IN THE NSW CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE AND EQUAL OPPORTUNITY DIVISION
No. 2024/00367444

Secretary, Department of Communities and Justice,
Port Stephens Council, and
Goulburn Mulwaree Council
Applicants

Telina Webb and DraftCom Pty Ltd (ACN 076 511 941) and Paul McEwan
Respondents

APPLICANTS' WRITTEN SUBMISSIONS

PART 1: SUMMARY

Order sought

1. The applicants jointly seek an order under ss.110(1) and 110(3) of the *Government Information (Public Access) Act 2009* (NSW) ('**the GIPA Act**') that Telina Webb and DraftCom Pty Ltd (ACN 076 511 941) ('**DraftCom**') and Paul McEwan (collectively, '**the respondents**') indefinitely not be permitted to make an access application to any agency under the GIPA Act whether solely on their own behalf or acting jointly, or in concert with any other person or entity without first obtaining the Tribunal's approval ('**the s.110 order**').

Access applications that lack merit

2. The respondents have separately, and by acting in concert, submitted a total of 225 access applications and informal requests to release government information ('**informal requests**') under the GIPA Act to the applicants. The applicants have spent approximately 988.25 hours dealing with those access applications and informal requests.
3. Of those access applications, the respondents have made a combined total of eight access applications to the applicants which 'lack merit' in the terms defined by s.110(2) of the GIPA Act within the two year period specified by s.110(1)(a), being four to the Department of Communities and Justice ('**the Department**') and two each to Port

Stephens Council and Goulburn Mulwaree Council. Those eight are set out and described at:

(a) paragraphs 9 to 17 of Tony Leslie Wickham's affidavit, described at [43(a)] below, (being two applications made to Port Stephens Council); and

(b) paragraphs 9 to 25 of the affidavit of Jonathan Ian Franklin, described at [43(b)] below, (being four applications made to the Department); and

(c) paragraphs 12 to 16 of the affidavit of Maria Timothy, described at [43(c)] below (being two applications made to Goulburn Mulwaree Council).

4. This is more than sufficient to engage the Tribunal's discretion in s.110(1) of the GIPA Act to make the s.110 order, as only three access applications within the two year period specified by s.110(1) (a) are required to do so.

5. Of the eight access applications which 'lack merit', seven have been submitted using the letterhead of DraftCom and signed by Ms Webb. The eighth was not on letterhead, being application PSC2023-00112 made to Port Stephens Council, but did bear on its face the notation "*Telina Webb E:draftcom@bigpond.com*".[1] see paragraph 10 of the Wickham affidavit. While none of these access applications has been signed by Mr McEwan, he is the 'directing mind and will' of DraftCom and is therefore amendable to the Tribunal's jurisdiction to make the s.110 order, on the bases submitted below.

Overview of submissions

6. The applicants submit the Tribunal should exercise its discretion to make the s.110 order as the respondents' access applications have had an adverse impact of their ability to comply with their obligations under the GIPA Act. This is because the respondents' access applications have:

- absorbed a disproportionate amount of the applicants' finite resources, taking into account the nature of the information sought by the respondents, and
- had a significant impact on the health and safety of the applicants' employees.

7. Ms Webb's original grievance relates to Port Stephens Council's direction in 2011 that she and Mr McEwan remove a privacy screen erected without Council approval. Ms Webb's attention turned from this original grievance to her use of the GIPA Act's processes over the last 13 years as a means to make wide-ranging false and malicious allegations of corruption against the applicants' officers, none of which has been substantiated to date.

8. Section 110 is a discretionary power that should be exercised in line with the object of the Act.

9. The object of the GIPA Act, as set out in s.3, is "to open government information to the public", in order to "maintain and advance a system of responsible and representative democratic Government that is open, accountable, fair and effective". However, as the

[1] Affidavit of Mr Wickham at [10].

High Court recognised in *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645; [2013] HCA 52 when considering the analogous object of the *Freedom of Information Act 1982* (Cth), "[the Act] does not pursue its objects, as legislative purposes, at any cost", but is a complex regime that seeks to balance competing objects (at 661, [37]). Where there are competing interests or forces, the question is not the purpose or object of the legislation, but the extent to which the legislation goes in pursuit of that purpose or object: *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at 142-143, [5]-[7], per Gleeson CJ, cited with approval in *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Limited* (2013) 248 CLR 619; [2013] HCA 36 at [40].

10. The s.110 order would protect the operations and functions of the applicants from the adverse impact of the respondents' applications and conduct on the applicants' ability to comply with their obligations under the GIPA Act. That is because it would allow the applicants to provide access to government information:
    - promptly and at the lowest reasonable cost, and
    - with minimal impact on the respondents' rights of access, which the High Court has declared should not be pursued at any cost.
11. The adverse impact of the respondents' access applications and conduct on the applicants' ability to comply with their obligations under the GIPA Act is significant. The fact that such conduct would impede agencies from being able to comply with their obligations under the GIPA Act was predicted in the New South Wales Ombudsman's report *Opening Up Government - Review of the Freedom of Information Act 1989*, issued in February 2009 ('**the Ombudsman's report**'). The Ombudsman's report is considered the 'source' of s. 110 of the GIPA Act. It noted that repeat applications from a small number of individuals can take up a disproportionate amount of agencies' finite resources with a corresponding impact on other work, including dealing with other applications.[2]
12. In particular, the respondents' access applications and conduct have adversely affected Port Stephens Council's capacity to comply with its obligations under the GIPA Act to the extent that, from 2020, it was required to increase the staff responsible for processing access applications to 80% across two full-time employees. Port Stephens Council has also expended $572,090.49 (excluding GST) in external legal costs related to the respondent's applications, external reviews and conduct generally.
13. The respondents' access applications and conduct have also adversely affected the Department's capacity to comply with its obligations under the GIPA Act by contributing to significant delays in it processing access applications from other applicants. The Department has, to date, spent 682 hours dealing with the respondents' matters. The

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[2] New South Wales Ombudsman, *Opening up government: Review of the Freedom of Information Act 1989,* A Special Report to Parliament under s.31 of the Ombudsman Act 1974, February 2009 at <https://www.ombo.nsw.gov.au/reports/report-to-parliament/opening-up-government-review-of-the-freedom-of-information-act-1989>. On the Ombudsman's report being the source of s.110, see *Pittwater Council v Walker* [2015] NSWCATAD 34 at [64]-[67].

resources expended by the Department in processing the respondents' various applications and external reviews is equivalent to the resources that could have been devoted to processing approximately 85 access applications from other applicants, noting that it takes, on average, 8 hours for the Department to process one access application.

14. The Department currently has a backlog of 151 access applications (as of 10 December 2024) which it has been unable to overtake due to the resources it has been forced to expend in engaging with the respondents' matters.[3] This has further impacted the Department's capacity to issue notices of decision on access applications within the statutory time frames (in which case, the decision is deemed by s.63 of the GIPA Act to be a refusal to deal with the application, unless an extension is available or agreed).
15. The respondents' access applications and conduct has also impacted Goulburn Mulwaree Council to the extent it was required to incur external legal fess of $26,179.14 in relation to them and to allocate an additional part-time officer to assist the in-processing requests for information.
16. Section 110 of the GIPA Act is the only avenue the applicants can exercise to mitigate the effects of the respondents' behaviour.
17. This application for the s.110 application is critical to prevent the ongoing impediments to the applicants' capacity to comply with their obligations under the GIPA Act and, in the case of the Department, process its backlog of other formal access applications.
18. An order would achieve this by preventing the misuse of resources provided by rate and taxpayers to the applicants and protecting the health and safety of the applicants' employees.
19. Significantly, the restraint order will not remove the respondents' rights to seek access to government information altogether. It does not extinguish the right conferred on a person by section 9(1) either expressly or by implication. A person subject to the restraint order may apply to the Tribunal under s.110 (5A) of the GIPA Act for approval to exercise the right.
20. The applicants submit that, when balancing the considerations in exercising its discretion, the Tribunal should:
    (a) attribute significantly greater weight to protecting the applicants' ability to comply with their obligations under the GIPA Act with respect to the public generally by protecting the applicants' functions and interests.
    (b) Find that such protection is also critical to the rights of other persons to access government information and to have their applications dealt with properly, efficiently, and in accordance with statutory deadlines. The rights of third parties must weigh heavily in the exercise of the discretion.
    (c) Attribute less weight to the minimal impact of the s.110 order on the respondents' rights of access to government information as the applicants' interests are of greater

[3] Affidavit of Mr Franklin at [60].

public significance in a context where the respondents' access applications (including those not grounding jurisdiction under section 110(1)) are voluminous and the conduct of Ms Webb and Mr McEwan towards agency employees is, as a clear statutory purpose, deprecated by section 110(5A)(c)- which the Tribunal is asked to take into account at [115] below when conducting the balance exercise necessary to determine whether to exercise its dicretion to make the s.110 order.

21. In the absence of the s.110 order, it is highly likely that the respondents will continue to make unmeritorious access applications indefinitely, given their lengthy history of doing so since 2011, and continue to engage in the same egregious conduct in relation to those applications and apart from those applications.
22. The applicants rely on the evidence of their witnesses, Mr Tony Wickham, Mr Jonathan Franklin and Ms Maria Timothy as the basis for the application.
23. The applicants may make submissions about the matters to which they depose in their affidavits on a confidential basis, being paragarphs [189]-[206] of Mr Wickham's affidavit, paragraphs [68] to [74], [76], [79] to [84], [87] to [88], [93], [97], [100] to [101], [109] and [113]-[115] of Mr Franklin's affidavit and paragarphs [77] to [87] of Ms Timothy's affidavit. The applicants rely on s.64(1) of the *Civil and Administrative Tribunal Act* 2013 ('**the CAT Act**') as the basis for adducing that evidence and making those submissions on a confidential basis. The applicants submit that:
    (a) a s.64(1) order is desirable due to the sensitive nature of that information, and
    (b) any resulting denial of procedural fairness to the respondents arising from the s.64(1) order is limited as the information subject to it is limited in scope and summarised in these submissions.

PART 2: BACKGROUND AND PARTIES

Background

24. There is a lengthy history of dealings between the applicants and the respondents dating back to 2011 when the respondents lodged their first access application. The genesis of the respondents' access applications and related conduct arises from Ms Webb and Mr Ewan's decision to build a privacy screen at their former residence in Port Stephens without Council approval. They later lodged a development application ('**DA**') for the privacy screen following its construction, which was refused. The privacy screen was subsequently ordered to be removed.[4]
25. Notably, Ms Webb and Mr McEwan have not lived in the Port Stephens local government area ('**LGA**') since 2013, and have never lived in the LGA of Goulburn Mulwaree.[5]
26. The respondents have, individually and by acting in concert, made access applications to the applicants. DraftCom is a '*person*' for the purposes of the GIPA Act, including section

[4] Affidavit of Mr Wickham at [18]-[21].
[5] Affidavit of Mr Wickham at [22] and Affidavit of Ms Timothy at [20].

110: see the definition of that term in Schedule 4 to the *Interpretation Act 1987* (NSW) ('***Interpretation Act***').

27. Ms Webb has at times, since 2021, submitted her access applications under the style of 'NSW Freedom of Information' (ABN 87 076 511 941), which is a registered business name of the respondent, DraftCom, a company of which Mr McEwan is the sole director and shareholder.[6]

28. When submitting her access applications, Ms Webb sometimes used a letterhead which referred not only to DraftCom, but also to 'NSW Freedom of Information'. The footer of that letterhead provides the details "DraftCom Pty Ltd t/as NSW Freedom of Information" ('**the DraftCom letterhead**').[7]

29. Ms Webb also describes herself as the 'site administrator' or 'sole full-time volunteer' of the website administered by 'NSW Freedom of Information' ('**the website**').[8] As at 9 September 2021, Ms Webb was described as an "employee" of DraftCom in the Lobbyist's Register kept by the NSW Electoral Commission.[9]

30. Some access applications lodged by Ms Webb and Mr McEwan sought similar classes of information, and are alike in their formatting style and use similar wording. Some access applications lodged by Ms Webb sought the same, or similar, information from the Port Stephens Council and the Department.[10]

Overview of access applications

31. The applicants have, during their dealings with the respondents, received a combined total of 225 applications (being 113 access applications and 112 informal requests) from the respondents acting separately and in concert with one another. Specifically, the applicants have received the following:

    (a) Port Stephens Council has, since 2011, received 90 access applications and 103 informal requests from Ms Webb and Mr McEwan (a total of 193), consisting of 78 access applications and 95 informal requests from Ms Webb (a total of 174) and 12 access applications and eight informal requests from Mr McEwan (a total of 20);[11]

    (b) the Department has, since 2020, received a total of 16 access applications and two informal requests from the respondents. Of these, Mr McEwan lodged one access application, Ms Webb lodged two informal requests for information, three access

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6 Affidavit of Mr Franklin at [28] to [30]; affidavit of Mr Wickham at [23] to [25] and affidavit of Ms Timothy at [22] to [24].

7 Affidavit of Mr Franklin at [6], [10], [14] and [19]; affidavit of Mr Wickham at [15] and [25] and affidavit of Ms Timothy at [12], [14], [23] and [25].

8 Affidavit of Mr Franklin at [33] to [35].

9 Affidavit of Mr Wickham at [26] and [183] and affidavit of Mr Franklin at [31].

10 See tables titled 'Acting in Concert – Similar applications by Ms Webb and Mr McEwan' and 'Similar applications lodged by Ms Webb with both DCJ and PS Council', being **Annexure 1** to these submissions.

11 Affidavit of Mr Wickham at [7], [27], [32] and [35].

applications and a further 12 access applications using the DraftCom letter head;[12] and

(c) Goulburn Mulwaree Council has, since 2020, received seven access applications and six informal requests from Ms Webb (a total of 13).[13]

32. The applicants have spent approximately 973 hours dealing with applications received from Ms Webb and Mr McEwan (being 783 hours on their access applications and approximately 190 hours on their informal requests). Specifically:

(a) Port Stephens Council has, since 2011, spent a total of approximately 849.25 hours in processing access applications and informal requests under the GIPA Act received from Ms Webb and Mr McEwan, consisting of 606.25 hours responding to Ms Webb's formal access applications, and 162.75 hours responding to her informal requests. Port Stephens Council has also spent 57.75 hours responding to Mr McEwan's access applications and 22.5 hours responding to his informal requests;[14]

(b) the Department has, since 2020, spent a total of 118 hours in processing access applications and informal requests under the GIPA Act received from Ms Webb and Mr McEwan, consisting of 107 hours responding to Ms Webb's access applications and four hours responding to her informal requests and seven hours responding to Mr McEwan's access application;[15] and

(c) Goulburn Mulwaree Council has, since 2020, spent a total of 21 hours in processing access applications and informal requests under the GIPA Act received from Ms Webb and Mr McEwan, consisting of 18 hours responding to Ms Webb's access applications, and 3 hours responding to her informal requests.[16]

33. The respondents, in making the access applications identified in [31] and [32] above have not requested information which is objectively relevant to their personal circumstances.[17]

34. Unlike the vast majority of members of the public who make access applications to the applicants, the respondents are not seeking personal information relating to their involvement with the Department in the areas of, for example, homelessness or child protection, Youth Justice or Corrective Services, or seeking information from a local council of an LGA in which they presently reside.

35. Instead, Ms Webb and Mr McEwan have exploited the access application process under the GIPA Act to intentionally disrupt the applicants' functions and pursue an ongoing campaign of harassment against them and their officers.

36. This is demonstrated by their access applications having a marked tendency to be self-perpetuating in the sense that they were lodged in order to generate further correspondence, further access applications, opportunities for internal and external review,

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12 Affidavit of Mr Franklin at [9] and [49].
13 Affidavit of Ms Timothy at [26].
14 Affidavit of Mr Wickham at [69], [84], [86] and [87].
15 Affidavit of Mr Franklin at [51] to [52].
16 Affidavit of Ms Timothy at [40].
17 Affidavit of Mr Franklin at [59].

to appear in the Tribunal and provide material to publish on the website. They were also self-perpetuating, in the sense that Ms Webb or Mr McEwan have lodged access applications immediately following a decision relating to previous complaints and matters initiated by them.

37. The respondents' *modus operandi* includes, for example, lodging an access application, seeking external review, the determination of that application by the Information Commissioner or the Tribunal, and then seeking information relating to that external review through a further access application.

38. In short, the respondents' various applications have therefore created a 'snowball effect' that has prolonged the applicants' dealings with them for an unreasonable and disproportionate amount of time compared to any other access applicant experienced by the applicants.

39. Ms Webb and Mr McEwan's exploitation of the access application process is also demonstrated by the general nature of the scopes of their applications. They are, either directly or indirectly, directed at seeking information that the applicants are corrupt, and have been engaging in corrupt activities. That the respondents have been markedly unsuccessful in obtaining any such information demonstrates that their continuing access applications are intended to 'fish' for information in the hope of finding something that supports their fabricated allegations or simply to intimidate and/or harass the applicant's officers.

40. Ms Webb has leveraged these self-generated dealings to publicly promote herself on her website as a "freedom of information advocate" who "has extensive experience in personal experience as a member of the public endeavouring to exercise her legally enforceable right to access" under the GIPA Act after amassing 225 access applications and informal requests.

41. However, the respondents' applications and conduct, in particular Ms Webb's, have:
    (a) undermined the ability of the applicants to comply with their obligations under the GIPA Act;
    (b) absorbed an exorbitant and disproportionate amount of the applicants' finite, rate and taxpayer funded resources and have diverted those resources from other functions and resourcing requirements; and
    (c) exposed the applicants' employees to a spectrum of vindictive, fixated conduct ranging from malicious libels and doxing to harassing and threatening behaviours that have impacted the health and safety of those employees both in the workplace and in their private lives. That conduct has been pursued in support of Ms Webb's conspiracy theories and has resulted in her making sustained, baseless allegations of corruption by public officers. This in turn impacts the applicants' capacity to comply with their obligations under the GIPA Act.

