



**ASIC**

Australian Securities & Investments Commission

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[REDACTED]

Mr Peter O'Brien  
Assistant Director  
Compliance Branch  
Office of The Australian Information Commissioner  
GPO Box 5218 Sydney NSW 2001

**PRIVATE AND CONFIDENTIAL**

Dear Mr O'Brien,

**Re: Application For Vexatious Applicant Declaration**

As advised please find attached Application for Vexatious Applicant Declaration in respect to [REDACTED]

[REDACTED]

Yours Sincerely,

[REDACTED]

Australian Securities and Investments Commission

## APPLICATION FOR VEXATIOUS APPLICANT DECLARATION

### 1. Introduction

- 1.1 This is an application by the Australian Securities and Investments Commission ("ASIC") for a declaration to be made by the Information Commissioner pursuant to s 89K(1) and (2)(a) and s 89L(1)(a) of the *Freedom of Information Act* 1982 (Cth) ("*FOI Act*") that [REDACTED] is a vexatious applicant. Documents to which specific reference is made are reproduced in the accompanying folders.

- 1.2 The grounds upon which ASIC relies in making this application are that [REDACTED]

#### GROUND 1

- (i) has repeatedly engaged in access actions (*FOI Act* s 89L(1)(a)(i)); and
- (ii) the repeated action involves an abuse of the process of an access action (*FOI Act* s 89L(1)(a)(ii)), in that the repeated action is unreasonably interfering with the operations of ASIC (*FOI Act* s 89L(4)(b));

#### GROUND 2

- (i) has repeatedly engaged in access actions (*FOI Act* s 89L(1)(a)(i)); and
- (ii) the repeated action involves other abuse of the process of an access action (*FOI Act* s 89L(1)(4)).

- 1.3 Common to Grounds 1 and 2 is the requirement to establish that [REDACTED] has repeatedly engaged in access applications. Component (ii) in Ground 1, set out in s 89L(4)(b), is that the person's repeated engagement in access actions involves an abuse of the process for an access action in that it is "unreasonably interfering with the operations of an agency". Component (ii) of Ground 2 is different, reflecting that s 89L(4)(a) to (c) is a non-exhaustive definition of the expression "abuse of the process for an access action". There are thus three components in ASIC's application, which are now addressed with reference to supporting evidence.

1.4 An "access action" is the making of an FOI request under s 15 of the *FOI Act*, making an application for amendment or annotation of records under s 48, making an application for internal review under s 54B, or making an IC review application under s 54N.<sup>1</sup>

1.5 There is no definition of "vexatious" in the *FOI Act*.<sup>2</sup> However a definition is not necessary. By force of s 89L(1)(a) and (b) a vexatious applicant declaration may be made when an applicant repeatedly engages in access applications and this conduct falls within one or more of the descriptions in (a) to (c) of s 89L(4) or is otherwise conduct falling within the expression "abuse of the process for an access action". In order to establish Grounds 1 and 2, as indicated in paragraph 1.2 above, the relevant expressions in s 89L requiring application are "repeatedly engaged", "unreasonably interfering with the operations of an agency" and, more generally, "abuse of the process for an access action".

1.6 In accordance with the Information Commissioner's *Guidelines*, this application does not seek to include as evidence of repeated access actions any access action made prior to 1 November 2010, but may refer to relevant events preceding that date as background.<sup>3</sup>

## 2. Background

2.1 [REDACTED] initial FOI requests were made in March 2009 in relation to his concerns about his [REDACTED]

[REDACTED] From that time ASIC corresponded with [REDACTED] in relation to his complaint.

2.2 By letter dated 2 July 2010 [REDACTED] ASIC, advised [REDACTED] that any further correspondence relating to his complaint would be considered and assessed but may not be responded to (Tab 2).

2.3 More detailed accounts of [REDACTED] requests and complaints are set out in a letter dated 25 October 2010 from [REDACTED] to [REDACTED] of Treasury (Tab 3), and a letter dated 5 July 2011 from [REDACTED] of ASIC, to the Commonwealth Ombudsman (Tab 4).

<sup>1</sup> *FOI Act* s 89L(2).

<sup>2</sup> The power to make a vexatious applicant declaration is additional to the Commissioner's power under s 54W(a)(i) to decide not to undertake an IC review or not to continue to undertake an IC review if satisfied that the IC review application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.

