ABCC's resources from its other operations.

Discretion

99. The word "*may*" is used in s 24(1)(b) and means that, although I have found that the work involved in processing the request would substantially and unreasonably divert the ABCC

[97] [2013] HCA 17; (2013) 248 CLR 432; 297 ALR 206; French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ
[98] [2013] HCA 17; (2013) 248 CLR 432; 297 ALR 206 at [4]; 438; 208 per French CJ, Hayne, Crennan, Kiefel and Bell JJ
[99] See the consideration of ASIC as a public office in *Chapel Road v ASIC* [2006] NSWSC 1014; (2006) 203 FLR 322 at [88]-[93];339-340; Harrison AJ
[100] *Rich v Australian Securities and Investments Commission* [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354; Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ; Kirby J dissenting and *Little v Law Institute of Victoria (No 3)* [1990] VicRp 25; [1990] VR 257; Kaye, Beach and Ormiston JJ

from its other operations, whether or not I refuse Mr Morgan's request on that basis remains a discretionary decision.[101] On this occasion, my reasons for refusing it mirror those that underpin my conclusion that the substantial diversion of ABCC's resources would be unreasonable. I am not satisfied that there is any relevant public or wider interest that supports my doing so.

DECISION

100. For these reasons, I affirm the decision of the AIC dated 2 February 2018 made under s 55K of the FOI Act.

I certify that the preceding one hundred paragraphs (100) paragraphs are a true copy of the reasons for the decision herein of Deputy President S A Forgie

.....[sgd].....
Associate

Date of decision:	18 March 2020
Heard:	5 April 2019
Applicant's counsel:	Mr J D Catlin
Applicant's solicitor:	Mr J Yeatman Group General Counsel Roy Morgan
Respondent's counsel:	Ms R Walsh
Respondent's solicitor:	Mr M Mulcahy Bird & Bird

[101] *Acts Interpretation Act 1901*; s 33(2A)