42. The applicants submit that the Tribunal, based on the evidence before it, should exercise its discretion to make the order sought by the applicants, as set out in these submissions at [258].

PART 3: APPLICANT'S EVIDENCE

43. The applicants rely, in addition to these submissions, on the following affidavits in support of their application.
    (a) The affidavit of Tony Leslie Wickham affirmed on 12 December 2024. Mr Wickham is the Governance Section Manager and Public Officer of Port Stephens Council and supervised the decision-making process relating to the respondents' access applications. Exhibited to Mr Wickham's affidavit is a folder of documents marked Exhibit TLW-1.
    (b) The affidavit of Jonathan Ian Franklin affirmed on 13 December 2024. Mr Franklin is a solicitor within the Open Government, Information and Privacy team within the Department. Exhibited to Mr Franklin's affidavit is a folder of documents marked Exhibit JF-1.
    (c) The affidavit of Maria Timothy affirmed on 12 December 2024. Ms Timothy is the Business Manager Governance within Goulburn Mulwaree Council and supervised the decision-making process relating to Ms Webb's access applications. Exhibited to Ms Timothy's affidavit is a folder of documents marked Exhibit MT-1.
44. The applicants' detailed submissions follow.

PART 4: LEGISLATION AND PRINCIPLES

45. This application is made under ss.110 (1) and (3) of the GIPA Act.
46. The object of the GIPA Act, declared in s.3(1), is to provide the public with access to government information so as to maintain and advance a system of responsible and representative democratic government that is open, accountable, fair and effective.
47. Division 1 of Part 2 of the GIPA Act identifies the various mechanisms for accessing government information under the GIPA Act. They include the:
    (a) proactive release of government information under ss.6 and 7,
    (b) informal release of government information under s.8, and
    (c) description, in s.9, of the right to provision of information in response to access applications, in accordance with Part 4.
48. Section 5 provides that there is a presumption in favour of the disclosure of government information, unless there is an overriding public interest against disclosure.
49. Even so, the GIPA Act does not confer an absolute right on a person to access government information.
50. Section 8 provides that that an agency is authorised, unless there is an overriding public interest against disclosure, to release government information in response to an informal

request from a person, subject to any reasonable conditions the agency thinks fit to impose.

51. Section 9 provides that a person who makes an access application for government information has a legally enforceable right to be provided with access to the information unless there is an overriding public interest against disclosure of the information.

52. However, in determining whether to provide access to the information applied for, the agency must have regard to the 'public interest test' set out in s.13 when determining whether there is an overriding public interest against disclosure of government information. Section 13 establishes a regime where the public interest considerations against disclosure contained in s.14 are weighed against the considerations in favour of disclosure contained in s.12 or which are otherwise applicable. If the public interest considerations against disclosure, on balance, outweigh those in favour of disclosure, the agency may decide to refuse access to the information under s.58(1)(d) of the GIPA Act.

53. Further, s.60 of the GIPA Act details circumstances in which an agency may refuse to deal with an access application where, for example, dealing with the access application would require an unreasonable and substantial diversion of the agencies' resources. Also, s.70(1) of the GIPA Act provides that an agency may refuse to deal further with an access application if the applicant has failed to pay an advance deposit within the time required for payment.

54. Section 110, like s.13, also provides that the importance of an individual's right to access government information may be outweighed by competing factors. It gives the Tribunal the discretion to make restraint orders which have the effect of restricting an individual's right to government information by requiring them to first obtain the Tribunal's approval before making an access application.

55. In relation to interpretation of s.110 of the GIPA, s.3(2) provides that it is the intention of Parliament that the:

    (a) GIPA Act be interpreted and applied so as to further the object in s.3(1), and

    (b) discretions conferred by the GIPA Act be exercised, as far as possible, to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.

56. The Tribunal described the purpose of s.110, and its relationship to the objects of the GIPA Act, in *Department of Education v Zonnevylle* [2020] NSWCATAD 96 at [19]:

> "That statement of intention [in s 3(2)(b)] indicates that the discretion in s 110(1) is to be exercised to facilitate and encourage access to government information. Where an individual is making repeated or multiple access applications that are without merit, and therefore do not provide any access to government information, an order for restraint on that individual furthers the objects of the Act by ensuring that meritorious access applications by others can be facilitated "promptly and at the lowest reasonable cost". In limited cases, the objects of the Act may thereby be

served by restraining conduct that misuses the right of access to government information through the making of unmeritorious access applications. It is therefore an appropriate exercise of the discretion to free Departments and Agencies of the burden, otherwise directly imposed upon them by the GIPA Act, of responding to each and every GIPA application made by an individual with a specific history of making frequent and unmeritorious applications."

Jurisdiction

57. There are two matters for the Tribunal to consider in determining an application for a s.110 order:
    (a) the Tribunal must be satisfied that the preconditions in s.110(1) for exercising its power to make the order have been met, and
    (b) if those preconditions are met, the Tribunal must consider whether it is appropriate in the circumstances to exercise its discretion to make the order.
58. Section 110 provides as follows:

"110 Orders to restrain making of unmeritorious access applications

(1) NCAT may order that a person is not permitted to make an access application without first obtaining the approval of NCAT (a **restraint order**) if NCAT is satisfied that—
    (a) at least 3 access applications (to one or more agencies) in the previous 2 years have been made that lack merit, and
    (b) the applications were made by the same person or by any other person acting in concert with the person.

(2) An access application is to be regarded as lacking merit if—
    (a) the agency decided the application by refusing to deal with the application in its entirety, or
    (b) the agency decided the application by deciding that none of the information applied for is held by the agency, or
    (c) the access applicant's entitlement to access lapsed without that access being provided (including as a result of failure to pay any processing charge payable).

(3) A restraint order may be made to apply to all access applications made by the person the subject of the order or may be limited by reference to any one or more of the following—
    (a) a specific time period,

(b) a specific number of applications, whether in total or to particular agencies,

(c) particular kinds of information,

(d) particular agencies.

(4) A person who is subject to a restraint order cannot apply to NCAT for approval to the making of an access application by the person without first serving notice of the application for approval on the agency concerned and the Information Commissioner.

(5) An application for a restraint order against a person may be made by an agency that receives an access application from the person (whether or not the agency has decided the application) or by the Minister or the Information Commissioner.

(5A) In deciding whether to approve the making of an access application by a person the subject of a restraint order, NCAT is to consider, without limitation, any of the following—

(a) whether the proposed application is lacking in merit,

(b) whether the proposed application is frivolous, vexatious, misconceived or lacking in substance,

(c) whether the applicant has engaged in conduct designed to harass, to cause delay or detriment, or to achieve another wrongful purpose.

(6) NCAT may order that a person who is the subject of a restraint order is not permitted to apply to NCAT for approval to make an access application if NCAT is satisfied that the person has repeatedly made applications for approval that are lacking in substance.

(7) While a restraint order is in force against a person, any application for government information made to an agency in contravention of the order is not a valid access application."

Persons against whom restraint orders can be sought

59. The Tribunal, first, has jurisdiction under s.110(1) to make orders in relation to a 'person' who made the three access applications required to trigger its discretion in s.110(1).

60. The Tribunal does not, however, have jurisdiction to make order in relation to any other unspecified, unnamed person who may, at some future point, act in concert with that person to make an access application to prevent the unspecified, unnamed person from doing so.

61. The Appeal Panel noted in *Webb v Port Stephens Council* [2020] NSWCATAP 152 at [61]-[65] as follows:

> 61. The Council submitted that the Tribunal has the power to make orders which relate not only to access applications made by Ms Webb in her own name but also orders which relate to her acting in concert with another person. The basis for that submission was said to be that where a statute confers an express power, it impliedly confers power to do anything which is reasonably necessary to make that express grant of power effective: *Coffs Harbour City Council v Minister for Planning and Infrastructure* [2013] NSWCA 44 at [51]. This principle extends to bodies which are a creature of statue, such as the Tribunal: *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at 522 [38].
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> 62. According to the Council, the GIPA Act recognises the need to limit access applications by a person acting in concert. It cannot be said that an order restraining a person from acting in concert is outside of the contemplation of the GIPA Act, nor something that cannot properly be implied in the exercise of power pursuant to s 110. The Council acknowledged that a power cannot be implied merely because it is desirable or useful: *BUSB v R* [2011] NSWCCA 39; (2011) 80 NSWLR 170 at 176 [32].
>
> *Consideration*
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> 63. Like the Local Court, which is a statutory court, the Tribunal does not have inherent powers. It only has the powers that are conferred expressly or are necessarily to be implied from the express conferral of powers: *John Fairfax Publications Pty Ltd v Ryde Local Court* [2005] NSWCA 101; (2005) 62 NSWLR 512 at 522 [38]. There is no express power in s 110 to prohibit a person from making an access application "in concert with any other person".
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> 64. Section 110(3) describes the scope of the Tribunal's power. A restraint order may "apply to all access applications made by the person the subject of the order" or it may be "limited by reference to" certain defined criteria. The ordinary grammatical meaning of this provision is that the order may apply to all, or some applications made *by the person the subject of the order*. The defined criteria relate to the period of time, the number of applications, the kind of information and the particular agency. There is no defined criterion relating to applications, not made by the person the subject of the order, but made by another person in concert with the person the subject of the order.

65. The Tribunal has an implied power to make the "in concert order" if it is "reasonably required or legally ancillary to the accomplishment of the specific remedies . . .": *Pelechowski v The Registrar, Court of Appeal* (NSW) [1999] HCA 19; (1999) 198 CLR 435 at [51]. The test of necessity "cannot be stretched to encompass what is merely desirable or useful": *BUSB v R* [2011] NSWCCA 39; (2011) 80 NSWLR 170 at 176 [32]. The effect of the Tribunal's order would be that another person could not make an application if Ms Webb was acting "in concert' with that person. While it may be desirable to make an "in concert order" to prevent another person from making applications on Ms Webb's behalf, s 110 does not give the Tribunal power to do so. In addition, the difficulties of identifying such an application may make it impractical to enforce such an order."

62. The present case is distinct from *Webb v Port Stephens Council* [2020] NSWCATAP 152. Here, the applicants seek the s.110 order against three specific, named entities who have, individually, made unmeritorious access applications to the applicants (i.e.):
    - Ms Webb in both her personal capacity and her capacity as the representative/employee of DraftCom, and
    - Mr McEwan as the 'directing mind and will' of DraftCom.
63. In other words, the applicants do not seek orders against the respondents only on the basis that they 'acted in concert' with each other. They seek those orders, additionally, on the basis that the respondents have been directly and individually responsible for making unmeritorious access applications.

Section 110(1)(b) - Applications made by the Same Person

64. The first point to be made is that seven unmeritorious access applications have been on the Draftcom letterhead. That must, the applicants submit, lead to the Tribunal finding that Draftcom made those access applications. Secondly, those access applications were signed by Ms Webb, and the applicants submit the Tribunal should conclude that she also made those access applications. There is nothing in the GIPA Act which prevents there from being more than one applicant. The Appeal Panel, for example, in *Webb v Port Stephens Council* [2020] NSWCATAP 152 at [58] referred to a joint application which bears the name of more than one applicant. Thirdly, Ms Webb was given access to stationery (electronic at least) bearing the names, and emails for, Draftcom and/or NSW Freedom of Information. The Tribunal may properly infer that Ms Webb was permitted by Mr McEwan, the ultimate owner of those names, to use the names Draftcom and/or NSW Freedom of Information to make GIPA Act applications.
65. Indeed, the conduct of Mr McEwan was absolutely necessary for the making of the unmeritorious access applications. He permitted the DraftCom letterhead to be used, he allowed Ms Webb to use it as signed by her and to use the DraftCom email address or that

of NSW Freedom of Information: see [92](a)] and [b] below). In other words, Mr McEwan permitted DraftCom to make the applications that lacked merit after they had been signed by Ms Webb. Without Mr McEwan's acts, the unmeritorious applications would never have been made or pursued to a determination. That conduct is sufficient to constitute Mr McEwan as an applicant in respect of the unmeritorious access applications, and enlivens the Tribunal's jurisdiction as against him as well.

Section 110(1)(b) - Applications made by acting in concert

66. However, as a further or alternative ground for enlivening the Tribunal's jurisdiction, the applicants seek the s.110 order against the respondents on the basis that as well as the 'person' identified in [59] above, the Tribunal has jurisdiction to make an order against a person who did not make a relevant access application but acted in concert with another person or persons who did make unmeritorious access applications (on the "acting in concert" jurisdiction point, see [82]-[94] below).
67. In addition, or in the alternative to [66] above, when lodging access applications on DraftCom letterhead, Ms Webb acted in concert with that company. Due to his participation in that process, further or in the alternative to [66] above, Mr McEwan acted in concert with DraftCom and Ms Webb.
68. Mr McEwan could do these things (and no one else, since he was the sole director and shareholder of DraftCom) because Mr McEwan was 'the directing mind and will' of DraftCom. And so, not only did MrMcEwan make the applications, but Mr McEwan acted in concert with Ms Webb and DraftCom by the conduct described in [67] above, and also with his own company, DraftCom, in permitting that company to make the applications that lacked merit (as set out at [3]-[5] above) after they had been signed by Ms Webb.
69. The "acting in concert" ground is the second basis for enlivening the Tribunal's jurisdiction. In the case of Mr McEwan he made the applications as the directing mind and will of DraftCom and/or or he caused that to be done through Ms Webb; either way that amounts to the making of the applications.
70. The Tribunal has jurisdiction to make the s.110 order in respect of Mr McEwan on the 2 bases appearing in section 110(1)(b).
71. While a corporation is a discrete legal entity, it has no corporeal existence. As Lord Thurlow observed in 1778, it has "no soul to damn, no body to kick."[18] Instead, it can only act through its officers.
72. As Lord Reid observed in *Tesco Supermarkets Ltd v Nattras* (1972) AC 153:

> "I must start by considering the nature of the personality which by a fiction of law attributes to a corporation. A living person has a mind which can have knowledge or

[18] Quoted by Payne JA in his 'How D Companies Think ?', Address to the Commercial Law Association, 7 June2024 at <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/2024-speeches/Payne_07062024.pdf>.

intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, although not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company."[19]

73. In other words, the "person who acts" is acting as the company and is"…the directing mind and will of the company". [20]

74. That said, a company controller may act in dual capacities. The full High Court said in *Hamilton v Whitehead* (1988) 166 CLR 121; [1988] HCA 65 at [13]:

> "13. ... The company is not vicariously liable for the actions of the respondent. The company is the principal offender and the respondent is charged as an accessory. Franklyn J. thought that it was "wrong and oppressive" to prosecute the respondent for the identical acts and decisions as were relied on as the acts of the company. There is nothing conceptually wrong in such a course since "it is a logical consequence of the decision in Salomon's case (1897) AC 22 that one person may function in dual capacities*": Lee v. Lee's Air Farming Ltd.* (1961) AC 12, at p 26. In *The Queen v. Goodall (1975) 11 SASR 94,* Bray C.J. discussed what his Honour described as:
>
> > "... some sort of metaphysical bifurcation or duplication of one act by one man so that it is in law both the act of the company and the separate act of himself as an individual" (at p 100)
>
> and expressed his conclusion as follows (at p 101):
>
> > "... my view is that the logical consequence of Salomon's Case ... is that the company, being a legal entity apart from its members, is also a legal person apart from the legal personality of the individual controller of the company, and that he in his personal capacity can aid and abet what the company speaking through his mouth or acting through his hand may have done."
>
> We agree with this view."

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[19] At p.170, cited with approval by the High Court in *Hamilton v Whitehead* [1988] HCA 65 at [10] and the *Land and Environment Court in Georges River Council v SAF Developments Pty Ltd* [2023] NSWLEC 50 at [59].

[20] *Bolton Engineering v Graham* (1956) 3 ALL ER 624 per Denning L.J. at 630.

75. While the concept of acting in concert is not the same as aiding and abetting, the statements of principle in these passages establish that Mr McEwan was legally capable of acting in concert with his own company. Moreover, as already submitted, he did so: see [92] below.

76. To reiterate, the applicants submit that Mr McEwan can be established as the 'directing mind and will' of DraftCom as:
    (a) he is the sole director and shareholder of DraftCom,
    (b) as such, he has capacity to authorise Ms Webb to make access applications on behalf of DraftCom using the DraftCom Letterhead, and
    (c) Ms Webb signed the majority of the access applications described in [3], as well as in [31] and [32] above under cover of the DraftCom letterhead.

77. It follows Mr McEwan clearly acted in concert with Ms Webb and DraftCom in making the access applications that lacked merit, and therefore the Tribunal:
    (a) can consider any access applications on the DraftCom letterhead as being also:
        - from both Ms Webb and Mr McEwan (the first ground), in addition or alternatively,
        - from all three of them for the purposes of the acting in concert requirement in s.110(1) (the second ground); and
    (b) has jurisdiction to make a restraint order in relation to Mr McEwan (on this second ground, see [82]-[94] below).

Gateways for enlivening jurisdiction

78. The Tribunal identified three "necessary gateways" through which the Applicants must pass to enliven its jurisdiction to make the s.110 order. They are as follows:

    (a) there must be a history of the respondents, or those they are acting in concert with, making access applications to the applicants under the GIPA Act; and

    (b) the applicants must have determined that a number of these access applications meet the criteria in s.110(2);

    (c) the applicants must have received three or more access applications that meet one of the criteria in s.110(2) in the two years immediately prior to this application to the Tribunal.[21]

79. Importantly, the Tribunal observed in *Pelerang Council, Queanbeyan City Council & Goulburn Mulwaree Council v Powell* [2015] NSWCATAD 44 ('*Powell*') that it is not required to assess the merits of the decisions made by the applicants in relation to the applications which lack

[21] *Pittwater Council v Walker* [2015] NSWCATAD 34 at [11].

merit described at [3(a)] - [3(c)] above and [123] below.[22] That is because s.110(2) describes the circumstances in which an access application is deemed to be lacking in merit by reference to the decision made by the agency. The Tribunal is not required to make an independent assessment of whether an access application lacks merit for the purpose of s.110(2) (and, in any event, lacks the power to do so).[23] In other words, the applicants are not required to prove that they were the correct and preferable decisions. They are only required to prove they made decisions that fell within the terms of s.110(2).