<sup>3</sup> Office of the Australian Information Commissioner *Guidelines* para 12.6.

- 2.4 At Tab 1-(Attachment A) to this application is a document listing letters received by ASIC from [REDACTED] seeking information pursuant to the Freedom of Information Act 1982 during the period 1 November 2010 to 30 January 2012. The Key at the end of Attachment A provides an explanation of the abbreviations. For example "NR" signifies a new FOI request under s 15. Contained in Volume 2, are copies of the letters listed in Attachment A and ASIC's responses thereto.
- 2.5 By way of further background two proceedings commenced by [REDACTED] should be mentioned. On [REDACTED] commenced a proceeding in the [REDACTED] of ASIC's decision to take no further action in response to his complaints. When [REDACTED] subsequently withdrew his application, the [REDACTED] dismissed the proceedings. On [REDACTED] commenced proceedings under the [REDACTED] against ASIC and several of its senior officers, alleging ASIC improperly exercised its powers in taking no further action in response to his complaints. The proceeding was dismissed by consent.
3. **Repeated engagement in access actions: *FOI Act* s 89L(1)(a)(i) – Ground 1(i) and Ground 2(i):**
- 3.1 Section 89L(1)(a) empowers the Information Commissioner to make a vexatious applicant declaration in relation to a person if the Commissioner is satisfied that the person has "repeatedly engaged" in access actions and the repeated engagement involves an abuse of the process for the access action.
- 3.2 The expression "repeatedly engaged" should be given its ordinary English meaning. The repetition may be established simply by the high volume of requests made under s 15 of the FOI Act within a particular period of time.
- 3.3 Repetition may also be established on the basis of making FOI requests under s 15 which are identical or closely similar to requests already made under s 15. The Queensland Information Commissioner has issued Guidelines<sup>4</sup> ("the Queensland Guidelines") on s 114 of the *Right to Information Act* 2009 (Qld) ("*RTI Act*"), which empowers the Queensland Information Commissioner to make a declaration that a person is a vexatious applicant on a basis closely similar to s 89L of the *FOI Act*. The Commissioner expresses the view that the words "repeatedly

engaged" in s 114(2)(a), the counterpart to s 89L(1)(a)(i), include circumstances where the requests were the same or substantially the same as earlier applications, and whether a reasonable basis has been disclosed for again seeking access.<sup>5</sup>

3.4 Section 14(1) of the *Freedom of Information Act 2000* (UK) ("*UK FOI Act*") provides that the general right to information created by the Act "does not oblige a public authority to comply with a request for information if the request is vexatious". Section 50 provides that the Information Commissioner is not obliged to deal with a complaint if the application appears to him or her to be frivolous or vexatious. The *UK FOI Act* addresses repeated applications separately from vexatious applications and in a more stringent manner. Under the *UK FOI Act* requests can therefore be vexatious without being repeated, and may be vexatious without being repeated, and may be both vexatious and repeated. <sup>6</sup>Section 14(2) of the *UK FOI Act* provides that "where a public authority had previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request." If these requests are simply repeated, in the sense described in the *UK FOI Act*, the agency need not respond. This provision is more detailed and somewhat different from s 89L(a)(i), and on its own justifies an agency's not responding to a request.

3.5 As to the first form of repetition, [REDACTED] has repeatedly engaged in access actions. The repetition is established purely on the basis of his having made numerous fresh applications to ASIC, totalling [REDACTED] access applications in the relevant period. (one request containing request for document and request for internal review), consisting of:

- (i) [REDACTED] access applications pursuant to s 15 of the *FOI Act*;
- (ii) [REDACTED] internal review applications pursuant to s 48 of the *FOI Act*.<sup>7</sup>

3.6 As to the second form of repetition, [REDACTED] has engaged in repetition by making requests under the *FOI Act* which are identical or closely similar to requests already made. As set out in column 6 of the table in Attachment A, [REDACTED] has made:

- (i) [REDACTED] requests under s 15 seeking the same information sought in earlier s15 requests;

<sup>4</sup> Office of the Information Commissioner of Queensland *Right to Information Guidelines* (2009).

<sup>5</sup> Office of the Information Commissioner of Queensland *Right to Information Guidelines* (2009), Vexatious Applicant Declarations, para 3.1 (p 8).

<sup>6</sup> Section 14(1) of the *UK FOI Act*, dealing with "vexatious", is considered below.

