Information Commissioner Presentation to the RTI Network 8 June 2010

Thank you for the opportunity to speak with you today. The new Privacy Commissioner Linda Matthews commences work on Monday next week. The recruitment process for the RTI Commissioner is underway and hopefully an announcement can be made later in the year.

It might be of interest for you to know that the Office will receive about 60% more external review applications than it usually does. While there was a marked improvement in the timeliness of external reviews last year in the magnitude of 35%, the increase in workload will inevitably have an impact on our timeliness. There has been an increase in the number of applications from the media and MPs.

The Office is focussed on improving its performance and the increase in workload makes that focus even more important. We take feedback from review participants seriously and the timeliness of reviews is one indicator on which the Office's services are evaluated. The Office is systematically addressing reasons for delays and it is that topic that I will primarily address today.

Before I do that I should mention an agency survey we received which indicated the agency wanted the Office to make more formal decisions rather than informally resolve external review applications. I realise that many agencies might share that feeling so I'll say a few words about it. The Office presently has on hand around 160 external reviews. About 100 of those are RTI matters, about 30 are FOI matters and about 30 are IP matters. With the changing profile of FOI matters to RTI matters, RTI decisions are now starting to emerge.

The Office decision page on the website has been updated to enable people to access decisions by the relevant Act. We were slow to publish the first RTI decisions in the RTI section of the website because we needed three or four decisions for the website developer to create an index that would allow us to publish decisions. RTI decisions will now appear directly in that section of the decision page, making them more easily identifiable.

Section 90 of the RTI Act says that I must identify opportunities and processes for early resolution of the external review application, including mediation and promote settlement of external review applications. Because it is my duty to do that, I cannot respond to the agency feedback by making more decisions. This year it looks like we will resolve over 90% of external review applications.

On the subject of early resolution I wish to thank the vast majority of you who cooperate with the Office in the resolution of matters. Those agencies can see the benefit of it, are less likely to have antagonistic relations with the applicant and can assist in rebuilding an applicant's trust in an agency by doing so. Section 90 of the RTI Act creates a statutory process in which participants to a review are able to participate. The IP has an equivalent provision. It is intended that participants will try to agree on matters. Agreements are made when both participants give way on their positions or when one participant agrees to give way. The Act clearly anticipates that agencies can change their minds and the Act permits agencies to enter into agreements which may differ from the original decision made by the agency concerned.

If I could return to the timeliness of external reviews. Reasons for delay generally are those which fall within the control of the Office and those which don't. Many agencies are consistently good at meeting the time frames permitted by the Office, some agencies are consistently poor. I have statutory tools available to me to address poor agency response times and it is only fair that I give all of you some forewarning that it is my intention to use the tools available to me. Unfortunately the impact of the changes to the Office's practices will effect all agencies, although they will result from the actions of those poor performers.

In a recent application for judicial review which was dismissed by Justice McMurdo of the Supreme Court, the judge awarded costs against the Office, notwithstanding his decision that the application for judicial review was misconceived and futile. How could this happen you might ask?

In his judgement Justice McMurdo expressed some views about what he considered to be a reasonable length of time the Office might take to process an external review. In this particular matter he commented that five months for the Office to express a

preliminary view was reasonable. While recognising the Office's attempt to informally resolve the matter with the agency as proper, particularly in light of the fact that the Office knew the applicant would otherwise receive no documentation, the judge was of the view that in this matter, the nine months taken after the preliminary view had been formed before a decision was issued was unreasonable. I agree with the Justice's view on that. In expressing that view he specifically commented on the significant contribution made by the agency to the delay. The Justice's comments were helpful in focussing the Office on its responsibilities to run external reviews with as much expedition, as a proper consideration of the matters allow and the requirements of the Act allow. It is my duty to ensure that agency delays in responding to the Office do not result in unreasonable delays for the applicant and in the Office incurring costs to the public purse. Timeliness will continue to be the Office's focus but next year, the Office's attention will be focussed on agency contribution to the Office's delays.

External review processes are at the discretion of the Information Commissioner. For years now, the process has been conducted on the papers with the Office operating in a courteous rather than directive way, and seeking to rely on cooperation from agencies in responding within time frames permitted. As a consequence of agencies having statutory time frames in which to process access and amendment applications, agencies have come to consider that they can take for themselves a wide discretion as to whether or not they comply with Office time frames. The informal way in which the Office has sought to work with agencies has perhaps lulled agencies into a false sense of belief that they can set their own times in responding to external reviews, set external review matters aside and get to external review matters when they can.

In my mind Justice McMurdo's decision, creates a different context where applicants for external review may be awarded their costs in any matter which is delayed. It is a context where delays by agencies or the Office can no longer be afforded, justified or tolerated.

I wish to draw to your attention a Federal Court Judge's comments in another matter that shines some further light on what an objective assessment of reasonable time frames might be.

Reasonableness of time permitted for notices to produce

AB Pty Ltd v Australian Crime Commission and Another [2009] FCA 119

Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of a decision of the Australian Crime Commission to issue notices to produce information. The statutory capacity of the ACC is in similar terms to that of the Office's capacity to issue notices to produce information. The first notice was issued to the applicant, AB Pty Ltd on 8 December 2008 requiring the production of documents in 9 calendar days, by 17 December 2008. The information required was extensive. Records containing the following information and the following documents:

1. Details of all personnel employed, contracted, engaged directly or indirectly by the company, any business unit or subsidiary of the company including full name, date of birth, address, employment status, tax file number and ABN.
2. Details of all venues/contracts currently serviced directly or indirectly … including venues where there is no written or formal agreement of service.
3. All corporate records, including (list of 12 items)
4. Annual financial statements..
5. Bank statements
6. Sales/income records
7. Wage and superannuation records and 4 other categories of information.