80. The applicants submit the Tribunal has jurisdiction to determine the application, as the respondents have made a combined total of eight access applications to the applicants over the previous two years which lack merit within the meaning of s.110(2): see paragraph [3] above.

81. The time frame of "…the previous two years…." in s.110(1)(a) is determined by reference to the date of the application to the Tribunal for an order under s.110.[24] These proceedings were commenced on **4 October 2024**. It follows the 3 or more access applications that lack merit relied on by the applicants had to be made during the two year period commencing **4 October 2022**. The earliest access application relied on by the applications is that PSC2023-00112, which was submitted by Ms Webb to Port Stephens Council on **6 December 2022**.

'Acting in concert'

82. The Tribunal, for the purpose of determining whether its jurisdiction is enlivened, is required to consider that Ms Webb has lodged access applications separately and also in concert with Mr McEwan and with DraftCom, of which Mr McEwan is the sole director and shareholder and therefore the 'directing mind and will' of DraftCom.

83. It is clear that the respondents have acted in concert to make unmeritorious access applications.

84. The term 'acting in concert' is not defined in the GIPA Act. The Supreme Court, in *In the matter of Asia Pacific Data Centre Limited* [2018] NSWSC 1375 at [42]-[43], observed as follows:

> 42. "Both parties referred to *Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Michael Crivelli) v IOOF Investment Management Ltd; Murray v Perennial Investment Partners Ltd* [2012] NSWSC 1318; (2012) 91 ACSR 530 (Perpetual v IOOF), where Stevenson J said (at [102]) that in order for two parties to act "in concert":

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22 *Powell* at [66].

23 *Port Stephens Council v Webb* [2017] NSWCATAD 341 ('*Port Stephens Council v Webb* [2017]') at [20], *Webb v Port Stephens Council* [2020] NSWCATAP 152 at [69]-[70], *Port Stephens Council v Webb* [2021] NSWCATAD 180 at [23]-[25] and *Department of Education v Zonnevylle* [2020] NSWCATAD 96 at [3].

24 *Department of Education v Zonnevylle* [2020] at [16], [20] and [84]; which diverged from *Webb v Port Stephens Council* [2020] NSWCATAP 152 at [68], whether the Appeal Panel had followed in *Port Stephens Council v Webb* [2021] NSWCATAD 180 at [26].

(a) there must at least be an understanding between them as to their common purpose of object; a mere coincidence of separate acts is insufficient: per McPherson J in *Adsteam Building Industries Pty Ltd v Queensland Cement & Lime Co Ltd* [1985] 1 Qd R 127 at 132; (1984) 14 ACLR 456 at 459;

(b) there must be some knowing conduct the result of communications between parties and not merely simultaneous actions occurring contemporaneously;

(c) there must be an understanding between the parties as to a common purpose of [sic] object: *Bank of Western Australia v Ocean Trawlers Pty Ltd* (1995) 13 WAR 407 at 431-2; (1995) 16 ACSR 501 at 524-525 (Ocean Trawlers) per Owen J;

(d) there must be contemporaneity and community of purpose (per French J (as his Honour then was) in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers* (1992) 44 IR 264 at 272);

(e) a concurrence of views about the merits of a particular resolution proposed by another person is not sufficient: *Re Winepros Ltd* [2002] ATP 18 at [33]; (2002) 43 ACSR 566; and,

(f) the understanding between the parties as to the common purpose or object must be consensual and there must be some adoption of it: Ocean Trawlers.

43. No challenge to the correctness of those propositions was made so far as they went, on the appeal in *Perpetual v IOOF* which was dismissed*: Perpetual Custodians Ltd (as custodian for Tamoran Pty Ltd as trustee for Crivelli) v IOOF Investment Management Ltd* (2013) 278 FLR 49; [2013] NSWCA 231 (Perpetual v IOOF (CA))."

85. The applicants submit these criteria of common purpose, and knowing, consensual conduct are demonstrated by the following.
86. Ms Webb and Mr McEwan are married.
87. Ms Webb and Mr McEwan have both lodged various access applications using the DraftCom letterhead or bearing the DraftCom email or the NSW Freedom of Information email.[25]
88. [Intentionally left blank.]
89. [Intentionally left blank.]
90. This correspondence from Ms Webb does not change the position that correspondence bearing the business name "NSW Freedom of Information" comes from DraftCom, since that company is the owner of that business name: see paragraphs [27] and [28] above.
91. There are, as noted in [30] above and as deposed to by Mr Wickham, clear similarities between the access applications lodged by the respondents.

[25] Affidavit of Mr Wickham at [25] and [183]-[185] and affidavit of Mr Franklin at [9] and Exhibit JF-1, p.102.

92. Further:
    (a) all of the access applications signed off by Ms Webb and Mr McEwan, that are not on the DraftCom letterhead, use a variation of a DraftCom email address as the email contact;
    (b) the access applications submitted on the DraftCom letterhead signed by Ms Webb include 'info@nswfreedomofinformation.net' as the applicant's contact email address;
    (c) the applications and correspondence that are signed off by Ms Webb and Mr McEwan individually are alike in their formatting style and use very similar wording;
    (d) the access applications from them that contain hand-writing used the same hand-writing; and
    (e) their applications seek similar classes of information, including information that is related to proceedings and other matters initiated by Ms Webb and Mr McEwan. In other words, Ms Webb and Mr McEwan sought the same information under separate access applications.[26]
93. Mr McEwan is, as submitted at [64]-[65] and [68]-[69] above, the 'directing mind and will' of DraftCom and therefore any acts of Mr McEwan are also acts by DraftCom in the present context: see further the analysis in paragraphs [70] to [77] above.
94. The applicants submit it follows that any access applications made under cover of a letter with the DraftCom letterhead or using the name NSW Freedom of Information or a DraftCom email address are in fact made not only by DraftCom but also by Ms Webb and by Mr McEwan, in addition, or in the alternative, by all 3 acting in concert.

Exercise of the discretion

95. The Tribunal, after determining its jurisdiction is enlivened, must consider whether to exercise its discretion in s.110(1) to make the orders in the terms the applicants seek.
96. The Tribunal's s.110 discretion is broad.[27] However, s.33 of the *Interpretation Act* requires the Tribunal to adopt a construction of s.110 that would promote the purpose or object of the GIPA Act in preference to a construction that would not promote that purpose or object.
97. Section 3(2)(b) of the GIPA Act provides that the discretion is be be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information.
98. This was also emphasised by the High Court in *Kline v Official Secretary to the Governor – General* (2013) 249 CLR 645; [2013] HCA 52, where it was considering the analogous object of the *Freedom of Information Act* 1982 (Cth). The High Court held that: "[the Act]

[26] Affidavit of Mr Wickham at [36]-[60].
[27] *Port Stephens Council v Webb* [2017] at [24].

does not pursue its objects, as legislative purposes, at any cost", but is a complex regime that seeks to balance competing objects (at [37], 661).

99. The s.110 discretion is directed at the same purpose outlined in s.3(1) of the GIPA Act (i.e.) where restraining a person from exercising their statutory right to government information would, on balance, promote as far as possible, access to government information promptly and at the lowest reasonable cost (to both the applicants and the respondents).

100. Dinnen SM considered the application of ss.3(2)(b) of the GIPA Act and s.33 of the *Interpretation Act* in exercising the s.110(1) discretion in *Department of Education v Zonnevylle* [2020] at [18]-[19], as follows:

> "18 Applying principles of statutory interpretation including s 33 of the Interpretation Act 1987, a construction of s 110(1) that would promote the purpose or object underlying the Act is preferred to a construction that would not promote that purpose or object. The object of the GIPA Act as expressed at s 3(2)(b) is:
>
> > "It is the intention of Parliament that the discretions conferred by this Act be exercised, as far as possible, so as to facilitate and encourage, promptly and at the lowest reasonable cost, access to government information."
>
> 19 That statement of intention indicates that the discretion in s 110(1) is to be exercised to facilitate and encourage access to government information. Where an individual is making repeated or multiple access applications that are without merit, and therefore do not provide any access to government information, an order for restraint on that individual furthers the objects of the Act by ensuring that meritorious access applications by others can be facilitated "promptly and at the lowest reasonable cost". In limited cases, the objects of the Act may thereby be served by restraining conduct that misuses the right of access to government information through the making of unmeritorious access applications. It is therefore an appropriate exercise of the discretion to free Departments and Agencies of the burden, otherwise directly imposed upon them by the GIPA Act, of responding to each and every GIPA application made by an individual with a specific history of making frequent and unmeritorious applications."

101. Section 110(1) of the GIPA Act does not list any specific factors the Tribunal must, or may, take into account in exercising the discretion. Nor does s.110 identify any specific factors that the Tribunal must, or may, not take into account, in exercising the discretion.

102. In those circumstances, the starting point are the principles described by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:

> "What factors a decision maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion … If the relevant

factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication for the subject matter, scope and purpose of the Act".[28]

103. This principle was adopted by Montgomery SM in *Powell*. There, Montgomery SM observed that the discretion granted by s.110 was wide, and listed the factors he considered relevant to determining the s.110 application before him. They were:

(a) the total number of access application made by the respondent (including, but not limited to, applications which lack merit),

(b) whether the applications, in one way or another, seek access to information about the same thing;

(c) the amount of information the agency has provided in response to those access applications,

(d) the resources of the agency, and

(e) the conduct of the respondent.[29]

104. In *Port Stephens Council v Webb* [2017] and *Department of Education v Zonnevylle* [2020] NSWCATAD 96, the Tribunal expanded on the principles that inform the exercise of the discretion. Dinnen SM, in *Department of Education v Zonnevylle* at [4], adopted the reasoning of Lucy SM in *Port Stephens Council v Webb* [2017] as follows:

"4 In *Port Stephens Council v Webb* [2017] … the Tribunal identified the following principles that inform the exercise of the discretion under s 110(1):

(1) if the preconditions for making an order are satisfied, the discretion is a broad one: at [24];

(2) factors which in any particular case might be relevant include (at [25 and 26]):

(a) the total number of access applications (including but not limited to applications which lacked merit) that have been made.

(b) the fact that the applications were all in one way or another seeking information about the same thing.

(c) the amount of information the agencies have provided in response to those applications.

(d) the resources of the agencies; and

(e) the conduct of the access applicant.

(3) the focus is upon the conduct of the applicant for information not upon the character of the agency to which the applications were made: at [40];

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[28] (1986) 162 CLR 24 at 39-40.

[29] *Powell* at [56] and [68].

(4) the power is not to be exercised for the purpose of controlling or punishing individuals who take up a lot of agency time or for the reason that the person might be regarded by the agency as vexatious: at [47];

(5) the focus of the power is to control the making of access applications which would lack merit if made: at [47].

(6) the making of at least three access applications which lack merit in a 2 year period is itself a reason which supports the making of an order: at [52].

(7) whether the making and prosecution of the access applications, considered as a whole, was vexatious: at [57]."

105. Dinnen SM, at [5], also adopted Hennessy DP's reasoning in *Pittwater Council v Walker* [2015] NSWCATAD 34 *('Walker')* as follows:

> "5 In [*Walker*] Hennessy DP reasoned that in exercise of the discretion both the number and frequency of access applications and the substance or merit of the applications were relevant: at [25]. Hennessy DP's reference to substance or merit appears not to be restricted to the matters referred to in the deeming provisions in s 110(2). Rather the Tribunal was concerned in the exercise of the broad discretion conferred by s110 with an overall assessment of the number and frequency of access applications by the applicant for information and the substance or merit of those applications."

106. In *Webb*, Lucy SM observed that the considerations Montgomery SM considered in *Powell* did not identify the relevant considerations in every application for s.110 orders. In other words, the list in *Powell* is not a static or closed list of factors the Tribunal can consider. The factors relevant to the exercise of the Tribunal's discretion will depend on the circumstances of the case before it.[30] However, *Powell and Port Stephens Council v Webb* [2017] provide a useful framework for exercising the discretion.

107. The applicants submit the matters identified in *Powell* and *Port Stephens Council v Webb* [2017] are relevant to the Tribunal's exercise of the discretion and support the making of the order against the respondents. The applicants' submissions on each of those factors are set out at paragraphs [135]-[200] below.

The balancing exercise

108. While the Tribunal's discretion is broad, it must be exercised reasonably and in accordance with the subject matter, scope and object of the GIPA Act.[31]

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30 *Port Stephens Council v Webb* [2017] at [22]

31 *Pittwater Council v Walker* [2015] NSWCATAD 34 at [77]-[78] citing Deputy President Constance's observations in *Sweeney v Australia Information Commissioner* [2014] AATA 539 at [74]. Also see McAteer SM in *Walker v Pittwater Council* [2016] NSWCATAD ('Walker') at [48].

109. The Tribunal, in determining what is reasonable, is required to consider whether "…the impact [of the restraint order] on the individual …" is "… proportionate to the interest which the decision-maker is seeking to protect."[32]

110. In doing so, the object in s.3 of the GIPA Act and s.110 indicate that the Tribunal is required to balance:
    (a) an individual's right to be provided with access to government information, subject to any overriding interest against disclosure; against
    (b) exercising the discretion in s 110 so as to align that object with facilitating access to that information promptly and at the lowest reasonable cost (to both the applicants and the respondents).

111. The s.110 order would recognise the public importance of preventing the ongoing adverse impact on the ability of the applicants to comply with their GIPA Act obligations. It would also recognise the public importance of the appropriate management of rate payer and taxpayer funded public resources and the functions of the applicants including protecting the health and safety of their employees. The applicants submit that the impact of the s.110 order on the respondents would be minimal and the interests it would protect are of public significance.

112. In particular, the Tribunal should take into consideration that the respondents' applications and associated conduct was intended to harass government employees by making false allegations of corruption. This has absorbed an unreasonable and disproportionate amount of the applicants' finite resources and had a very significant impact on the health and wellbeing of the applicants' officers.

113. The Tribunal has observed, in this regard, that an individual's "…purposes and motives for seeking access to government information are of limited relevance and weight" to a s.110 application because an individual's right to be provided with government information "...is not limited by [their] purposes and motives for seeking access to that information." [33]

114. However, the applicants submit that the nature of the information sought by an individual and their purposes and motives in seeking it should be given very significant weight in determining "the impact" of a s.110 order on the individual and whether that impact is proportionate to the interests that order seeks to protect. It would be unrealistic, when gauging the impact on an individual of an order under s. 110(1), to ignore or put to one side the purposes and motives under which the individual has acted in the past with respect to access applications and other conduct. For one thing, those purposes and motives are relevant to the risk that conduct will continue unless the s.110 order is made. This consdeiration is a standard discretionary factor in the award of injunctions at law or in equity or under statute. As the Supreme Court said in *Commissioner for Fair Trading, Department of Commerce v Hunter [2008] NSWSC 277* at [78]: "Past conduct will be relevant

[32] *Pittwater Council v Walker* [2015] at [78] citing *Sweeney* at [76] and *Powell* at [68].
[33] *Port Stephens Council v Webb* [2021] NSWCATAD 180 at [64].

to the likelihood of future conduct to the extent that it demonstrates a "propensity" or "inclination" to infringe the relevant legislation." Further, by analogy, in the context of access applications, the personal factors of the application, which are factors particular to the person making the access application, and include motives for making the access application, are expressed to be relevant by s. 55 of the GIPA Act. The applicants contend the interests of agencies impacted by the respondent's applications outweigh the impact of a s.110 order on the respondents.

115. There is implied support for the applicants' position in s.110(5A), which lists the factors to be considered by the Tribunal in deciding whether to approve the making of an access application by a person the subject of a s.110 order. They include whether the:
    (a) proposed application is lacking in merit,
    (b) proposed application is frivolous, vexatious, misconceived or lacking in substance, and
    (c) applicant has engaged in conduct designed to harass, to cause delay or detriment, or to achieve another wrongful purpose.
116. It is unlikely the introduction of s.110(5A) was intended to import a completely different set of factors to be considered *after* making a restraint order than would logically be considered by the Tribunal when determining whether to exercise its discretion to make one in the first place.
117. The s.110 order would not remove the respondents' rights to seek access to government information altogether. In *Walker v Northern Beaches Council* [2022] NSWCATAD 8, the Tribunal observed that a restraint order made under section 110(1) does not extinguish the right conferred on a person by s.9(1) of the GIPA either expressly or by implication. That is apparent from the fact the person subject to the restraint order may apply to the Tribunal for approval to exercise the right. The right must therefore continue in existence despite the regulation of its exercise.
118. On balance, the respondents' enforceable right to access government information is overridden by the need for the Tribunal to exercise its discretion so that it aligns with the object of the Act and the interests of other applicants and agency staff as bearing on the GIPA Act process.

PART 5: APPLICATION OF PRINCIPLES

119. The Tribunal has jurisdiction to exercise its discretion under s.110(1) and should exercise that discretion to make the orders sought by the applicants for the reasons detailed below.

Jurisdiction

120. The Tribunal's jurisdiction in s.110(1) is enlivened where it is satisfied that there have been at least three access applications (to one or more agencies) in the previous two years that lack merit, and those applications were made by the same person or by any other person acting in concert with the person.