- (ii) internal review request which is identical to internal review requests he has already made, see item 36; and
- (iii) requests for copies of notices of receipt of request under s 15(5)(a) (see items 46, 66 and 69).

3.7 While one form of repetition would be sufficient, both forms of repetition exist in the present case. Therefore it is submitted that the first component for making a vexatious applicant declaration, on Ground 1 or 2, under s 89L(1)(a)(i), is established.

4. Repeated action involves "abuse of process for an access action" by "unreasonably interfering with the operations" of ASIC: *FOI Act* s 89L(1)(a)(ii), (4)(b) – Ground 1(ii):

4.1 Pursuant to s 89L(4)(b) of the *FOI Act* "abuse of the process for an access action" includes "unreasonably interfering with the operations of an agency".

4.2 A statutory test of unreasonableness requires simply that an objective standard of unreasonableness be met.<sup>8</sup> In addition, the expression "unreasonably interfering with the operations of an agency" should be construed in its entirety.

4.3 The expression "unreasonably interfering with the operations of an agency" is in part similar to the "practical refusal reason" under s 24AA(1)(a)(i), which poses a test as to whether the work involved in processing the request "would substantially and unreasonably divert the resources of the agency from its other operations".<sup>9</sup> There are three significant differences between this test and the test posed by s 89L(4)(b). Section s 24AA(1)(a)(i) requires that the agency establish that:

- (i) the diversion of resources is "substantial" (whereas s 89L(4)(b) imposes no such requirement);
- (ii) there is a "diversion" of resources (rather than simply "interference" with resources as required by s 89L(4)(b)); and

<sup>7</sup> See attachment A, column 1, items 6, 19, 20, 29, 56, 57, 61, 65, 67 and 68.

<sup>8</sup> It would be erroneous to construe "unreasonably" as requiring that the *Wednesbury* standard be met, of interference with the operations that is so unreasonable no reasonable requester could so interfere with the operations.

<sup>9</sup> After a consultation process, if the agency is satisfied that a practical refusal reason exists, it may refuse to give access to the document requested: *FOI Act* s 24(1)(b). While the agency may for this purpose treat two or more requests as a single request if satisfied they relate to the same document or documents, or their subject matter is the same, the substantial and unreasonable diversion of resources is only assessed on the basis of processing that request: *FOI Act* s 24AA(1)(a). Not taken into account is the processing of internal review applications and responding to other correspondence.

- (iii) the diversion relates to “resources” (rather than “operations” of the agency as required by s 89L(4)(b)).

4.4 The expression “unreasonably interfering with the operations of an agency” is in part similar to the public interest conditional exemption under s 47E(d) where disclosure would or could reasonably be expected to have a substantial adverse effect on the proper and efficient conduct of the operations of an agency. However there are three significant differences in the scope and application of this provision and s 89L(1)(a). Section 47(e) requires that the agency establish that:

- (i) giving access would, on balance, be contrary to the public interest<sup>10</sup> (whereas no public interest test applies under s 98L);
- (ii) the adverse effect is “substantial” (whereas s 89L(4)(b) imposes no threshold as to the degree of interference with operations of the agency); and
- (iii) the effect is upon “the proper and efficient conduct” of the operations of the agency (whereas s 89L(4)(b) does not include this element, simply referring to “operations”).

4.5 Unreasonable interference with the operation of an agency may be established on the basis of similar kinds of evidence to that ordinarily considered in connection with ss 24AA(1)(a)(i) or s 47E(d). However, as the analysis above indicates, case-law on s 24AA(1)(a)(i) or s 47E(d) (or their predecessor provisions) needs to be approached with caution if relied upon as a guide to the construction and application of s 89L(4)(b). Section 89L(4)(b) sets a lower threshold than s 24AA(1)(a)(i) or s 47E(d). This is understandable since an agency seeking a vexatious applicant declaration pursuant to s 89L(1)(a) must not only establish that one of the tests of abuse of the process for an access action under s 89L(1)(a)(ii) and 89L(4) is met, but must also establish that repeated engagement in access actions under s 89L(1)(a)(i).