On 8 December 2008 and again shortly thereafter, the general counsel telephoned an officer of the Commission and stated that it was not possible to comply with the notices within the time permitted. No documents were submitted by 17 December 2008.

On 16 January 2009 the Commission issued fresh notices in substantially identical terms, requiring production of documents in 14 days - by 30 January 2009.

The applicant contended that the decisions to issue the notices were invalid because they were not authorised and were an improper exercise of the power conferred by section 29 (because the time frame was unreasonable).

Flick J considered the “reasonableness of the time permitted for production of documents”.

> *… The reasonableness of the period of time within which production is required is to be determined objectively by the Court in the light of the surrounding circumstances. The objective surrounding circumstances would include the* ***breadth of each particular notice*** *and (perhaps) the* ***need for a recipient to construe the terms of a notice****; the* ***classes of documents required to be produced****; the apparent* ***ability of the recipient to collate and thereafter produce the documents****; the* ***time of the year*** *at which a notice is served and intervening disruption to business activities by reason of public or religious holidays; whether there has been a* ***prior attempt to require the production of the same or similar documents****; and the* ***time in fact allowed****. Some consideration could also be given to the amount of time an examiner thought appropriate; although that consideration would not be decisive…*
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> *… The mere fact that compliance with a requirement to furnish information or to produce documents would be burdensome will not invalidate that requirement...*
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> *… Where a large number of documents are sought within a short period of time and where allowing greater time is possible, the specification of an arbitrarily short time for compliance may reflect upon the reasonableness of the exercise of the power or the good faith with which it has been exercised…*

Flick J noted that, given the potential for a serious erosion into the confidentiality of an individual’s documents and the consequences for non-compliance, section 29 is a provision which must be construed according to its terms such that no greater power is in fact exercised than the words employed by the legislature permit. Flick J also recognised the implied requirement to exercise the power under section 29 in good faith and for the purpose for which it was conferred. Ultimately, however, the focus was on the terms of the section of the Act and it was held that there was no unreasonableness as to the time for compliance for either the nine day notice or the 14 day notice.

In a current external review I have called an agency CEC to a public hearing perhaps for the first time since 1982. In that matter the Office has spent around 9 months trying to extract documents from the agency in what is partly a sufficiency of search matter, and I remain dissatisfied that all relevant documents have been provided. I anticipate that other CEOs may be required to appear when there are delays in agency response times and in reflecting on Justice McMurdo's comment that 5 months to produce a preliminary view is reasonable, I will not be as patient in future as I was with this agency.

The matter of *AB Pty Ltd v Australian Crime Commission* was decided in relation to a provision of an Act that concerned the production of documents. It cannot necessarily be directly relied upon to determine what might be considered reasonable in court discovery processes or the time frames allowed for parties to make submissions in judicial or *quasi judicial* proceedings.

It does however provide some general indication. The factors Flick J considered should be taken into account in deciding a reasonable time are equally applicable. Those factors do not include staff being away on leave or having other matters to attend to. These are common reasons agencies put forward for not responding within permitted time frames.

The factors identified by Flick J are factors the Office should bear in mind in setting a time frame. In another recent external review application, I allowed an agency three months to provide me with a submission taking into account the circumstances of that matter. The agency failed to provide a submission on time and I am now proceeding to make a decision without the benefit of the agency's views. Failure to respond within permitted time frames is a significant oversight by agencies in light of section 87 which says that the agency which makes the decision under review has the onus of establishing that the decision was justified or that a decision adverse to the applicant should be given by the Information Commissioner.

A time frame of two weeks for submissions is generally considered reasonable by the courts and tribunals. A two week time frame was the time frame the Consumer and Trader Tribunal. I note in a current RTI matter now before QCAT, that Tribunal has allowed 2

week for the parties to make their submissions. The Office's practice is to generally afford participants in a review a time frame of two weeks within which to make submissions, subject to those factors given by Flick J.

It is now my intention to proceed to decision in those matters where the agency is afforded the opportunity to make submissions and has failed to do so within the time frame permitted. We won't be chasing up submissions. For those agencies which can't meet time frames reliably, I will consider utilising the powers available to me under the Act and issuing a notice that requires production of information or documents or attendance at the Office. Failure to follow such a direction is an offence under the Act.

With the appointment of an RTI Commissioner I envisage that the Office will assess whether certain types of external review are better conducted through public hearings, whether certain types of external review can be expedited through public hearings and in particular, the circumstances, such as agency delay where CEOs will be directed to appear before a public hearing.

Last financial year the Office improved its timeliness through its early resolution and assessment process by some 35%. It has been pointed out to me that this is the kind of improvement some agencies would only dream of achieving over a 10 year period. We are not sitting on our laurels.

This year the Office seeks to continually improve its performance and this year has worked on two significant projects. Firstly a case management system that will provide management information about the causes of delays. The Office will also use this information to not only improve its own performance but to provide annual report cards on agency timeliness in responding to external reviews. The case management system will be operational from 1 July 2010.

Secondly, the Office is setting up a Knowledge Management system which includes an annotated act. This resource will reduce the amount of duplicated original legal research which should improve timeliness and consistency. The resource will be internally available by September in the new financial year but will require further development before consideration can be given to making the system available to external parties. The public

availability of such a system may assist agency decision makers and applicants, although as I say, detailed consideration is yet to be given to this.

Despite the additional workload we are all facing and which I recognise, I hope that you will work with me on improving the timeliness of external reviews. I would be delighted if I was not required to use the statutory powers available to me. Given the context in which we now work has changed, courtesy of the recent costs order against the Office, I intend to use them should I need to ensure the timeliness of external reviews.

Thank you again for allowing me to address you.