121. The respondents have, as noted at [3]-[5] and [80]-[81] above, made eight access applications to the applicants within the previous two years (i.e. the two years prior to 4 October 2024) which meet the criteria in s.110(2), as follows.
    (a) Two access application made to Port Stephens Council, being PSC2023-00112 and PSC2023-04772, in which it was determined that no information was held pursuant to s 58(1)(b) of the GIPA Act.[34] These access applications lacked merit by virtue of s.110(2)(b).
    (b) Four access application made to the Department, being GIPA23/666, GIPA23/5209, GIPA24/1566 and GIPA24/1568, in which it was determined that no information was held pursuant to s 58(1)(b) of the GIPA Act.[35] These access applications lacked merit by virtue of s.110(2)(b).
    (c) Two access application made to Goulburn Mulwaree Council, being GIPAA2223012 and GIPAA2324025, in which it was determined that no information was held pursuant to s 58(1)(b) of the GIPA Act. These applications lacked merit by virtue of s.110(2)(b).[36]
122. It follows that the respondents have made more than three access applications within the past two years which have been determined to lack merit within the meaning of s.110(2) and so the Tribunal has jurisdiction to make the order sought by the applicants.
123. Of those eight access applications,
    (a) seven were submitted under cover of the DraftCom letterhead and signed by Ms Webb, and
    (b) one was submitted under cover of a letter signed by Ms Webb (being PSC2023-00112, received by Port Stephens Council). Although not on DraftCom letterhead, this application gives the email address of the sender as '*Telina Webb E:draftcom@bigpond.com*'.[37]
124. The applicants submit that, in these circumstances, the Tribunal's discretion to exercise the discretion to make the s.110 order is enlivened.
125. This is so even though none of the eight access applications were signed by Mr McEwan.
126. This raises the question as to whether s.110(1) requires the Tribunal to find that there were three access applications that lack merit from each of the three respondents so as to ground a restraint order against each of them.
127. That is because the Appeal Panel's reasoning in *Webb v Port Stephens Council* [2020] NSWCATAP 152 appears to be, in summary, that the only person(s) who can be subject to the s.110 order are a person(s) who made the three access applications that lacked merit and not any other person who acted in concert with them. In this respect, the Panel said at [64]:

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34 Affidavit of Mr Wickham at [9] to [17].
35 Affidavit of Mr Franklin at [9] to [25].
36 Affidavit of Ms Timothy at [12] to [16].
37 Affidavit of Mr Wickham at [10].

> "Section 110(3) describes the scope of the Tribunal's power. A restraint order may "apply to all access applications made by the person the subject of the order" or it may be "limited by reference to" certain defined criteria. The ordinary grammatical meaning of this provision is that the order may apply to all, or some applications made by the person the subject of the order. The defined criteria relate to the period of time, the number of applications, the kind of information and the particular agency.There is no defined criterion relating to applications, not made by the person the subject of the order, but made by another person in concert with the person the subject of the order."

128. However, this does not apply to the preliminary, threshold issue of whether Mr McEwan and DraftCom 'acted in concert' for the limited purposes of enlivening the Tribunal's s.110 discretion.

129. Further, it is respectfully submitted that the Appeal Panel, in reaching the view noted in [127] above, misconstrued s. 110. Section 110(3) certainly refers to a restraint order applying to the person the subject of the order. But the enquiry s.110 requires the Tribunal to make is who may be made the subject of such an order. Section 110(1) describes the universe of persons who have acted in the past so as to contribute to the generation of at least three unmeritorious applications in the previous two years. That universe consists of two categories of persons:
    (a) any person or persons who made any of the access applications; and
    (b) any other person who acted in concert with a category (a) person so as to assist that category (a) person in making access applications.

130. It is clear from s.110 that the provision is intended to address the mischief of the making of repeated unmeritorious access applications. "*The making*" of such applications, the applicants submit, is not restricted to category (a) persons (that is, the persons who lodge the access applications) but extends to category (b) persons as well.

131. The Appeal Panel appears to move from s. 110(1) to s. 110(3) in a manner that assumes, without expressly saying, that the only "*person*" who may be made the subject of the order is a category (a) person. However, in s. 110(1)(b), persons who contribute to the mischief (i.e. the making of unmeritorious access applications) are either category (a) persons, category (b) persons, or both.

132. There is no reason in the construction of s. 110 to exclude category (b) persons when one arrives at s. 110(3). That provision refers to "the person the subject of the order", and as a matter of addressing the mischief and applying a purposive reading to s. 110(1), such person must include a category (b) person. There is no basis in construction of s. 110(3) to exclude one source of the mischief to be addressed, namely category (b) persons. To do so leaves part of the problem unaddressed, and there is no reason to do so. A case may be imagined where a category (a) person makes a series of unmeritorious access applications, and is assisted by a larger group that acts in concert with the applicant. In that case, there is

no reason to make the former individual the subject of the order but leave untouched the group of category (b) persons.

133. Nor does the statutory language support such a conclusion. In section 110(3), "the person the subject of the order" is not expressly or impliedly limited to category (a) persons. It can equally extend to category (b) persons. In circumstances where s. 110(1) identifies two categories of persons, there is no basis for construing s. 110(3) as applicable to one category only. For example, s. 110(3) does not refer to "the person first referred to in paragraph (1)(b)". It uses rather the general language "the person the subject of the order", and in the context of s. 110 and the mischief to be addressed and purpose to be effectuated, that general language identifies all the persons referred to in s. 110, being both categories of persons identified in s. 110(1).

134. It follows that the Tribunal has the power to make an order under s. 110(1) against category (b) persons. That is the alternative basis upon which the Tribunal may make a restraint order against Paul McEwan in the event that it were to find that he was not a category (a) person for the purposes of s. 110(1) (i.e.) that he acted in concert with the applicants DraftCom and Ms Webb. The applicants submit that Mr McEwan fits within both categories.

Exercise of the discretion

Total number of access applications lodged by the respondents

135. The Tribunal has held that the history of the access applications made by the respondents is a "central consideration in the exercise of the [s.110] discretion…".[38]

136. Since 2011, the respondents have pursued a course of conduct which has resulted in them lodging with the applicants a combined total of 225 access applications and informal requests, comprising, as summarised in the table below, 113 access applications and 112 informal requests.

Table – Applications lodged by the respondents since 2011

Applicant	Access applications	Informal requests
Port Stephens Council, since 2011.[39]	Ms Webb: 78 Mr McEwan: 12	Ms Webb: 95 Mr McEwan: 8
Department of Communities and Justice, since 2020.[40]	Ms Webb: 15 Mr McEwan: 1	Ms Webb: 2
Goulburn Mulwaree Council, since 2021.[41]	Ms Webb: 7	Ms Webb: 6
	Total: 113	Total: 112

38 *Port Stephens Council v Webb* [2021] at [36].
39 Affidavit of Mr Wickham at [32] and [35].
40 Affidavit of Mr Franklin at [5], [49] and [50].
41 Affidavit of Ms Timothy at [26].

137. The Tribunal has considered both the number and frequency of access applications and their substance or merit as relevant to the exercise of its discretion (i.e.) the nature of the access applications and their outcomes.[42] When considering whether to exercise its discretion to make a restraint order, as noted at [103] above, the Tribunal is not limited to considering whether applications 'lack merit' within the meaning of s.110(2). At this stage of its analysis, the Tribunal can consider whether the access applications are meritorious in a more general sense.[43]
138. The history of the respondents' access applications is inextricably entwined with Ms Webb's conduct.

Port Stephens Council

139. Ms Webb lodged her first access application in relation to the privacy screen matter with Port Stephens Council in July 2011.[44]
140. Since July 2011, the respondents have lodged, on average, either one access application or informal request each calendar month with Port Stephens Council (calculated on the basis of a combined 193 access applications and informal requests against 161 calendar months).

Department of Communities and Justice

141. Ms Webb's first access application to the Department sought access to part of the Tribunal file for the matter of *Powell* on 14 April 2021.[45] The origin of this application is related to the first access application lodged by Ms Webb with Goulburn Mulwaree Council and appears to relate her compulsion to find material supporting her unfounded suspicions of corruption of its employees following the Tribunal's order under s.110 in *Powell*.
142. Shortly after, on 13 July 2021, Ms Webb lodged a second access application with the Department for, among other things, the cost to the Tribunal for remunerating the presiding Members' and related expenses in her matters of *Port Stephens Council v Webb* [2017] NSWCATAD 341, *Webb v Port Stephens Council; Webb v Port Stephens Council; Port Stephens Council v Webb* [2020] NSWCATAD 81, *Webb v Port Stephens Council* [2020] NSWCATAP 152 and *Port Stephens Council v Webb* [2021] NSWCATAD 180.[46]
143. On 13 July 2021, Ms Webb lodged an identical access application to the Department as was not uncommon: see above at [30] and [92 (e)]. Since July 2021, Ms Webb predominantly sought access to Tribunal expenses. However, in 2023, Ms Webb sought access to a presentation of the Director of the Open Government Information and

42 *Port Stephens Council v Webb* [2021] at [38].
43 *Department of Education v Zonneylle* [2020] NSWCATAD 96 at [5].
44 Affidavit of Mr Wickham at [21].
45 Affidavit of Mr Franklin, Exhibit JF-1, Tab 1, p.1 (LEGAL2536/21).
46 Affidavit of Mr Franklin, Exhibit JF-1, Tab 1, p.97.

Privacy Unit ('**OGIP Unit**') within the Department. Since then, all but one of Ms Webb's access applications have sought access to information concerning either her dealings with the Department or related to some stage to one of her other access applications or review applications.[47]

144. Since April 2021, Ms Webb has lodged, on average, one access application every three calendar months with the Department (calculated on the basis of 15 access applications against 45 calendar months). Fifty per cent of Ms Webb's access applications to the Department were lodged in 2023. This equates to 1.6 access applications per month.

Goulburn Mulwaree Council

145. Ms Webb and Mr McEwan have, it appears, never lived within the LGA of Goulburn Mulwaree Council. Yet Ms Webb has, unaccountably, targeted the staff of Goulburn Mulwaree Council, with vitriolic abuse and allegations of corruption.[48]
146. The origins of the various applications lodged with Goulburn Mulwaree Council appear to relate to Ms Webb's compulsion to find material supporting her unfounded suspicions of corruption of its employees following the Tribunal's order under s.110 in *Powell*.
147. Since 2021, Ms Webb has lodged, on average, one access application or informal request approximately every three calendar months with Goulburn Mulwaree Council (calculated on the basis of a combined 13 access applications and informal requests against 40 calendar months).
148. Of the seven access applications, 28.6% lacked merit within the meaning of s.110(2).
149. For these reasons, the applicants submit the Tribunal should give significant weight to the history of the respondent's access applications when considering exercising the s.110 discretion.

Whether the same subject matter

150. The Tribunal has held that where an applicant has lodged multiple access applications effectively seeking the same information, this factor weighs in favour of making a s.110 order because that conduct suggests applications were vexatious or misconceived.[49]
151. As noted at [30] and [92(e)] above, some access applications lodged by Ms Webb and Mr McEwan sought similar classes of information and are alike in their formatting style and use similar wording.
152. Further, the access applications lodged by the respondents are, on the whole, directed along the same lines (i.e.) towards finding something that would support their pre-occupation with the allegedly corrupt conduct of public officers who have declined to provide them with access to information on the grounds provided by the GIPA Act.

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47 Affidavit of Mr Franklin, at [59].
48 Affidavit of Ms Timothy at [65]-[87].
49 *Port Stephens Council v Webb* [2017] at [36].

153. Notably, Ms Webb has generated 21 baseless and false misconduct complaints against employees of Port Stephens Council and used the GIPA application process to then seek information about some of those complaints.
154. Ms Webb's preoccupation is supported by her recent demand for a Parliamentary Inquiry into this Tribunal and the operation of the *Civil and Administrative Tribunal Act* 2013, the GIPA Act and the *Privacy and Personal Information Protection Act* 2009 ('the **PPIP Act'**).[50]
155. Ms Webb alleges that the basis of her demand is "maladministration, systemic abuse and failures" of this Tribunal. Ms Webb goes on to accuse the former Attorney General, the Hon. Mark Speakman, of causing "a trail of trauma, deep hurt and injustice towards the people of NSW".[51]
156. This is further supported by the information sought by the respondents, which broadly falls into the following categories:
    (a) personal information about employees of the applicants and other government agencies, including, for example, the Crown Solicitors Office,[52]
    (b) information relating to how their previous access applications were managed and/or determined,[53] and
    (c) information about how the applicants have managed Ms Webb's conduct.[54]
157. As noted above at [33], the access applications lodged by Ms Webb and Mr McEwan have not sought access to information which is objectively relevant to their personal circumstances.
158. The Tribunal can also infer, from the general statements made by Ms Webb about the purpose of her access applications, her posts on the website and complaints to Port Stephens Council, that Ms Webb may suspect that the officers named in those access applications have engaged in misconduct, including unlawful or corrupt conduct. The Tribunal can infer Ms Webb began to target the Department and Goulburn Mulwaree for the same reason.
159. In a constitutional democracy such as New South Wales, the respondents are entitled to their beliefs. It is clear from their fixated pursuit of information about these issues and in relation to specific officers of the applicants that they seek may seek evidence of those beliefs. However, the scheme for obtaining access to government information provided by the GIPA Act has not assisted them in proving these preoccupations. The motive of seeking evidence, however, sits uneasily with the harassing and threatening behaviour of Ms Webb addressed elsewhere in these submissions.

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50 Ms Webb's letter dated 8 Aug 2024 calling for a Parliamentary Inquiry, published on the '*NSW Freedom of Information*' website. Affidavit of Mr Franklin, at [94].
51 Ms Webb's letter dated 8 Aug 2024 calling for a Parliamentary Inquiry, p.3. Affidavit of Mr Franklin, at [94].
52 The formal access application relating to the CSO was GIPA23/5076. Affidavit of Mr Franklin, Exhibit JF-1, Tab 19, p.146.
53 For example, GIPA 23/1885, see the affidavit of Mr Franklin at Exhibit JF-1, Tab 1 (GIPA23/666, GIPA23/3166 and GIPA23/5209).
54 For example, GIPA 23/4481, see the affidavit of Mr Franklin at [56(b)].

160. Despite having the opportunity to make 225 access applications and informal requests, no such information has been uncovered in the misconduct investigations into the applicants or under the GIPA Act.
161. While the integrity of Local Government and the NSW Public Sector are matters of public interest, the respondents' motives for making repeated, access applications for information supporting their preoccupation with alleged corruption, cannot justify the significant imbalance in resources expended by the applicants in responding to their access applications as well as the impact of their conduct on its employees. This is particularly so given those 225 access applications and informal requests have not resulted in the release of government information to that effect. Further there is no reasonable likelihood that the making of applications will cease, nor the unfounded fixation with corruption.
162. In summary, the content of the respondents' applications and the fact that they have made repeated requests for the same or similar information supports the conclusion that their applications are unmeritorious as they were frivolous or misconceived. In essence, Ms Webb and Mr McEwan's original grievance over the privacy screen has been subsumed by a relentless barrage of unsubstantiated allegations of corruption against anyone they perceive as denying them access to 'evidence' of those allegations.
163. For these reasons, the applicants submit that the Tribunal should give significant weight to the nature of the respondents' access applications when considering its exercise of the s.110 discretion.

Amount of information released

164. Superficially, it appears the respondents have had a measure of success with the access applications they have made. An examination of the respondents' endeavours to obtain government information in response to their access applications would show:
    (a) of the 78 formal access applications made by Ms Webb to Port Stephens Council, 60 resulted in full or partial release of the information requested (only approximately 11 resulted in the full release of the information requested);[55]
    (b) of the 14 formal access applications to the Department, eight matters resulted in the release of some information (GIPA22/3539, GIPA22/4424, GIPA23/1885; GIPA23/1885; GIPA23/3166; GIPA 23/3859; GIPA23/4481 and GIPA23/5076);[56] and
    (c) of the seven formal access applications to Goulburn Mulwaree Council, five resulted in the release of some information (GIPAA2122005; GIPAA2223012; GIPAA2324015; GIPAA4023 and GIPAA2324030).[57]
165. However, as noted in paragraph [36] above, the respondents' access applications have had a strong tendency to be 'self-perpetuating' as they were lodged to generate further

[55] Affidavit of Mr Wickham at [33], Tab 8 to Exhibit TLW-1.
[56] Affidavit of Mr Franklin, Exhibit JF-1, Tab 8.
[57] Affidavit of Ms Timothy, Tab 6 to Exhibit MT1.

correspondence, further GIPA applications, opportunities to appear in the NCAT and provide material to publish on the NSW Freedom of Information website. They are also self-perpetuating in the sense that Ms Webb or Mr McEwan have made complaints or initiated external reviews, and then lodged access applications seeking information relating to those complaints and review matters or (for example) information relating to the consultation process of a previous access application. In this regard, the respondents' conduct is analogous to that of the respondent in *Department of Education v Zonneylle* [2020], whose attention, Dinnen SM observed, turned from the original source of his grievance (being a contract procurement process) "…to GIPA processing and in particular to the processing of previous applications made by him… the Respondent's [subsequent] applications have all focussed upon documents to support his submissions and complaints that there has been corruption or other impropriety in the dealings by Departments and the Tribunal with him both in respect of procurement processes and the processing of GIPA applications."[58]

166. An example of the self-perpetuating nature of the respondents' matters is provided by the access application to the Department GIPA22/4424, where Ms Webb using the DraftCom letterhead sought information related to a presentation delivered by the OGIP Unit Director.

167. GIPA22/4424 has since been the subject of the following further access applications by Ms Webb.

    (a) External review by the Information Commissioner (GIPA23/663).

    (b) External review by NCAT (GIPA23/1640; Case no. 2023/00125842) which consisted of an Appeal Panel matter during the proceedings.

    (c) Ms Webb filed a Notice of Appeal in relation to an interlocutory decision in these proceedings (GIPA23/2810; Appeal Panel case no. 2023/00209749).

    (d) Ms Webb filed another Notice of Appeal in related to the Tribunal's decision in 2023/00125842. This is currently before the Appeal Panel.

    (e) Ms Webb lodged an access application on the DraftCom letterhead seeking government information regarding a letter sent to her due to the conduct in the external review proceedings at (b) above (GIPA23/4481). Ms Webb then sought external review with the Information Commissioner concerning this access application (GIPA23/5281).

[58] *Department of Education v Zonneylle* [2020] NSWCATAD 96 at [91].

(f) Ms Webb lodged another access application on the DraftCom letterhead seeking government information regarding an affidavit used by DCJ as respondent in the external review proceedings at (b) above (GIPA23/5209).