4.6 In addressing s 114(6)(b) of the *RTI Act*, the counterpart to s 89L(4)(b) of the *FOI Act*, the Queensland Guidelines identify as relevant matters the resources that would be used in processing the request, the quantity of documents involved, the location of the documents, any efforts made by the agency to narrow the application and the operations that would be interfered with and how they would be interfered with.<sup>11</sup> The criterion as to whether effort has been made by the agency to narrow the application is in ASIC’s view not a relevant matter. It is a criterion based upon the premise that there is a single request (rather than a context of repeated requests

<sup>10</sup> *FOI Act* s 11A(5)

<sup>11</sup> Office of the Information Commissioner of Queensland *Right to Information Guidelines* (2009) Vexatious Applicant Declarations, para 3.2.2 (p 11).



which may engage a provision such as s 89L) and also that a consultation process as to the scope of that request applies under a provision such as ss 24 and 24AB of the *FOI Act* (when no such process applies or could apply under s 89L).

- 4.7 Of some assistance as an illustration of the material relevant to a question of unreasonable interference with operations, or placing a burden on an agency, is the decision of the United Kingdom Information Tribunal in *Latimer and Information Commissioner and Environment Agency*.<sup>12</sup> In that case the application was required to be considered under the *Environmental Information Regulations* 2004 (UK) rather than the *UK FOI Act* s 14. The statutory test was whether the particular request was "manifestly unreasonable". The Information Tribunal held that the communications by the applicant with the Environment Agency placed a significant burden on it, noting the volume of communications; that the Agency had already provided the applicant with an exhaustive amount of information; and that the applicant had made overlapping requests by writing to the Agency about the same issues while making new requests of it before responses to preceding requests were received.<sup>13</sup> There was also evidence that a number of communications from the applicant focused upon particular individuals within the Agency with demands that some resign, and charges made without foundation.<sup>14</sup>

- 4.8 ASIC contends that the volume, nature and manner of making of access applications by [REDACTED] has the effect of unreasonably interfering with ASIC's operations.

- 4.9 The interference is illustrated below by reference to the manner in which [REDACTED] requests have interfered with the performance of four specified ASIC officers of their respective duties.

- 4.9.1 [REDACTED] is a [REDACTED] of ASIC [REDACTED] substantive work involves the conducting reviews related to the handling of misconduct reports; drafting responses to correspondence for the Chairman, Commissioners and Senior Executives, related to reports of misconduct identified as requiring detailed responses, such as correspondence from Ministers and other Members of Parliament, Government officials or other Departments; assisting with the drafting responses to correspondence for the Chairman, Commissioners and Senior Executives, related to reports of misconduct that have been identified as requiring detailed responses, including correspondence from Ministers and other Members of Parliament, Government officials or other Departments; assisting with the drafting of responses

<sup>12</sup> Information Commissioner, 3 August 2009 EA/2009/0018.

<sup>13</sup> Information Commissioner, 3 August 2009 EA/2009/0018, at [34].



to Ombudsman investigations into ASIC's handling of reports of misconduct and providing input into communication strategies for [REDACTED]

4.9.2 [REDACTED] has been the decision maker in, or participated in the processing of some FOI applications and internal review request from [REDACTED]

4.9.3 Due to the nature of the requests received from [REDACTED] the requests actioned by [REDACTED] have generally required review of dozens of hard copy files in [REDACTED] relating to the numerous complaints filed with ASIC by [REDACTED] reviewing other hard copy files containing documents related to other [REDACTED] matters, such as his previous FOI requests; reviewing the electronic database entries related to [REDACTED] complaints and other matters reported to ASIC about [REDACTED] in respect to which [REDACTED] raised his concerns; reviewing the electronic database entries related to ASIC's specialist [REDACTED] Team's consideration of these entities; and consulting internally with ASIC staff in [REDACTED] Team, and members of [REDACTED]

4.9.4 [REDACTED] has estimated that his work in processing the FOI requests received from [REDACTED] and, advising other ASIC officers handling FOI requests received from [REDACTED] advising on the regulatory issues raised in [REDACTED] concerns and ASIC's handling of [REDACTED] complaints has taken at least [REDACTED] hours per week since July 2011.

4.9.5 This has meant that for at least one whole day each week [REDACTED] has been diverted from his duties to respond to [REDACTED] related matters. This work commitment has affected his ability to complete his substantive operational work. It has also meant that some instances [REDACTED] has been unable to meet statutory time limits for certain FOI requests, and meet urgent internal and external deadlines for the preparation of ASIC correspondence, including responses to investigations from the Commonwealth Ombudsman.