(g) In an unrelated access application lodged by Ms Webb on DraftCom letterhead (GIPA23/3166) which progressed to external review with the Tribunal (GIPA24/595; Case no. 2024/00063701), Ms Webb cross-examined a Departmental witness in those proceedings about a statement related to the earlier proceedings at (b) above. The witness' answer then was the subject of a Privacy Internal Review complaint (OGIP24/3706).

(h) Privacy Internal Review complaint (OGIP24/3706), where Ms Webb alleged that her personal information had been unlawfully accessed from another public sector agency related to the external review proceedings at (b) above.[59]

168. Further, the respondents self-generated additional work by seeking internal and/or external review of their access applications. In particular, Ms Webb sought external review by the:
    (a) Information Commissioner of approximately 71% of the notices of decision issued by the Department in relation to her access applications, and
    (b) Tribuanl of of approximately 29% of the notices of decision issued by the Department in relation to her access applications.[60]

169. For these factual reasons, the applicants submit that the Tribunal should give less weight to the quantity of information released when considering its exercise of the s.110 discretion given the self-generating nature of those applications and their content. In addition, given that s.110(1) requires only 3 unmeritorious applications, it is submitted that as a matter of statutory construction, it should not be taken to be the case that a larger number of relatively successful access applications will overwhelm the existence and impact of unmeritorious applications and other considerations. The focus should be on matters giving effect to the statutory purpose as outlined by Dinnen SM (see paragraphs [100] and [104]-[105] above). Indeed, a number of Tribunal members have pointed to the amount of information already provided to an applicant, and the conduct of the applicant, as factors favouring exercise of the discretion: see paragraphs [104] and [105] above. A larger number of successful access applications carries, it is submitted, little weight in the exercise of the s. 110 discretion, which focuses on unmeritorious applications which produce little, if any, information in response to an access application.

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59 Affidavit of Mr Franklin, at [56].
60 Affidavit of Mr Franklin, at Exhibit JF-1, pp 34-45.

The applicants' resources

170. Mr Wickham, Ms Timothy and Mr Franklin each provide evidence that processing of the respondents' access applications and informal requests and the respondents' conduct in relation to those access applications has consumed an extraordinary amount of the applicants' time, public monies and public resources. That has often been because of the wide scope of those access applications. The respondents have on many occasions sought access to "all" documents relating to a particular matter. The breadth of these access applications has invariably made responding to them resource intensive.

Port Stephens Council

171. Port Stephens Council, between 2003 and 2011, allocated about 30% of the time of one full-time staff member to process access applications. However, the number of access applications lodged by Ms Webb and Mr McEwan, forced the Council to, by 2020, increase staff resources for processing access applications to 80% of the time of two full-time employees.[61]
172. Those staff members spend, on average, approximately five hours to determine an access application and approximately one and a half hours to determine an informal request.[62]
173. Since 2011, Port Stephens Council has received 388 access applications, 90 of which were lodged by the respodents (i.e. 23.19% of all access applications received by Port Stephens Council since 2011 were signed by Ms Webb or Mr McEwan. Since June 2012, Port Stephens Council has spent 7,837 hours processing all access applications and informal requests received by members of the public, including the respondents.[63]
174. Between then and 2024, of these 7,837 hours, Port Stephens Council spent 849.25 hours processing formal access applications lodged by Ms Webb and Mr McEwan alone.[64] In particular, the Council has:
    (a) spent 769 hours responding to Ms Webb's access applications and informal requests, which equates to 21.97 weeks of full-time work by one of Council's employees (based on a 35 hour work week), and
    (b) spent 80.25 hours responding to Mr McEwan's access applications and informal requests, which equates to almost 2.3 weeks of full-time work by one of Council's employees (based on a 35 hour work week).[65]
175. That equates to approximately 37.72% of the time spent by Council officers processing access applications lodged by members of the public between 2011 and 2024. In other words, over the last 13 years, 37.72% of the total time spent by Port Stephens Council in processing access applications were spent processing the respondents' access applications.

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61 Affidavit of Mr Wickham at [75] to [78].
62 Affidavit of Mr Wickham at [67].
63 Affidavit of Mr Wickham at [28]-[29] and [82]-[83].
64 Affidavit of Mr Wickham at [84].
65 Affidavit of Mr Wickham at [69(a)], [82]-[84] and [86]-[87].

176. It follows the Tribunal may safely conclude the frequent and voluminous nature of the respondents' access applications has impacted Port Stephens Council's ability to fulfil its obligations under the GIPA Act.

177. The impact of the respondents' conduct in pursuing additional complaints and proceedings against Port Stephens Council is of such a magnitude that it adversely affects its ability to comply with its obligations under the GIPA Act with respect to the public generally, particularly noting the expenditure of significant legal costs.

178. Further, the frequent and voluminous nature of the respondents' access applications has impacted on Port Stephens Council's ability to fulfil its obligations under the GIPA Act to provide other applicants with access to government information.

179. In addition to the access applications and informal requests lodged by the respondents, Port Stephens Council has been required to manage and respond to the following.

    (a) A range of frivolous and vexatious complaints made by Ms Webb and Mr McEwan, including the following.

        (i) 21 complaints to Council alleging breaches of its Code of Conduct, each of which was determined to be unfounded.

        (ii) A complaint to the NSW Ombudsman, which was not investigated.

        (iii) Ten complaints to the Information and Privacy Commissioner, seven of which the Commissioner determined required no action.

        (iv) A complaint to the NSW Police that Mr Wickham and Ms Marshall had misled the Tribunal and perverted the course of justice, about which no action was taken.

        (v) Four complaints to the Law Society of NSW against Council's legal representatives, all of which were dismissed as misconceived or lacking in substance.

        (vi) A complaint to the Legal Services Commissioner against Council's legal representative, which was dismissed as misconceived or lacking in substance.[66]

    (b) Ms Webb and Mr McEwan's 72 applications for internal review of Council's determinations of their access applications and their applications for external review of those decisions to either the Information Commissioner or this Tribunal. To date, Port Stephens Council has incurred external legal costs totalling $572,090.49 (excluding GST) relating to GIPA Act and privacy related matters before the Tribunal involving Ms Webb and Mr McEwan.[67]

    (c) Ms Webb commenced two sets of proceedings in the Tribunal accusing Council, its officers and Council's legal representatives of being in contempt of the Tribunal's orders. These proceedings were baseless and were commenced without foundation in fact and were either withdrawn by Ms Webb or determined against her.[68]

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66 Affidavit of Mr Wickham at [124] to [162].
67 Affidavit of Mr Wickham at [92] and [98].
68 Affidavit of Mr Wickham at [112] to [121].

(d) Land and Environment Court Proceedings commenced by Ms Webb and Mr McEwan in 2012 in relation to Council's order to demolish the privacy screen.[69]

(e) Local Court proceedings commenced by Ms Webb, without any legal basis, to recover the cost of processing charges for her formal access applications lodged with Council and Tribunal filing fees for some of her applications for administrative review. The Local Court found against Ms Webb and ordered she pay the Council's costs.[70]

180. In addition to the $572,090.49 Port Stephens Council has expended of ratepayer monies, (which included $116,625.50 in external legal costs in attempts to previously restrain Ms Webb under s.110 of the GIPA Act) in 2019 Port Stephens Council was required to increase the legal budget by $100,000 due to ongoing matters in this Tribunal relating to the respondents.[71]

181. Mr Wickham's evidence that the funds the Council has been forced to spend in managing Ms Webb and McEwan's conduct has meant Council funds could not be allocated to community assets and infrastructure, such as building public children's playgrounds, improvements to local community halls, and sporting field maintenance.[72]

The Department

182. Access applications lodged with the Department are managed and determined by the Open Government, Information and Privacy Unit ('OGIP'). OGIP received, during the 2023/2024 financial year, 3,350 formal access applications.[73]

183. The Director of the Department's OGIP team directs approximately 56 full-time officers to perform a variety of functions, including determining applications under the GIPA Act. The evidence demonstrates that processing the respondents' frequent and voluminous access application has diminished the ability of OGIP officers to perform their other functions as demonstrated by the backlog of access applications.

184. While OGIP has approximately 28 officers responsible for managing and determining GIPA applications, the roles of these officers are not limited to those tasks. They are also required to, for example, respond to subpoenas to produce issued to the Department, provide legal advice and represent the Department in various courts and tribunals, conduct internal reviews under the PPIP Act and provide information in response to applications to the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.[74]

185. On average, the processing time for a valid access application is approximately eight hours per application.[75]

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69 Affidavit of Mr Wickham at [110] to [111].
70 Affidavit of Mr Wickham at [122] to [123].
71 Affidavit of Mr Wickham at [79] and [94].
72 Affidavit of Mr Wickham at [80].
73 Affidavit of Mr Franklin at [42].
74 Affidavit of Mr Franklin at [42]-[44].
75 Affidavit of Mr Franklin at [47].

186. The Department, between 2021 and 2024, spent a total of approximately 118 hours processing access applications and informal requests lodged by the respondents.[76]

187. In addition to the access applications and informal requests lodged by the respondents, the Department has been required to manage and respond to the following matters arising from those access applications:
    (a) two GIPA internal review applications under s.82 of the GIPA Act;
    (b) nine external review applications with the Information Commissioner;
    (c) four external review applications to the Tribunal;
    (d) two Notices of Appeal to the Tribunal's Appeal Panel; and
    (e) one privacy internal review application under s. 53 of the *Privacy and Personal Information Protection Act* 1998.[77]

188. The Department spent a total of 564 hours managing these additional matters arising from the respondents' access applications.[78]

189. That total time of 682 hours is the equivalent period for determining approximately 85 access applications, noting the average time spent on each access application is eight hours. In other words, the Department's decision-makers have been diverted or delayed by those applications from deciding approximately 85 access applications from other members of the public during this time.

190. This has prejudiced its ability to fulfill its responsibilities under the GIPA Act to provide other applicants with access to government information.

191. Also, between 2021 and 2024, the Department spent a total of 2030 hours on approximately 100 different applicants who exercised their external review rights. The Department spent 511 hours of that time on the respondents' external review matters by the IPC and the Tribunal (being approximately 25% of all the hours the Department spent on external reviews).

192. Further, the cost and resourcing impact of each external review in the NCAT for the Department is on average approximately $15,000-$20,000 per matter and represents 20 hours per matter noting several senior employees, including the Director, are involved in the preparation and representation in each matter.

193. The Department is required to conduct its own external reviews because there is no budget for external legal expenditure where the Core Fund is not available. The Core Legal Work Guideline do not enable the Department to engage the Crown Solicitor's office unless the matter relates to (a) the best interests of the Government as a whole which requires a single source of authoritative legal advice and central management or (b) it relates to the statutory or common law functions of the Attorney General.[79]

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[76] Affidavit of Mr Franklin at [51].
[77] Affidavit of Mr Franklin at [50].
[78] Affidavit of Mr Franklin at [51].
[79] NSW Government Core Legal Work Guidelines at *https://arp.nsw.gov.au/assets/ars/49df5591a9/Core-Legal-Work-Guidelines.pdf*.

Goulburn Mulwaree Council

194. Goulburn Mulwaree Council has one staff member in its Governance Business Unit allocated to responding to access applications.[80] During the period 2022 to 2024, Goulburn Mulwaree Council received a total of 66 formal access applications and 1147 informal access applications from members of the public. Of those, as noted in the table in paragraph [136 above], 7 access applications and 6 informal requests were received from Ms Webb.[81]
195. Notably, there are only two staff who respond to these requests, being Ms Timothy and Ms Keegan, who is the staff member who responds to the vast majority of requests and access applications under the GIPA Act.[82]
196. Goulburn Mulwaree Council has spent 18 hours responding to Ms Webb's access applications and 3 hours responding to her informal requests.[83]
197. In addition to responding to Ms Webb's access applications, Goulburn Mulwaree Council has also been required to manage and respond to the following:
    (a) Ms Webb's application to the Tribunal for review of one of Council's decisions on her access applications, being *Webb v Goulburn-Mulwaree Shire Council [2023] NSWCATAD 194,*
    (b) five applications by Ms Webb to the IPC for external review of the Council's decisions on her access applications, and
    (c) two internal reviews to Council of Ms Keegan's decisions on her access applications.
198. In defending Ms Webb's application for external review before the Tribunal, Goulburn Mulwaree Council expended a total of $42,954.71:
    (a) $22,882.00 in external legal costs, and
    (b) approximately $20,072.71 for internal staffing costs.[84]
199. Goulburn Mulwaree Council has also spent an estimated $3,000.00 for internal staffing costs in responding to Ms Webb's external reviews with the IPC.
200. The respondents' access applications consumed Council's resources to a degree which prejudiced its ability to carry out other functions and prejudiced its ability to fulfill its responsibilities under the GIPA act to provide other applicants with access to government information.

80 Affidavit of Ms Timothy, at [34].
81 Affidavit of Ms Timothy, at [37].
82 Affidavit of Ms Timothy, at [36].
83 Affidavit of Ms Timothy at [40].
84 Affidavit of Ms Timothy at [43] to [44].

Respondents' conduct

Overview

201. Ms Webb is a fixated litigant. In the week of 9-17 September 2024 alone, Ms Webb had five separate sets of proceedings listed before this Tribunal.[85]
202. Ms Webb has:
    - put the applicants to disproportionate expense in terms of the amount of rate payer and taxpayer monies, time and staff resources required to deal with the respondents' access applications, and
    - actively and deliberately threatened and intimidated the officers of the applicants responsible for managing her access applications to pursue her preoccupation with alleged corruption in a public forum, and, in doing so prejudiced the applicants' functions to comply with their obligations to their staff under the *Work Health and Safety Act 2011* (NSW) ('**the WHS Act**') and provide a safe system of work.
203. The respondents' conduct is a factor to which the Tribunal is, in the applicants' respectful submission, required to give significant weight in determining whether to exercise its s.110 discretion: see the views of Mason J (as his Honour then was), cited at [102] above.
204. There is an increasing public recognition of the costs inflicted on government agencies by fixated persons, in the sense of both financial and work health and safety costs. There is also an increasing recognition that such persons pose a grave risk to public confidence in public institutions and government.[86]
205. As noted above at [7] and [24], Ms Webb's applications and conduct arose from her and Mr Ewan's decision to build a privacy screen at their former residence in Port Stephens without Council's approval.
206. The respondents, in order to identify who notified Port Stephens Council that they had constructed the privacy screen, initially made numerous access applications and sought internal and external review of Council's determination to refuse them access to that information.
207. Despite selling their former property in 2013, Ms Webb and Mr McEwan continued to lodge access applications relating to the property, DA and privacy screen, and made related complaints until 2020.
208. The respondents subsequently pursued, and continue, a sustained and vindictive course of conduct against Port Stephens staff whom they perceived as denying them approval for the privacy screen and subsequently with access to the information they sought.
209. Ms Webb has escalated her fixation to sustained and vindictive conduct against the Department's staff and the staff of Goulburn Mulwaree Council.

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85 Affidavit of Mr Franklin at [57].

86 See, for example, Nick Bryant, 'Democracy on the Ballot', 'Good*W*eekend', *Sydney Morning Herald*, 7 Sept 2024, pp.6-9, being **Annexure 2** to these submissions.

210. As noted at [154] above, Ms Webb's fixation recently culminated in a demand for a Parliamentary Inquiry into this Tribunal and the operation of the GIPA Act and the PPIP Act.
211. Ms Webb forwarded her demand to (among others), the Premier, the Leader of the Opposition, the Attorney General, the Shadow Attorney General, Mark Latham MLC, the *60 Minutes* program at Channel 9 and Radio 2GB.[87]
212. The spectrum of the respondents' conduct ranges from malicious libels and doxing (i.e. the public disclosure of people's images and personal information without their consent) to harassing and threatening behaviour. That conduct includes, for example,

    (a) posting self-proclaimed 'media releases' on the website, in which they publicly libel staff members of the applicants who have managed their access applications and/or represent them before this Tribunal; and

    (b) lodging applications to public sector agencies seeking personal information about officers with the intention of intimidating them by publishing baseless allegations about them on the 'NSW Freedom of Information' website. The applicants have been exposed to the following specific conduct by the respondents and, as a result, have been forced to take the precautions detailed below.