4.10 Ms [REDACTED] Analyst, [REDACTED] is one of the decision-makers who have been responsible for responding to FOI requests from [REDACTED] relating to documents within her area of responsibility. [REDACTED] principal operational duties involve determination of applications under the Corporations Act, financial service participant surveillance, actioning of complaint and breach notifications and contribution to

<sup>14</sup> Information Commissioner, 3 August 2009 EA/2009/0018, at [35].

policy and law reform issues as required. The matters dealt with by [REDACTED] and the other officers in her work area are generally on a tight timing schedule with frequent short and inflexible statutory timing compliance requirements.

- 4.10.1 As with other ASIC officers, dealing with the issues arising from [REDACTED] FOI requests has impacted adversely on [REDACTED] effective and timely performance of her normal duties. Given the extensive history of [REDACTED] dealing with ASIC, with intersecting applications, complaints, written exchanges and prior FOI requests, and the additional matters raised in the context of the requests, each request has necessitated discussions with several officers in different operational areas of ASIC, the conduct of wide ranging searches, and in some instances, consideration of matters addressed and issues arising in other requests.

The number of FOI requests dealt with or being dealt with by [REDACTED] is [REDACTED]. The hours of work involved in each of these respectively has to date been (approximately) as follows, 17 (matter number 7), 9 (matter number 21), 15 (matter number 30), 9 (matter number 38) and 6 (hours to date on the most recent 3 received on 24, 25 and 26 January 2012, being matters numbers 75, 76 and 77 in the Schedule, which are each in the early stages of processing).

- 4.10.2 By way of example items 75, 76 and 77 in Attachment A are three requests presently being processed by [REDACTED]. These are new requests under s 15 of the *FOI Act* but they are similar in that each raises matters pertinent to [REDACTED] earlier complaints to ASIC in 2009. ASIC has concluded exhaustive enquiry into [REDACTED] complaints and has responded to them, indicating to [REDACTED] that those matters are closed and it will not respond to further correspondence from him in that regard (Tab 2). By making FOI requests in this form [REDACTED] continues to seek to engage ASIC through the performance of its duties under the *FOI Act* and thus re-agitate issues addressed in his complaints.

- 4.11 [REDACTED] a legal officer in ASIC's [REDACTED] has also been diverted from her assigned duties by responding to FOI requests from [REDACTED]. [REDACTED] usual duties involve the management and carriage of matters before the AAT and the Federal Court in which ASIC is a party; preparing internal advice in relation to issues of administrative law, appearing on behalf of ASIC on directions hearings and other interlocutory listings; advising ASIC staff in relation to administrative law matters and participating in law reform and regulatory review projects.

4.11.1 Over the last 12 months, the time spent by [REDACTED] on matters connected with [REDACTED] requests has increased to the point where it presently occupies more than 25% of her time. [REDACTED] has been diverted from her duties on average [REDACTED] hours per week over the last 7 months. This is due to the number of large and complex requests from [REDACTED], particularly those involving third parties, including the Parliamentary Joint Committee on Corporations and Financial Services; the number of requests that are a repetition of an earlier request and requests for documents that [REDACTED] already has in his possession, including as earlier correspondence sent by him to ASIC and responses received from ASIC.

4.12 A more senior officer of ASIC, [REDACTED] has in the course of the last 12 months been increasingly occupied with the supervision of and preparation of responses to [REDACTED] and responding to correspondence from other agencies, including your agency and the Commonwealth Ombudsman in relation to [REDACTED] complaints about ASIC's processing of his FOI requests. The volume of the correspondence from [REDACTED] and the complexity involved in responding to it, generated in particular by repetition of requests, requests for internal review being made before initial determinations have been issued, and the intermingling of complaints about ASIC officers including herself, have exacerbated the demands upon her time. [REDACTED] estimates that she has been diverted from her duties as a Senior Manager of ASIC with responsibility for managing administrative law litigation in the Federal Court and the Administrative Appeals Tribunal on average [REDACTED] hours per week over the last 12 months.

4.13 The resources of ASIC occupied by [REDACTED] requests are not limited to the examples of the four officers mentioned. The regular performance of the normal functions of other decision-makers and legal officers has also been interfered with by reason of [REDACTED] requests. The quantity of documents involved in responding to [REDACTED] requests is not calculated simply by the documents responsive to any one request, but is also a product of the number of requests and contacts made by [REDACTED] in his correspondence. The time involved in preparing the responses is high, given the complexity introduced by the overlapping of requests, confusion where [REDACTED] is requesting material already provided, and the intermingling of complaints and allegations with requests.

4.14 The demand upon resources makes this interference with ASIC's operations unreasonable. Further, there are elements of the requests that are of themselves unreasonable. This includes requests for certified copies of documents that ASIC has already provided to [REDACTED] items

37 and 39, and requests that decisions already communicated to [REDACTED] be rewritten in a format as required by [REDACTED] item 36.

- 4.15 The second component of Ground 1, an abuse of the process for an access application under s 89L(4)(b), is established. In ASIC's submission on the basis of Ground 1 the Commissioner should make a vexatious applicant declaration.
5. Repeated action involves "abuse of the process for an access action" by reason of other matters: *FOI Act* s 89L(1)(a)(ii),(4) – Ground 2(ii):
- 5.1 The expression "abuse of the process for an access action" is defined in s 89L(4) by reference to the three matters in subparagraphs (a), (b) and (c). However abuse of the process for an access action "includes but is not limited to" the matters in (a) to (c). The definition is non-exhaustive: there may be other forms of abuse of the process for an access action.
- 5.2 Chapter 12 of the Information Commissioner's *Guidelines*, dealing with vexatious applicant declarations, states that a matter relevant to abuse of process is "whether an applicant has made repeated requests for documents which have been provided earlier or to which access has been refused".<sup>15</sup> Repetition of requests, while the focus of s 89L(1)(a)(i), is also relevant to s 89L(4)(b).
- 5.3 The Queensland Guidelines examine the meaning of vexatious in common law contexts of abuse of process and vexatious litigants and summarise cases bearing upon the issues that arise under s 114.<sup>16</sup>
- 5.4 The United Kingdom case law on repeated applications provides guidance as to the volume of requests that may be significant. The word "vexatious" in s 14(1) of the *UK FOI Act* is not defined. The United Kingdom Information Commissioner has issued guidelines ("UK

<sup>15</sup> Office of the Australian Information Commissioner *Guidelines* para 12.4.

<sup>16</sup> In *Re Qualtime Association Inc and Department of Communities* [2011] QICmr 26, the Queensland Information Commissioner refused an application for a declaration under s 114 that was made by Qualtime, a non government disability and respite service provider funded by the agency, which as a third party objector had brought the proceedings for review by the Commissioner of the agency's determination to release the documents sought. The identity of the access applicant was not known to Qualtime. This decision is not of assistance in the construction or application of s 89L since it was a case where there was no evidence before the Commissioner that the access applicant had repeatedly engaged in access applications, or that one of the three criteria (counterparts to (a) to (c) of s 89L(4)) applied: at [22], [23]. Qualtime of course had no standing to make an application for a declaration, although the Commissioner could make a declaration on his or her own motion.

Guidelines") as to the meaning of "vexatious".<sup>17</sup> In *Re Birmingham City Council*,<sup>18</sup> the Commissioner applied the UK Guidelines, upholding a decision of the agency to refuse applications under s 14(1) of the *UK FOI Act*. The applicant had made 49 requests over 4 months. The Commissioner concluded that regardless of the intention of the applicant, the requests imposed a significant burden on the council by reason of the disproportionate inconvenience and expense diverting the council's resources; had a cumulative effect of harassing the council; and that even though they were not requests for the same information, taken together the requests formed a pattern of obsessive thematic requests that could fairly be characterised as obsessive or manifestly unreasonable.

- 5.5 In *Vaithilingam Ahilathirumayagam and the Information Commissioner and London Metropolitan University*,<sup>19</sup> the United Kingdom Information Tribunal, on review of a decision of the UK Information Commissioner, held that a request is vexatious within s 14(1) if, adopting the ordinary meaning of "vexatious" it is likely to cause distress or irritation, literally to vex a person to whom it is directed. The request in that case was vexatious because the applicant sought information that he "clearly already possessed and the detailed content of which had previously been debated" with the agency, used "tendentious language ... demonstrating that his purpose was to argue and even harangue [the agency] and certain of its employees and not really to obtain information that he did not already possess"; and appeared to be "intended simply to reopen issues which had been disputed several times before".<sup>20</sup>
- 5.6 In the present case there is an abuse of the process for an access action quite apart from the tests in paragraphs (a), (b) or (c) of s 89L(4), by reason of six matters.
- 5.7 Firstly, the volume of requests and correspondence about requests, set out in Attachment A, is extraordinary, and excessive.
- 5.8 Second, the nature of the repeated requests contributes to the burden placed upon ASIC. [REDACTED] repeated requests to ASIC have a tendency to create confusion and introduce unnecessary complexity, as may be seen from the following categories of repetition:

<sup>17</sup> Information Commissioner Freedom of Information Act Awareness Guidance No 22: *Vexatious and Repeated Requests*.