<u>Port Stephens Council</u>

213. The respondents' conduct towards Port Stephens Council has comprised of bombarding council officers with repeated, frequent and often abusive correspondence concerning the same subject matter within short periods of time and a protracted campaign over the last 13 years against Mr Wickham, Ms Lisa Marshall (the Council's Legal Services Manager), and Council and its staff, including Ms Webb's publication of 25 self-declared 'media releases' on the 'NSW Freedom of Information' website containing defamatory, false and unsupported allegations about Council staff. They include unsubstantiated and false allegations of corruption.[88]
214. Their prolonged and unreasonable conduct has created psychosocial hazards and risks at Port Stephens Council which has, on many occasions, obstructed Mr Wickham's ability to provide a safe working environment for himself and the staff he supervises.[89]
215. Port Stephens Council has been forced to use the following strategies to manage the respondents' behaviours, including Ms Webb's abuse of the officers managing her access applications.
    (a) Apply to this Tribunal on two occasions for s.110 orders to restrain her from making further access applications. The Tribunal dismissed Council's first

[87] Ms Webb's letter dated 8 Aug 2024 calling for a Parliamentary Inquiry, p.3. Affidavit of Mr Franklin, Tab 31, Exhibit JF-1.
[88] Affidavit of Mr Wickham at [72]-[73], [165] to [171] and [179] to [185].
[89] Affidavit of Mr Wickham at [71].

application in November 2017, however failed to take into account Ms Webb's conduct.[90] The Council's second application was successful.[91] However, the Tribunal's decision was remitted for re-determination by a differently constituted Tribunal on the grounds of apprehended bias.[92] The remitted application was dismissed.[93]

(b) Instructing its legal representatives to send Ms Webb a cease and desist letter in relating to her self-proclaimed 'media releases' published on the 'NSW Freedom of Information' website (which Ms Webb has ignored by posting further disparaging media releases).[94]

(c) Establish restrictions on Ms Webb's communications with the Council by limiting her dealings with it to written correspondence only addressed to certain Council officers.[95]

(d) Notifying Ms Webb that Council would consider issuing a formal restriction of service should her conduct continue.[96]

(e) Implement measures to assist in securing the personal safety of Council officers.[97]

<u>The Department</u>

216. Ms Webb's conduct toward the Department's officers has included the following.

(a) Ms Webb has published 15 self-declared 'media releases' on the 'NSW Freedom of Information' website containing false and unsupported allegations against officers of the Department's OGIP Unit. They include unsubstantiated allegations of corruption.[98] Ms Webb used these 'media releases' to 'dox' OGIP officers, including Ms Jodie Cobbin, Director of OGIP and Mr Franklin. Of these 15 media releases, 10 refer to Mr Franklin and include his full name, email address and telephone number. Another media release includes a historical photograph of Ms Cobbin culled from a local newspaper.[99]

(b) Ms Webb has threatened to report OGIP officers to regulatory bodies, for example, to the Office of the Legal Services Commissioner, for unspecified breaches of the *Australian Solicitors' Conduct Rules*.[100]

217. The Department has been forced to use the following strategies to endeavour to manage Ms Webb's behaviours, including her abuse of the officers managing her access application:

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90 *Port Stephens Council v Webb* [2017] NSWCATAD 341.
91 *Webb v Port Stephens Council; Webb Port Stephens Council; Port Stephens Council v Webb* [2020] NSWCATAD 81.
92 *Webb v Port Stephens Council* [2020] NSWCATAP 152.
93 *Port Stephens Council v Webb* [2021] NSWCATAD 180 and affidavit of Mr Wickham at [222]-[234].
94 Affidavit of Mr Wickham at [235] to [239].
95 Affidavit of Mr Wickham at [208] to [221].
96 Affidavit of Mr Wickham at [217].
97 Affidavit of Mr Wickham at [201].
98 Affidavit of Mr Franklin at [61] to [62].
99 Affidavit of Mr Franklin at [62] and Exhibit JF-1 at pp.258, 281 and 288.
100 Affidavit of Mr Franklin at [63] and [91]-[93].

(a) issuing a warning of its intention to restrict her ability to email the Department and limiting her to communicating via Australia Post, and

(b) deployed other strategies as referenced in the confidential evidence.[101]

Goulburn Mulwaree Council

218. As noted above at [25] and [145], Ms Webb and Mr McEwan appear to have never lived within Goulburn Mulwaree Council's LGA. Yet Ms Webb has unaccountably, and unreasonably targeted the staff of Goulburn Mulwaree Council, with vitriolic and unfounded allegations of corruption.

219. This conduct has had a significant impact on the health and well-being of Ms Keegan and Ms Timothy, noting that they are the only individuals who respond to access applications within Goulburn Mulwaree Council. That conduct has included the following:

(a) Ms Webb has published seven self-declared 'media releases' on the 'NSW Freedom of Information' website containing false and unsupported allegations against the Council's officers. Ms Webb has used those 'press releases' to 'dox' Ms Timothy and Ms Amanda Keegan (the Council's Information Access Officer) by publishing their direct contact details, which are not publicly available.[102]

(b) Ms Webb has directed abusive correspondence about Ms Timothy and Ms Keegan and correspondence to the Council, including the Mayor and Councillors, making false accusations against Ms Timothy.[103]

220. Goulburn Mulwaree Council has been forced to use the following strategies to try to manage Ms Webb's behaviours, including her abuse of the officers managing her access applications.

(a) Instructing its legal representatives to send Ms Webb a cease and desist letter in relation to her self-proclaimed 'media releases' published on the NSW Freedom of Information website (which letter Ms Webb posted on the website and otherwise ignored).[104]

(b) Establishing restrictions on Ms Webb's excessive and abusive communications with the Council by limiting her dealings with it to written correspondence only addressed to the general Council email address.[105]

Impact of the respondents' conduct on functions and the work, health and safety of staff

221. The applicants have finite resources needed to process the various access applications, information requests, subpoenas and statutory orders and other matters received.

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[101] Affidavit of Mr Franklin at [106] to [108] and [112].
[102] Affidavit of Ms Timothy at [70] to [71].
[103] Affidavit of Ms Timothy at [64] to [67].
[104] Affidavit of Ms Timothy at [91] to [94].
[105] Affidavit of Ms Timothy at [95].

222. Part of the applicants' core responsibilities include facilitating information sharing and responding to requests for information to assist members of the public. For the Department, most of its applicants are vulnerable people seeking information about their time in out of home care as a child, time spent in Youth Justice or adult correctional facilities, and homelessness. For example, the Department's commitments to Closing the Gap aims to reduce the rate of overrepresentation of Aboriginal and Torres Strait Islander ('**ATSI**') children in out of home care ('**OOHC**') noting half of all children in OOHC are ATSI and, their access to information is critical. Critically, delays in providing information for people who are in custody creates delays in trials and sentencing where information sought is relevant to the proceedings. The Department's backlog of access applications is directly related to handling the respondents' applications and conduct, which are adversely affecting the ability of the Department to comply with its obligations under the GIPA Act.[106]
223. If a s.110 order is not made, the applicants will continue wasting significant public funded resources, indefinitely, on the respondents' various applications, meaning that the time taken to efficiently respond to genuine information requests will be severely impacted. This would in turn significantly impact people's ability to access their own records in a timely manner.
224. Also, the functions of the applicants include ensuring that they are able to manage, by elimination or minimisation of risks, the health and safety of employees in the workplace.
225. The WHS Act provides a legislative framework that relates to all workplaces in NSW.
226. The objects of the WHS Act are set out in section 3 and specifically provide for "protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work…" Accordingly, the applicants' functions required by the WHS Act imposes a primary duty of care on employers "to ensure as far as reasonably practicable, the health and safety of workers…".
227. However, the health and safety of employees of the applicants have been threatened by having to deal with the respodents' oppressive and unreasonable behaviour. Their behaviours have resulted in staff feeling distressed and harassed.
228. The applicants submit that the respondents' conduct be given significant weight. The conduct has created very serious and very real risks of stress and psychological injury to staff. There are also genuine concerns that employees will lodge work cover claims or suffer from stress and anxiety from dealings with the respondents on an ongoing and indefinite basis. Further, if the s.110 order is not made, the applicants will continue to make unmeritorious access applications indefinitely given their lengthy history of doing so since 2011 and the egregious conduct they have engaged in since then in relation to those applications.

[106] Affidavit of Mr Franklin at [58] to [60].

229. The Ombudsman's report considered that 'unreasonable complainant conduct' may manifest in such ways that: "unreasonably impact on the resources of agencies, create significant equity considerations in relation to the ability of other applicants to exercise their rights and sometimes adversely impact on the health and welfare of agency staff."[107]
230. Noting the Ombudsman's report is considered the source of s.110, the demonstrated impact of the respondents' conduct on the health and welfare of the applicants' employees should be attributed significant weight when considered in combination with the significant impact on their resources and ability to fulfil their obligations under the GIPA Act.

PART 6: BALANCING EXERCISE

231. The Tribunal, as noted at [20] and [110] above, is required to conduct a balancing exercise between an individual's right to be provided with access to government information against exercising the discretion in s.100 so as to align with the objects of the GIPA Act. As part of that exercise, the Tribunal may, in an appropriate case, act "by restraining conduct that misuses the right of access to government information through the making of unmeritorious access applications": see the judgment of Dinnen SM in *Department of Education v Zonnevylle* [2020], cited at [56] and [100] above. That too is part of the object of the GIPA Act.
232. The right of members of the public to access government information promptly and at the lowest reasonable cost as required by the object of the GIPA Act is an important right. The GIPA Act, and its Commonwealth and New South Wales predecessors, were introduced to strengthen democracy here by increasing the accountability of the executive branch of government to the people.[108]
233. The GIPA Act, however, does not provide an unlimited right of access to government information.
234. Parliament included s.110 in the GIPA Act to provide the Tribunal a mechanism for placing a procedural condition on the right of access to government information where agencies are affected by unmeritorious access applications. In appropriate cases, the Tribunal can interpose that procedural condition so that the agency is able to provide its services effectively for the benefit of the pubic as a whole, rather than disproportionately for one person.
235. The Tribunal, when exercising the s.110 discretion in this matter, must be satisfied that the impact on the s.110 order on the respondents is proportionate to the interests which the

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[107] New South Wales Ombudsman, *Opening up government: Review of the Freedom of Information Act 1989,* A Special Report to Parliament under s.31 of the Ombudsman Act 1974, February 2009 at <https://www.ombo.nsw.gov.au/reports/report-to-parliament/opening-up-government-review-of-the-freedom-of-information-act-1989>. See *Pittwater Council v Walker* [2015] NSWCATAD 34 at [64]-[67].

[108] Moira Paterson, *Freedom of Information and Privacy in Australia: Government and Information Access in the Modern State*, LexisNexis Butterworth, Chatswood, 2005, pp.2-7.

Tribunal is seeking to protect (i.e. the interests of the applicants which they say are prejudiced by the respondents' access applications and related conduct).

236. The applicants submit that given the respondents have not for the most part, sought access to their own personal information or information of demonstrable importance to them or, more broadly, to the public, the impact of the s.110 order on them would be minimal.

237. The conduct of public officers is a matter of public interest. However, as described in [7], [112], [153], [213], [216] and [218]-[219], the respondents' applications have followed the making of false complaints and relate to unfounded assertions of corruption. They have also been intended as 'fishing expeditions' lodged in the hope of finding something that would support their preoccupation with allegedly corrupt conduct of public officers who have declined to provide them with access to information on the grounds provided by the GIPA Act. Again, despite 225 access applications and informal requests, no such information has been released, because it does not exist.

238. The respondents' preoccupation with allegedly corrupt conduct of public officers cannot justify the significant resources expanded by the applicants in responding to their access applications and the diversion of officers from other duties, including dealing with access applications lodged by other persons.

239. In applying the proportionality analysis (see [235] above) it is clear that the respondents' access applications have had a substantial impact on the applicants' ability to efficiently manage and allocate the limited resources available to perform their functions under the GIPA Act. The applicants rely on the evidence of Mr Wickham, Ms Timothy and Mr Franklin detailing the:

    (a) significant impact the respondents' baseless and vindictive course of conduct has had on the wellbeing of the applicants' officers and the applicants' obligations to provide a safe system of work to ensure their health and safety, and

    (b) considerable burden the frequency and scale of the respondents' access applications has had on the resources of each agency.

240. That evidence provides a detailed overview of Ms Webb's conduct and how she has made libellous allegations in public against officers with no right of reply, for no apparent reason other than, inferentially, Port Stephens Council called her to account for building a privacy screen without its approval. Whatever preoccupation has triggered Ms Webb, it has exacted a significant impact of the health and wellbeing of those officers and the reputation of their respective agencies.

241. Mr Franklin gives evidence that Ms Webb's applications have had a significant impact on the Department's resources, and her conduct has negatively affected staff in the OGIP Unit.[109] In Mr Franklin's view, if the s.110 order is not made, Ms Webb's conduct will

[109] Affidavit of Mr Franklin at [75], [77], [85], 91] and [92].

continue to escalate, and she will become more fixated with the Department's officers.[110] Mr Franklin notes that Ms Webb continues to lodge unmeritorious access applications with the Department. In December 2024, the Department determined to refuse to deal with an access application submitted on the DraftCom letterhead and signed by Ms Webb (reference GIPA24/4341).[111]

242. Mr Wickham gives very similar evidence. In his view, the s.110 order is necessary to protect Port Stephens Council's staff from Ms Webb's "egregious and relentless campaign of behaviour" and to allow the Council's funding and resources to be used on other functions and community assets as intended.[112]

243. Ms Timothy gives similar evidence, observing that if the s.110 order is not made, she expects Ms Webb will continue to lodge applications for information of the kind and continue to engage in the same conduct as summarised above at [218]-[219].[113]

244. That evidence also provides a significant level of detail about the resources that have been allocated in dealing with the respondents' access applications by each of the applicants, including significant hours spent responding to them and conducting enquiries about them. The nature of the respondents' access applications and Ms Webb's conduct has resulted in the diversion of senior members of staff from their regular duties.

245. It is highly unlikely given the period of time since the first GIPA application was lodged by the respondents that their applications or fixated conduct will stop without a method of intervention.

246. The applicants submit that, in weighing these matters, the balance favours making the s.110 order in the terms sought by the applicants against the respondents. This is clearly a case where the object of the GIPA Act "would be served by restraining conduct that misuses the right of access to government information through the making of unmeritorious access applications."[114] Given the respondents' history of making frequent and unmeritorious access applications, the Tribunal should exercise its discretion to restrain them from making further unmeritorious access applications so as to protect the:

    (a) ability of the applicants to comply with their obligations under the GIPA Act with respect to the public generally;

    (b) applicants' functions and interests including the protection of their limited resourcing and,

    (c) so as to limit the impact of their conduct on the health and safety of the applicants' officers.

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110 Affidavit of Mr Franklin at [117].
111 Affidavit of Mr Franklin at [117].
112 Affidavit of Mr Wickham at [240] to [244].
113 Affidavit of Ms Timothy at [97] to [99].
114 *Department of Education v Zonneylle* [2020] NSWCATAD 96 at [19].

PART 7: CONFIDENTIAL EVIDENCE

247. A confidential version of each of the affidavits of Mr Wickham, Mr Franklin and Ms Timothy has been filed with the Tribunal in sealed envelopes marked:
    (a) "Confidential version of the Affidavit of Tony Wickham affirmed 12 December 2024,"
    (b) "Confidential version of the Affidavit of Jonathan Ian Franklin affirmed 13 December 2024," and
    (c) "Confidential version of the Affidavit of Maria Timothy affirmed 12 December 2024."
248. The Department has served on the respondents copies of these affidavits in which the confidential paragraphs have been redacted.
249. The applicants rely on this evidence from Mr Wickham, Mr Franklin and/or Ms Timothy and/or make submissions, about the matters to which they depose on a confidential basis, and seek orders under s.64(1) of the CAT Act in respect of the adducing of parts of any such evidence and making any submissions (written or oral) on a confidential basis.
250. Section 64 provides:

> **"64 Tribunal may restrict disclosures concerning proceedings**
>
> (1) If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders—
>
> (a) an order prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),
>
> (b) an order prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal,
>
> (c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,
>
> (d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings."

251. The Tribunal is required to consider the principles of open justice and procedural fairness when determining whether to make an order under s.64(1).[115]

[115] *Grant v Commissioner of Police* [2020] NSWCATAD 158 at [24].

252. Section 38(2) of the CAT Act binds the Tribunal to the rules of natural justice. What is appropriate in terms of natural justice depends on the particular statutory framework and circumstances of the case, including the nature of the inquiry and the subject matter.[116]

253. In *Pendrick v Commissioner of Police (No 2)*, Lucy SM identified the principles which apply when deciding whether to exercise the discretion under s.64(1), observing:

> "…the power to prohibit or restrict the disclosure of evidence to a party is to be exercised, albeit sparingly, for the purposes of securing to the Tribunal the availability of as much relevant information as possible, without violating the confidentiality which a party, a witness or the public in properly entitled to preserve."[117]

254. In *Metleg v Commissioner of Police* [2021] NSWCATAD 358, Gatland SM observed at [38]-[39] (citations omitted):

> "In making orders under CAT Act, s.64(1) the Tribunal is required to deliberate on whether and to what extent any restriction on disclosure concerning its proceedings is desirable, having regard to the factors set out in the provisions and the basic common law precept of open justice and matters relevant to each particular case …
>
> The word 'desirable' necessarily has prominence in guiding the tribunal on the use of these restrictions. The principle of open justice is of course key …though that principle is not the sole considerations…and the Tribunal's powers to make the suppression orders are less constrained than a court considering similar matters at common law…"[118]

255. The applicants submit the Tribunal would be satisfied that orders under s.64 are 'desirable' in these proceedings in relation to the confidential paragraphs of Mr Wickham, Mr Franklin and Ms Timothy's affidavits and submissions relevant to those paragraphs that may be made subsequently because:

(a) the confidential evidence adduced by them establishes the sensitive nature and potential risks involved with the disclosure of those paragraphs, particularly noting Ms Webb is likely to publish any material she gains access to on her web page as part of a campaign: and

(b) any procedural unfairness to the respondents has been mitigated by addressing the general substance of the confidential paragraphs in these written submissions at paragraphs [42(c)], [112], [212], [227]-[228] and [239]-[240] above.

257. Any resulting denial of procedural fairness that would arise from making orders under s.64 of the CAT Act is not a reason not to refuse to make such orders. The Tribunal has recognised that s.64 of the CAT Act implicitly envisions that the rule of procedural farness

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116 *Kioa v West* (1985)159 CLR 550 per Mason J (as he then was) at 584-585.
117 *Pendrick v Commissioner of Police (No 2)* [2022] NSWCATAD 27 at [130].
118 *Metleg v Commissioner of Police* [2021] NSWCATAD 358 at [38]-[39] and [41].

will be altered (or even 'denied') where orders are made pursuant to it.[119] In any event, the applicants submit that any resulting denial of procedural fairness to the respondents in these proceedings is limited because the applicants have made a confined application under s. 64 which is limited to only that material over which confidentiality is necessary (not merely desirable) in order to avoid further potential impacts on staff of the kind described in the confidential paragraphs.

PART 8: ORDER SOUGHT

258. The applicants submit that the Tribunal should make an order under ss.110 (1) and 110(3) of the GIPA Act that the respondents indefinitely not be permitted to make an access application to any agency under the GIPA Act whether solely on their own behalf or acting jointly, or in concert with any other person or entity without first obtaining the Tribunal's approval.

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[119] *Grant v Commissioner of Police* at [24].

ANNEXURE 1

Acting in Concert – Similar applications by Ms Webb and Mr McEwan

McEwan PS Council Applications	Webb PS Council Applications	Details
PSC2016-01633 MCEWAN **Scope:** A full and unedited copy of all the **objecting submissions and attachments for the DA NO: 483/2011**, including the original DA and subsequent 82a Requests for Review.	PSC2016-00216 WEBB **Scope:** A full and unedited record of the dates Council consulted with third parties **regarding the objecting submissions to the DA NO: 483/2011**, specifically relating to only those persons who are not employed by Council in any capacity including on a sub-contractual basis.	Similarities include: • Identical cover letter • Structure of application (e.g.) request, scope.
PSC2019-04987 MCEWAN **Scope:** Unredacted **Secondary Employment & Pecuniary Interest Registers** – 2010 to date. All documents generated from this request.	PSC2018-02026 WEBB **Scope:** I am requesting a complete and unedited copy of the **Secondary Employment Register** from 2008 to date. Council has confirmed this information is currently held by it.	Similarities include: • Identical request for *'secondary employment register'*. However, varies in date range by 2 years.

McEwan PS Council Applications	Webb PS Council Applications	Details
PSC2020-04244 MCEWAN **Scope:** **Copy of all Council records relating to the Tribunal Decision of 27th March 2019** to all third parties. I understand correspondence was exchanged between Council and third parties in May 2019 resulting in a total of (10) ten documents. Council will recall the documents in question were generated the result of Tribunal Orders, in relation to my valid request for Open Access Information Mandated for Release, that is the Objecting Submission to the DA No: 483 of 2011 (PSC2016-01633 - NCAT2016-378193).	PSC2019-02506 WEBB Scope: This formal GIPA application requests a copy of **ALL Council records pertaining to the Tribunal Decision of 27th March 2019 to ALL third parties.** That is ALL correspondence from 27th March 2019 to date. For the purposes of this request I have therefore only considered documentation that was sent to or received by third parties. The scope of the application dictated the timeframe is 27 March 2019 until the receipt of this application 4 June 2019.	Similarities include: • Identical request for *'all council records pertaining to the Tribunal Decision of 27th March 2019'.*

McEwan PS Council Applications	Webb PS Council Applications	Details
PSC2024-01842 MCEWAN **Scope:** A full and unedited copy of each and every case management record uploaded to the IPC GIPA Tool.	PSC2024-01840 WEBB **Scope:** A full and unedited copy of each and every case management record uploaded to the IPC GIPA Tool. .	Similarities include: • Identical request • Remittance advice attached shows application fee paid within 2 minutes of each other – Webb paid on 8 May 2024 at 10:32AM and McEwan paid on 8 May 2024 at 10:34AM.

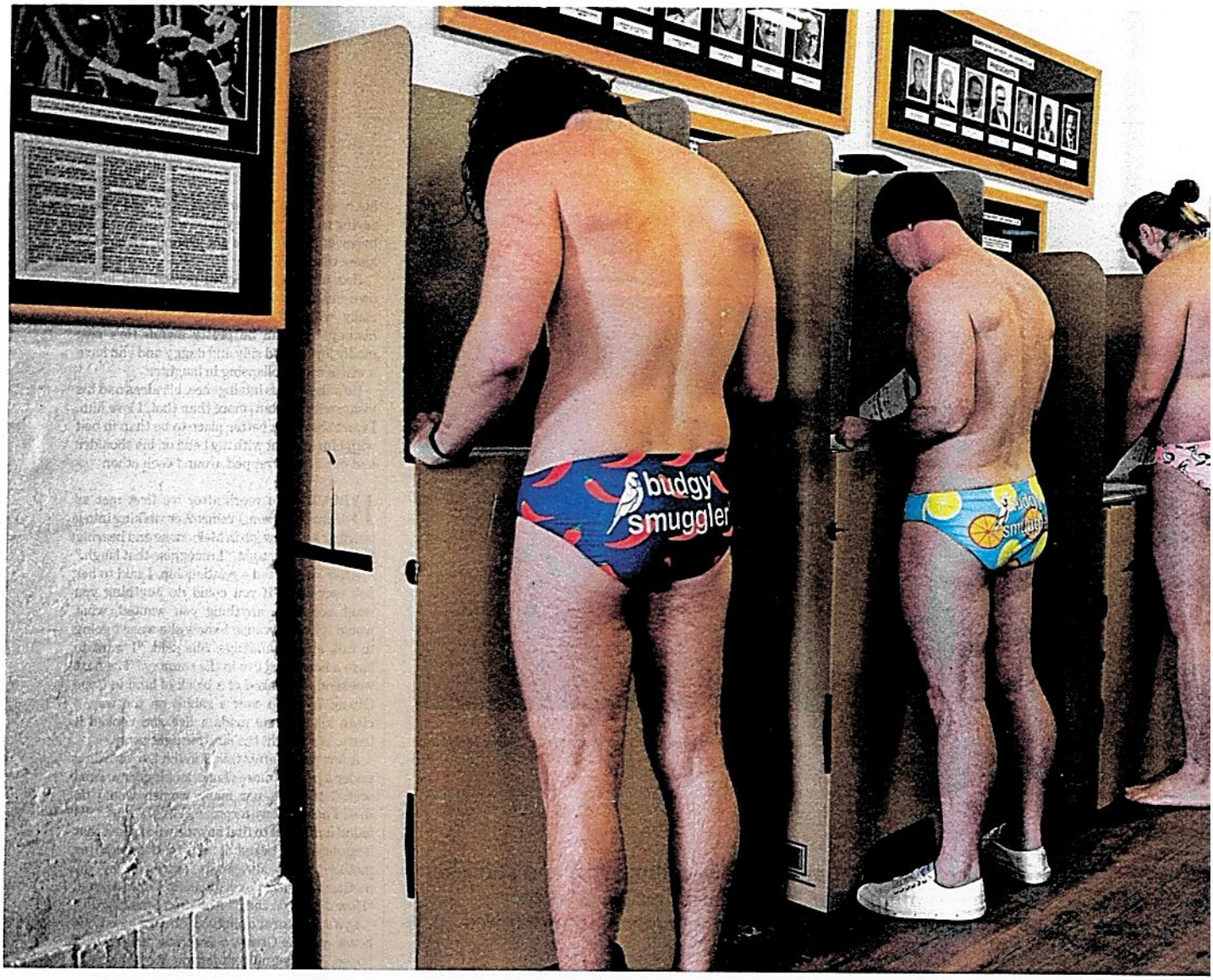
Similarities between applications lodged by Ms Webb with DCJ and PS Council

DCJ Applications	PSC Applications
GIPA21/1363 **Scope:** Applicant requested: 1. **NCAT Matter No: 2017 – 153702 – Port Stephens Council v Webb (2017) NSWCATAD 341** a. Copy and / or disclosure of the expenditure incurred by Justice NSW and / or NSW Attorney General's Department for all work conducted by staff inclusive of the NCAT's Dr Lucy the presiding member for this matter. b. I expect such costs to be separately highlighted. c. I do not expect provision of hourly rates or any information that might be considered prejudicial or of a commercially sensitive nature, however I am seeking the total costs in relation to this matter. 2. **NCAT Matter No: 2019 – 380640 - Webb v Port Stephens Council; Webb v Port Stephens Council; Port Stephens Council v Webb (2020) NSWCATAD 81 -** Note: But for that part which only relates to the Section 110 proceedings a. Copy and / or disclosure of the expenditure incurred by Justice NSW and / or NSW Attorney General's Department for all work conducted by staff inclusive of the NCAT's Mr Marks the presiding member for this matter. b. I expect such costs to be separately highlighted. c. I do not expect provision of hourly rates or any information that might be considered prejudicial or of a commercially sensitive nature, however I am seeking the total costs in relation to this matter.	PSC2021-02448 **Scope**: Financial and Associated Records – GIPA Act 2009 Section 110 Applications for Restraining Orders. **1. NCAT Matter No: 2017-153702 – Port Stephens Council v Webb (2017) NSWCATAD 341** • Copy of all invoices issued by legal service(s) provider(s). These documents are expected to have the hourly charge-out rate redacted but are expected to have the totals on each invoice unredacted. • Copy of all remittance notices confirming payment has been made, expected to accurately correlate to the invoiced amounts. • Copy of documentation requesting approvals for those expenditures. • Copy of the approvals for those expenditures. **2. NCAT Matter No: 2019-380640 – Webb v Port Stephens Council; Webb v Port Stephens Council; Port Stephens Council v Webb (2020) NSWCATAD 81** • Note: but for that part which only relates to the Section 110 proceedings. • Copy of all invoices issued by external legal service(s) provider(s). These documents are expected to have the hourly charge-out rate redacted but are expected to have the totals on each invoice unredacted. • Copy of all remittance notices confirming payment has been made, expected to accurately correlate to the invoiced amounts. • Copy of documentation requesting approvals for those expenditures. • Copy of the approvals for those expenditures.

3. **NCAT Matter No: AP 2020 – 15087 – Webb v Port Stephens Council (2020) NSWCATAP 152** a. Copy and / or disclosure of the expenditure incurred by Justice NSW and / or NSW Attorney General's Department for all work conducted by staff inclusive of the NCAT's Deputy President Hennessy and Principal Member Pearson the presiding members for this matter. b. I expect such costs to be separately highlighted. c. I do not expect provision of hourly rates or any information that might be considered prejudicial or of a commercially sensitive nature, however I am seeking the total costs in relation to this matter. 4. **NCAT Matter No: 2019 – 380640 – Port Stephens Council v Webb (2021) NSWCATAD 180** a. Copy and / or disclosure of the expenditure incurred by Justice NSW and / or NSW Attorney General's Department for all work conducted by staff inclusive of the NCAT's Senior Member Goodwin the presiding member for this matter. b. I expect such costs to be separately highlighted. c. I do not expect provision of hourly rates or any information that might be considered prejudicial or of a commercially sensitive nature, however I am seeking the total costs in relation to this matter.	**3. NCA Matter No: 2020-15087 – Webb v Port Stephens Council (2020) NSWCATAP 152** • Copy of all invoices issued by external legal service(s) provider(s). These documents are expected to have the hourly charge-out rate redacted but are expected to have the totals on each invoice unredacted. • Copy of all remittance notices confirming payment has been made, expected to accurately correlate to the invoiced amounts. • Copy of documentation requesting approvals for those expenditures. • Copy of the approvals for those expenditures. **4. NCAT Matter No: 2019-380640 – Port Stephens Council v Webb (2021) NSWCATAD 180** • Copy of all invoices issued by external legal service(s) provider(s). These documents are expected to have the hourly charge-out rate redacted but are expected to have the totals on each invoice unredacted. • Copy of all remittance notices confirming payment has been made, expected to accurately correlate to the invoiced amounts. • Copy of documentation requesting approvals for those expenditures. • Copy of the approvals for those expenditures.
GIPA23/666 **Scope:** Applicant requested: • A copy of the **case management data records on the IPC GIPA Tool** for each of your and/or NSW Freedom of Information's formal access applications *processed and/or lodged with* the NSW Department of Justice	WEBB **Scope:** A full and unedited copy of each and every **case management record uploaded to the IPC GIPA Tool.**

GIPA23/1885 **Scope:** Applicant requested: • Full and Unredacted copy of Documentation setting out the terms of employment of Amol Mane at that time, including date of commencement and cessation. • Full and Unredacted copy of Documentation setting out the parameters of employment / job description of Amol Mane at that time. • Full and Unredacted copy of Documentation setting out what updates were performed by Amol Mane at that time. • Full and Unredacted copy of Documentation setting out Amol Mane's authority to access the GIPA DATA Tool.	PSC2023-00112 **Scope:** 1. Full disclosure and/or unredacted copy of the terms of engagement and/or employment of Amol Mane. 2. Full disclosure and/or unredacted copy of the security approvals for access to the IPC GIPA Tool by Amol Mane. 3. Full disclosure and/or unredacted copy of the modifications to both the files by Amol Mane, both noted to have occurred on 18th August 2017, both apparently actioned at the same time of 7.36am.

ANNEXURE 2



☑ DEMOCRACY ☐ ON THE ☑ BALLOT

Australia has imported a lot from the UK and the US but our home-grown election system is the envy of the Western world. Will it be enough to inoculate us from AI, fake news and other threats to our way of life?

BY *Nick Bryant*

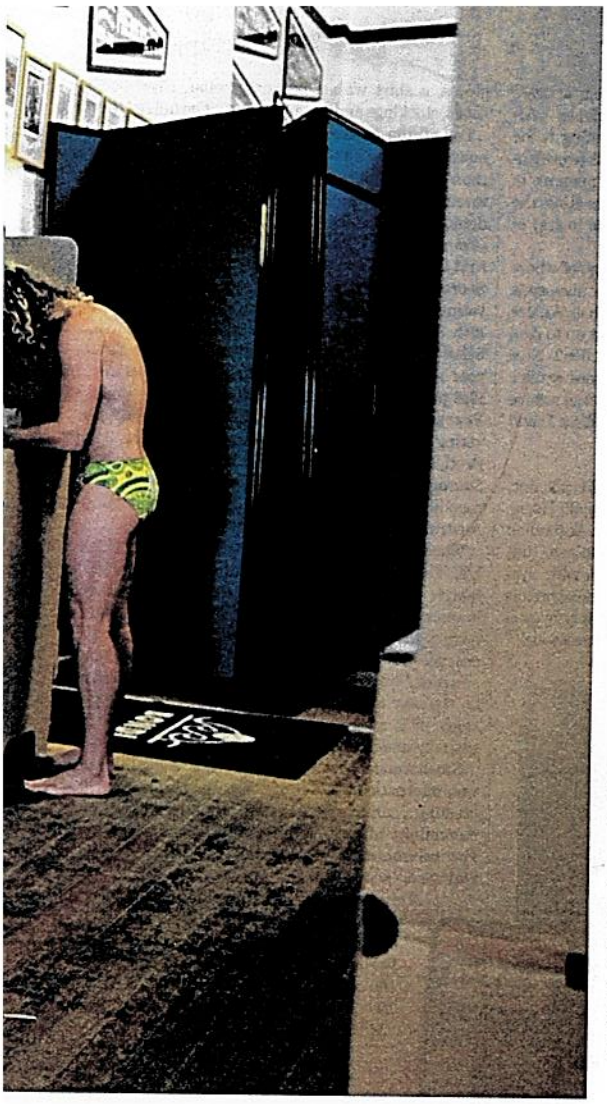
THE LETTERS arrive at the rate of a dozen a week, addressed to the headquarters of the Australian Electoral Commission (AEC) in Canberra but omitting the official title of the intended recipient, the Australian Electoral Commissioner, Tom Rogers. "When they write to me, they'll write something like, 'To the man Tom Rogers doing business as the fake election commissioner' or 'Tom of the family Rogers, the living man'," he says. "They're always signed with red thumbprints and use archaic language directly out of the US."

Most are penned – and thumbed – by "SovCits", as they are sometimes called. Activists aligned with the sovereign citizen movement, a loose group of extreme libertarians who disavow the very concept of the Australian state and who distance themselves from societal institutions. Many refuse to pay taxes or obtain driving licences. The idea of compulsory voting is repellent to them.

"Some are quite mad," says Rogers. "If we've tried to enrol them, quite often they include an invoice for $20,000 for opening the letter from the fake government. It's completely bonkers."

Over the 11 years he's been in charge of overseeing Australia's elections, Rogers has witnessed a worrying uptick in what he calls "tinfoil hat-wearing" conspiratorialism. "On one level you think it's only a dozen letters a week, frankly who cares?" he says. "But it's a bit of a worry that I'm getting that much stuff."

7/9/24



Left and above: voters at Sydney's Bondi Beach; (top) democracy sausages on Voice referendum day. "Voting for us is a family occasion, a duty fulfilled, as often as not, on the way to the beach ... an obligation, but a light one, a duty casually undertaken," said writer David Malouf.

The world over, democracy is under attack. On January 6, 2021, a sitting American president, who hopes to become the next US president, incited an insurrection aimed at violently overturning the result of a clear-cut presidential election. In Brazil on January 8, 2023, supporters of the far-right former president Jair Bolsonaro carried out a copycat attack in the country's capital, Brasília, after this "Trump of the Tropics" had also been defeated at the polls. The war in Ukraine is an emblematic struggle between freedom and autocracy. The new cold war pitting the US against China is framed in the same epochal terms. Foreign interference, from bad actors like Russia and China, is where threats to democracy become threats to national security. The world's richest man, Elon Musk, has become a super-spewer of misinformation through his social media platform X (formerly Twitter), a billionaire who has not only disrupted the economy but been accused of destabilising democracy. The rise of generative artificial intelligence will propagate the mind poison.

The body politic here is hardly immune. Adopting a Fortress Australia mentality, moreover, offers little protection from the contagion. Just consider what unfolded during the COVID-19 pandemic. In Melbourne, anti-lockdown protests paraded a gallows through the streets, seemingly mimicking the January 6 insurrectionists. Some pissed on the Shrine of Remembrance, the city's holiest shrine. Right-wing politics in Australia has also become more Trumpian. Scott Morrison's secretive multi-ministerial power grab flouted the Westminster tradition of open government. After meeting Donald Trump at Trump Tower in May, he posted on social media that the former president had been subject to a "pile on", seemingly dismissing the rap sheet against him, including criminal charges relating to the storming of the US Capitol, the attempt to overturn the election.

Ahead of the Voice referendum, the present Liberal leader questioned the integrity of the poll. Peter Dutton complained the vote was being "rigged" because the AEC ruled that a tick would likely count as a "yes" but a cross would not be counted as a "no". Yet the decision adhered both to precedent and the strict letter of electoral law.

So at a time when the electoral process is coming under assault on so many fronts, both foreign and domestic, maybe we should be grateful that the ramparts of Australian democracy are manned by a former soldier. Rogers, who grew up on Sydney's lower north shore, is a graduate of the Royal Military College, Duntroon, and served for 20 years as an officer in the Australian Army. For a time he commanded a UN peacekeeping mission in the Israeli-occupied Golan Heights. Both a strategist, peering at the horizon for long-term threats, and a tactician, responding to day-to-day attacks, Rogers draws inspiration from Australia's most revered military commander, General John Monash. He tells the story of how, during the Great Depression, a group of disgruntled veterans urged Monash to lead a military coup. "He shot them down straight away," says Rogers. "He said the future of Australia relies on the ballot box and an educated electorate. I've always thought of that, and the two components of that. Not just the vote, but providing citizens with the information they need to vote."