<sup>18</sup> Dated 8 March 2006.

<sup>19</sup> EA/2006/0070 (20 June 2007).

<sup>20</sup> EA/2006/0070 (20 June 2007) at [32].



- (i) repetition of a request for documents where the request had already been made to ASIC and had been or was being processed: column 7 in Attachment A.
- (ii) requests for copies of letters sent by ASIC to [REDACTED] acknowledging receipt of previous FOI request: see items 46, 66 and 69 in Attachment A;
- (iii) requests for copies of determinations or internal review determinations previously sent to [REDACTED] see items 36, 46 and 69 in Attachment A.
- (iv) requests for certified copies of documents released in a previous FOI determination or internal review determination of a request made by [REDACTED] items 37 and 39; and
- (v) request for copies of correspondence, including letters of complaint (not being a determination or internal review determination) previously sent by [REDACTED] to ASIC or sent to [REDACTED] from ASIC: items 41, 44, 48, 51, 52, 53, 54, 55 and 64 in Attachment A.

5.9 Third, [REDACTED] also makes requests for further reasons or that ASIC create some other new document in the following way:

- (i) requests for an explanation of:
  - (a) why no determination had been made: items 56, 57 and 66 in Attachment A;
  - (b) the absence of a document from a decision or bundle of documents previously released under a previous determination: see items 29 and 38 in Attachment A;
  - (c) other correspondence [REDACTED] has received from ASIC:
- (ii) requests for a document to be created: items 37 and 39 in Attachment A

5.10 Fourth, in making FOI request [REDACTED] intermingles with his requests, complaints about or suggestions of misconduct by ASIC officers: see items 6, 11, 12, 18, 19, 22, 23, 24, 27, 28, 29, 31, 35, 36, 38, 40, 42, 43, 44, 46, 47, 50, 58, 61, 62, 65, 66, 67, 68, 69, 72, 75, 76 and 77 as set out in Column 5 of Attachment A. The *FOI Act* is not intended to provide a vehicle for applicants to subject agency officers to such correspondence.

5.11 Fifth, [REDACTED] utilises the process under the *FOI Act* as a vehicle for repeating requests which ASIC has already dealt with: see items 3, 15, 21, 30, 36, 38, 39, 46, 54, 58, 61, 62, 66 and 69, as set out in column 7 of the table in Attachment A. In this way [REDACTED] abuses the process of the *FOI Act* by enlivening ASIC's statutory duty to respond to his correspondence in circumstances where ASIC has advised him that the complaint has been investigated and dealt with and that ASIC will not respond to further correspondence about the complaint.



5.12 The second component of Ground 2, an abuse of the process for an access application under s 89L(4), is established. In ASIC's submission, on the basis of Ground 2 the Commissioner should make a vexatious applicant declaration.

**6. Form of vexatious applicant declaration sought**

6.1 ASIC contends that Grounds 1 and 2 are established. The Commissioner should make a vexatious applicant declaration under ss 89L(1) and 89M(2) of the *FOI Act*. It remains to consider the form of the declaration.

6.2 Pursuant to s 89M(2) of the *FOI Act* ASIC seeks a vexatious applicant declaration that:

(a) in the absence of written permission of the Information Commissioner, ASIC may refuse to consider:

- (i) a request under s 15 of the *FOI Act* made by [REDACTED]
- (ii) an application under s 48 of the *FOI Act* made by [REDACTED] and
- (iii) an application for internal review under s [REDACTED] of the *FOI Act* made by [REDACTED] and

(b) in the absence of written permission of the Information Commissioner, the Commissioner may refuse to consider an application made by [REDACTED] for review by the Information Commissioner.

6.3 Pursuant to s 89M(1) the declaration should be expressed to be effective from the date when it is made.

**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**