Combating misinformation and disinformation now consumes much of the Commission's bandwidth. Ahead of the 2022 federal election, the AEC had to rebut claims that Dominion Voting Systems voting machines would be used to rig the vote. "THE ELECTION STEAL – FIX IS IN," read a post on Facebook in October 2021, from an account called Seaman John, which got dozens of shares and more than 100 reactions. "AEC to accommodate the utterly corrupt and discredited Dominion Voting Systems – in our next National Election." It was a local iteration of the Trump conspiracy theory that had been libellously amplified by Rupert Murdoch's Fox News, which had to pay the Colorado-based company a staggering $US787 million to settle the defamation lawsuit before it went to trial. Yet as Rogers wearily points out: "If you have ever been into an Australian polling booth, you will know that we don't use any voting machines. Never have, never will. It would be unlawful and illegal."

Another canard put out by conspiracy-mongers was that the AEC was using outsourced vote-counting software vulnerable to manipulation. Yet every vote is counted by AEC staff at designated AEC venues. Also, there were allegations of voter fraud, after rumours spread that ballot papers had been found near rubbish bins in Port Macquarie. The concocted image, sent to a radio station in Sydney, featured some bona fide AEC ballot papers, which might have been discarded by people who chose not to vote. Others, however, were clearly fake – photocopied on the wrong shade of green paper.

Of all the conspiracy theories, perhaps Rogers' favourite was the furphy that voters should not use pencils because the AEC would erase their votes. It came on social media with the hashtag #usepen. "I had some gigantic rubber that I was going round after

hours erasing 17 million votes," laughs Rogers. "These are nutty mad conspiracy theories that people pick up overseas and smear across what you are doing."

It was around 2013 that Rogers first noticed an escalation in conspiratorialism, which he ascribes to the rise of social media platforms such as Twitter, as X was then known. In 2016, the year of Donald Trump's shock victory, his concerns grew about the threat from misinformation. Not only was it a question of safeguarding Australia against foreign interference from countries such as China, Iran and even India, but foreign infection from its closest ally, the United States. Protecting the reputation of the AEC became paramount. "What they were seeing overseas was not a failure of electoral administration, it was a failure of reputation. People were deliberately sowing doubt about the validity of electoral results. I've got this very strong view that elections are part of national security. Trusting election results is what democratic legitimacy rests upon, so we really went to town."

Going to town meant establishing the electoral equivalent of a special forces detachment, the Defending Democracy Unit, which was tasked with protecting the AEC's reputation. Around the world, the AEC is seen as the gold standard in electoral administration, and within Australia it is widely regarded as unimpeachable. Nine out of 10 citizens say they trust how it carries out its work.

At the heart of its reputation management strategy is pre-bunking, as opposed to debunking – countering conspiracy theories before they take flight. The AEC set up a disinformation register, rebutting every fallacious claim that appeared on its radar. It raised its game on social media, that cesspit of disinformation. In 2019, it also set up its own YouTube channel, AEC TV. "It sounds very grand," says Tom Rogers. "It's effectively a series of videos filmed in a cupboard with a backdrop. Where we see one of these conspiracy theories online, we will immediately cut one of these videos with one of our experts talking about the actual facts, bang it online straight away and promote it on social. You've got to do it quickly. That's the thing."

By responding rapidly – counter-attacking, in effect – during the Voice referendum campaign, Rogers was able to quickly refute Dutton's dangerous comments about vote-rigging. In robust terms, the AEC "completely and utterly" rejected the claim it was acting unfairly, and complained the criticism was "based on emotion rather than the reality of the law". When I raise Dutton's comments, Rogers treads gingerly. "I think we're all responsible for our own statements" is all he will now say.

YET ANOTHER countermeasure is the Stop and Consider campaign, introduced ahead of the 2019 federal election, which Rogers says was "shamelessly stolen" from Sweden. "They ran a campaign, 'If it makes you angry, it is probably fake.' I really liked that as a tag line, and we did some testing and it didn't quite fly. So we came up with Stop and Consider." This public education campaign, promoted on all the AEC's social media platforms, urges voters to be wary of what they are seeing, reading and hearing. Is it from a reliable source? When was it published? Could it be a scam?

"It's about getting citizens to consider how they consume information, especially at election time," says Rogers. "We need to raise the level of digital competence among our citizens to give them the skills they need to work through this. Voters need to understand what is going on in the information ecosystem. We'd be foolish to think in Australia we are immune to these global trends that we have seen in other countries. That's being turbocharged by the rise of artificial intelligence."

The rise of AI unquestionably elevates the threat level. A recent report from NewsGuard, a US-based organisation which counters misinformation, found that between May and December 2023, online sites misleadingly hosting mostly AI-generated articles increased from 49 to more than 600. Deepfakes – AI-generated video, images and audio purporting to be real – have already been deployed in the US presidential election. Ahead of the New Hampshire primary in January, voters received phone calls fabricating the voice of President Biden. Fake Joe told them to stay at home rather than vote.

"I think we're operating at the cutting edge of where our legislation is," says Rogers, "but I've also gone public and said that new developments, such as AI, are complex, and that the Election Act is not set up to deal with that. And technically, internally, we don't have huge computers here in the basement where we are able to detect AI." It speaks of the asymmetrical nature of the battle. AEC TV up against AI feels like a David versus Goliath mismatch.

> "We don't have huge computers here in the basement where we are able to detect AI."

Above: Australian Electoral Commissioner Tom Rogers says some of the letters he receives are "quite mad". Right: the Cranky Uncle app aims to counter dangerous disinformation.

IN HIS scorching 1964 polemic, *The Lucky Country*, Donald Horne not only complained that Australian politicians were second-rate but that the country's democratic system was second-hand. "Australia is a lucky country run mainly by second-rate people who share its luck," is the quote that has echoed down the decades. But it was the beginning of his largely neglected next line that got to the nub of Horne's thesis: "It lives on other people's ideas." Horne bemoaned how Australia was lazily imitative, inheriting and mimicking Britain's system of governance. As he later explained: "I had in my mind the idea of Australia as a derived society."

Canberra appeared to prove his critique. Though the nomenclature of the House of Representatives and Senate was imported from Washington, much of the furniture looked like it had been shipped in from Britain. The green-and-red leather benches in Parliament House were modelled on those of the Palace of Westminster. As in Britain, *Hansard* provided a verbatim record of parliamentary proceedings. Old Parliament House could boast a near-replica of Augustus Pugin's Speaker's Chair in the Commons, replete with arm rests incorporating timber from Horatio Nelson's HMS Victory and a royal coat of arms hewn out of oak from Westminster Hall. To this day, a golden mace, gifted by King George VI, is carried in procession ahead of every sitting day by the Serjeant-at-Arms, who used to don on ceremonial occasions a pair of white gloves, a shirt with a butterfly collar, silver-buckled shoes, stockings and knee-breeches. The full *Bridgerton*.

For all the ceremonial and procedural similarities, however, Horne's thesis was too self-belittling. Rather than being imitators, Australians have been the inventors of an emphatically homegrown version of democracy. In 1902, with the passage of the *Commonwealth Franchise Act*, Australia became the first country where women could stand for parliament. Secret voting, through ballot papers and closeted voting booths, was taken up in America in the late 19th century, where it was called "the Australian ballot". Though it initially copied the first-past-the-post system used in UK parliamentary elections, in 1918 preferential voting was adopted for the House of Representatives. On October 10, 1924, compulsory voting was signed into law. As the historian Judith Brett has written in *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting*: "In the second half of the 19th and early 20th centuries, Australia led the world in electoral reform."

Weekend polling also sets it apart from the US and UK. From the sausage sizzles to voters turning up in budgie smugglers and bikinis, the electoral experience is quintessentially Aussie. The writer David Malouf, during his 1998 Boyer Lectures, neatly distilled the essence of Saturday elections. "Voting for us is a family occasion," he observed, "a duty fulfilled, as often as not, on the way to the beach, so that children early get a sense of it as an obligation, but a light one, a duty casually undertaken."

Small wonder that Australia's way of doing things has won international acclaim. "Australia has succeeded in creating a culture of celebration around elections as full-community affairs," wrote the influential *Washington Post* columnist E. J. Dionne jnr and Miles Rapoport, a Harvard academic, in their 2022 book, *100% Democracy*. As well as emulating the spirit of Australian democracy, they hoped that America would ape its model of compulsory participation. "The United States adopted the secret ballot after Australia tried it first," they wrote. "We should do the same with universal voting."

Another American admirer is the Nobel Prize-winning economist Joseph Stiglitz. "There are many institutional aspects of your model which I think other countries should emulate, among them mandatory voting," he told me during a recent visit to Sydney. "We spend so much money getting out the vote, that sort of spending gives power to those who contribute," creating a system of "one dollar per vote" as much as "one person one vote". Preferential voting he also finds attractive. "If the United States had had that, Trump would not even have been on the ballot. And our system gives undue influence to the extremes." Compulsory voting is a safeguard against polarisation. Elections become less of a base-mobilising exercise and more an appeal to the middle, with all the moderation that implies.

"We've been world leaders with the secret ballot, compulsory enrolment and compulsory voting," says Tom Rogers, who is also rightly proud of the statutory independence of the AEC. America, where states set their own electoral rules, has no equivalent body. But each wacky letter that arrives in his in-tray, and each new conspiracy theory that percolates online, reminds Rogers that he cannot let down his guard. According to the Washington-based watchdog, Freedom House, Australia has slipped down the global democratic rankings. In the body's 2024 *Freedom in the World* report, Australia ranked 17th on democratic health. Between 2017 and 2019, it had ranked sixth. Some of the slippage is explained by Australia's tough pandemic lockdowns, which were seen to have infringed on personal liberties.

But, at a bare minimum, Australia should strive to remain a top-10 democracy. Ideally, it should become *the* paragon nation. The democracy sausage needs to remain as succulent and nourishing as possible.

"THE CHALLENGES facing democracy are of an unprecedented scale, speed and complexity." In her first interview since becoming head of the Albanese government's Strengthening Democracy Taskforce, Dr Jeni Whalan makes no bones about the enormity and immediacy of the threat: "We've had this period where there's been a privilege of complacency, where we've taken our democracy for granted. That time has passed."

As the inaugural report from the taskforce pointed out when published in July, anti-democratic sentiment has risen because of the overlapping effects of misinformation, political polarisation, citizen discontent with the trustworthiness of governments and heightened geopolitical tensions. "The challenge is all of the challenges combined," says Whalan, a Rhodes scholar with a doctorate from Oxford, who would likely have made it on the Australian sailing team at the 2004 Athens Olympics had not injury forced her early retirement from the sport. "We have spoken of a constellation of challenges. And there is no one challenge that's bigger or a greater priority than the others. It's the way that they interact, and present new difficulties."

Civic education is a key weapon in the armoury, even if it sounds like bringing a pillow to a knife fight. The Museum of Australian Democracy, housed at Old Parliament House, is a vital bastion. More than 350,000 visitors pass through its doors annually and via digital outreach its educational programs attract an even larger audience online. "They don't just reach kids of school age," she says, "but all generations. It is a really crucial component."

Disinformation experts set great store in what are called inoculation games. The Australian-made *Cranky Uncle* app developed by John Cook, a University of Melbourne scientist who is also a talented cartoonist, will never emulate the global impact of *Bluey* but it is seen nonetheless as a pacesetter. Centred on a generic "cranky uncle", a know-it-all family member who claims to be better informed than the world's leading scientists, it has helped counter climate-change denialism and vaccine misinformation. Now available in 13 languages, it has been downloaded by tens of thousands of users globally. "In this dangerous information environment, we need to build new tools to build resilience in our communities," says Whalan. "We need our research community, our scientists, at the forefront to design some of those solutions and interventions."

The country's long tradition of democratic innovation could end up being its superpower. "The strength of Australian democracy didn't happen by luck," she says. "It happened by very careful design. From the secret ballot to the enfranchisement of women, from correcting some of the mistakes of our democracy, such as the shameful disenfranchisement of First Nations people, to the design of integrity reforms in the 1970s and '80s, which is globally renowned among policy wonks. These didn't happen by accident. They happened by hard graft... Every generation has found a way of doing it. So it's our time now to rise to that challenge."

Above: the challenge is to make the democracy sausage as succulent and nourishing as possible.

Australia's long tradition of democratic innovation could end up being its superpower.

Whalan sees other home-field advantages. Here, there has not been the same "democratic backsliding" evident in other advanced nations, such as America. There is not the same societal atomisation and collapse of communities – the "bowling alone" syndrome identified at the turn of the century by the Harvard academic Robert D. Putnam. Rather, the clubability of Australia, and the strength of civil society, is a valuable resource, even if in recent years there have been signs of fragmentation and fraying. Says Whalan: "Throughout history it's been organisations like the Country Women's Association, the RSL, the community choirs and so on. These go to our democratic way of life, not just the formal institutions and processes and legislation and laws. It's the things in our day-to-day lives, and our culture, in our shared identity. I've got a new appreciation of how important that is."

But how can that contend with modern-day threats posed by artificial intelligence? "It's the way that AI connects to the challenge coming from social media and digital platforms. It connects to foreign interference. It connects to declining public trust in institutions. It's the connections between these challenges that makes it alarming, but which also requires a more joined-up, cross-sector approach in the solutions space."

To keep pace, the Albanese government has promised to develop "Democracy 2.0", an ambition outlined in a speech by the then home affairs minister, Clare O'Neil, at the Museum of Australian Democracy on the day after Donald Trump survived an assassination attempt in Pennsylvania. This modernisation program includes new legislative powers to hold digital platforms to account and updated regulatory settings to govern AI, striking a balance between its potential for good and propensity for harm. A new technology foreign interference taskforce, known as Techfit, has already been established to combat bad international actors. The National Anti-Corruption Commission was created in 2022 to deter and detect public officials acting unlawfully.

During the September sitting of parliament, the government will introduce its long-awaited electoral reform bill. Its proposals will include donation and expenditure caps on political donations, to protect the system from what the special minister Don Farrell has called "the growing threat of big money in politics." At the last federal election, Clive Palmer spent $123 million in support of his United Australia Party – although it only ended up with one Senate seat in Victoria. The delayed reform package is also expected to include a "truth in advertising" measure to crack down on misinformation in political ads.

O'Neil claimed Australia could show the rest of the world how to "survive and thrive". She even echoed the messianism of Labor prime minister Ben Chifley, asserting: "This is Australia's light-on-the-hill moment." Her speech, however, was also a reality check. It cited worrisome survey data from the Australian Public Service Commission showing that only half of Australians believe democracy is on the right track.

"Nigh on a decade," says Jeni Whalan, "the research has been pointing us to a decline in trust in institutions of all kinds, a sense that young people didn't care about their democracy as much as older generations, a sense of disenfranchisement and entrenched inequality." Still, she ardently believes that in future-proofing its democratic system, Australia can call on old-fashioned virtues: the country's pioneering and problem-solving tradition. "Many of the reforms have a wonderfully Australian pragmatism to them. They're creations that underpin the lofty ideals of democracy but with this very Australian pragmatism and practicality." But the dizzying speed of technological change, she concedes, is daunting: "The things that will be in place by 2040 are the sort of things we haven't even thought of yet, that we cannot even begin to imagine."

WHAT MAKES this year of democracy so momentous is not just that so many elections are taking place – in more than 60 countries, half the world's population is going to the polls – but that democracy itself is on the ballot. That's certainly true in the United States. In India's election earlier this year, the largest on the planet, the country's secular democratic tradition was also under threat, which partly explained why its Hindu nationalist prime minister, Narendra Modi, failed to win an outright majority.

In contrast to other nations, Australia looks in pretty good shape. But the trend lines are worrying. The Albanese government's grandest initiative in the democracy space ended in crushing defeat. In the 2023 referendum, the Indigenous Voice to Parliament did not even come close to getting the two majorities in favour to alter the constitution. From Peter Dutton's attack on the integrity of the AEC to the slew of misinformation about the Voice, including that it could pave the way for land confiscation, the referendum was a poor advertisement for Australian democracy.

With the federal election looming, the democracy agenda, which can often feel abstract to voters, will become a lesser priority. In the recent cabinet reshuffle, Clare O'Neil, who describes herself as a "long-term democracy nerd", was replaced by Tony Burke, who has now taken over the super-portfolio of home affairs and immigration. Given the degree of difficulty that comes with the immigration brief, safeguarding democracy is unlikely to be uppermost in his mind. Besides, at a time when tensions in the Middle East have raised community tensions here, promoting social cohesion has become more of a priority than democratic resilience, even though they are flip-sides of the same coin. In July, the Labor MP Peter Khalil was appointed the country's first special social cohesion envoy.

Even commonsense proposals aimed at strengthening democracy come with risks. Take the plan to enact new truth-in-political-advertising laws. It could end up being counterproductive if the AEC is mandated to act as the referee. "The moment we start making pronouncements about what candidates are saying," warns Tom Rogers, "that will really impact on us."

At the end of this year, Rogers will also hand on the baton. This sentinel of democracy will end his watch. Already he is reflecting on the changes he has seen since taking over the AEC, at a time when it was reeling from the bungled 2013 Western Australia Senate election, when 1375 votes went astray. "If you had told me back then that we would have a defending democracy unit, the electoral integrity task force and the stop and think campaign, I would have laughed. It was so far away from our experience back then, when elections were just about the sausage sizzle with no thought of misinformation... But it's a new era."

Not everyone in Australian politics fully realises that, says Rogers, who recalls a conversation with a parliamentarian from a few years back. "Jeez, you're lucky mate," said the pollie. "It's a church hall and a piece of paper. How hard can that be?"

"That's the image," says this old soldier, "and in some ways, that's not a bad thing. But what's missing is how democracy is really under threat globally. We're managing that process in Australia in a really successful way, which is something which I think all Australians should be proud of. But, man, it's complex." ■