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Dear Commissioner,

The Arid Lands Environment Centre (ALEC) is Central Australia's peak community environmental organisation and has been advocating for the protection of nature and ecologically sustainable development of the arid lands since 1980. ALEC actively engages with coal, gas and oil activities, as these developments have the potential to produce significant environmental, social and cultural impacts. We engage with the energy and resources sector through regulatory reform, written submissions, community education and advocacy within the community.

ALEC's response is focused on four key areas: Tri-Star's claims in the letter *FOI IR2017/11 - APPLICATION FOR EXTENSION OF TIME UNDER SECTION 57(6) OF THE INFORMATION ACT 2002* (The Letter); s 57(1)(b) under the *Information Act 2002*; s 50 under the *Information Act 2002*; and reasons for why the disclosure of information is in the public interest.

### **1. Tri-Star's claims in The Letter**

Ward Keller representing Tri-Star in The Letter have called on the Commissioner to extend their exemption under s 57(6) of the *Information Act*, citing reasons of commercial in confidence.<sup>1</sup>

ALEC notes that determining whether the matter is in the public interest is a balancing act and requires more than mere consideration of Tri-Star's commercial interests which are private interests, not public interests.

The Letter goes on, stating that "Tri-Star submits that part of the basis for the 5 year rule is a rebuttable presumption that disclosure of information that old will no longer cause substantial harm to the competitive position of the third party".<sup>2</sup> However, it is apparent that it is not a "rebuttable presumption" but a discretion that may be exercised by the Commissioner under s 57(6) of the *Information Act*, if the Commissioner decides that it is in the public interest to do so.

Tri-Star goes further in The Letter stating that the "resubmittal of that information within the last five years rebuts that presumption".<sup>3</sup> However, Tri-Star re-submitting the same

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<sup>1</sup> *FOI IR2017/11 - APPLICATION FOR EXTENSION OF TIME UNDER SECTION 57(6) OF THE INFORMATION ACT 2002*, p.2.

<sup>2</sup> *FOI IR2017/11 - APPLICATION FOR EXTENSION OF TIME UNDER SECTION 57(6) OF THE INFORMATION ACT 2002*, p.4.

<sup>3</sup> *FOI IR2017/11 - APPLICATION FOR EXTENSION OF TIME UNDER SECTION 57(6) OF THE INFORMATION ACT 2002*, p.4.

information should not by default have the effect of extending the five year period.

## **2. Tri-Star does not meet the threshold of ‘unreasonably to disadvantage’ under s 57(1)(b)**

Tri-Star are still required to demonstrate how the disclosure of information is “likely to expose the undertaking unreasonably to disadvantage”.<sup>4</sup> S 57(1)(b) outlines a high threshold for what information is exempt, if it is of a business, commercial or financial nature. The document *Information Commissioner’s Guideline: A Guide to FOI Exemptions* (The Guideline) reinforces this understanding, stating clearly that Tri-Star must demonstrate how the disclosure of information will expose their undertaking unreasonably and to disadvantage. The Guideline states that the:

“third party’s views are important, but they do not dictate whether information is disclosed. The organisation itself must make and stand by a decision as to whether disclosing the information would in fact be likely to expose the third party to disadvantage under s57(1)(b) of the Act, and whether that disadvantage would be unreasonable. Even if these elements were satisfied, the organisation still needs to explain why it is not in the public interest to release the information in this particular case.”<sup>5</sup>

Tri-Star has not met this threshold that the disclosure of this information would expose their undertaking “unreasonably to disadvantage”, instead stating that the information should not be disclosed because it is “still of a commercially sensitive nature”.<sup>6</sup> Tri-Star have failed to explain how the disclosure of this information will impact their business, and to demonstrate that their complaint meets the threshold set under s 57(1)(b).

Tri-Star’s request to extend the timeline of extension under s 57(6) should be rejected, due to the considerations outlined above.

## **3. Tri-Star does not meet the threshold that the disclosure of information is ‘likely’ under s 57(1)(b)**

S 57(1)(b) uses the term ‘likely’ to qualify the possibility of unreasonable disadvantage occurring. The meaning of the term ‘likely’ has been considered in the Territory context by the Information Commissioner in *Collie v Office of the Commissioner for Public Employment* (25 March 2008). It was stated the ‘likely’ is:

“intended to be stronger than “could reasonably be expected”. It suggests that the expected event not only be something that could occur, but the occurrence is reasonably expected and probable in the sense of being more probable than not”.

Tri-Star again has not shown evidence that the disclosure of information would be ‘likely’ to leave their business ‘unreasonably to disadvantage’.

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<sup>4</sup> *Information Act* 2002, p.45.

<sup>5</sup> Information Commissioner’s Guideline: A Guide to FOI Exemptions, p.5.

<sup>6</sup> *FOI IR2017/11 - APPLICATION FOR EXTENSION OF TIME UNDER SECTION 57(6) OF THE INFORMATION ACT* 2002, p.4.

The Guideline reiterates that whether the disclosure of information is ‘likely’ to impact a third party, is central to the Commissioner's decision making process. It states that:

“The organisation itself must make and stand by a decision as to whether disclosing the information would in fact be likely to expose the third party to disadvantage under s57(1)(b) of the Act, and whether that disadvantage would be unreasonable.

Tri-Star does not outline or consider these responsibilities. As such, Tri-Star’s request to extend the exemption should be rejected and the information should be made publicly available.

#### **4. Tri-Star fails to show how the disclosure of information is ‘not in the public interest’**

The public interest test under s 50 states that information is “exempt only if it can be shown that, in the particular case, it is not in the public interest to disclose the information”.<sup>7</sup> Tri-Star again fails to outline how the disclosure of information is not in the public interest. Instead, Tri-Star only promotes their own concerns that the information is of a commercially sensitive nature. Tri-Star in The Letter does not consider public interest factors as they are required to under s 50 of the *Information Act*.

The Guideline expands on the Act and makes it clear that Tri-Star has a responsibility to consider s 50 in addition to the exemption, it says that:

“Section 50 is not a stand-alone exemption. You cannot simply withhold information because you say it is not in the public interest. You must show first that the information fits one of the exemptions provided for by sections 51-58, and then in addition you must show that the test in section 50 is satisfied. When you write your reasons, you should show clearly that you have addressed both the exemption and section 50, not simply assumed that section 50 applies because the information fitted within the exemption”.<sup>8</sup>

Tri-Star has failed to show how the disclosure of information ‘is not in the public interest’. The proponent’s request that the exemption should be rejected due to their failure to consider public interests as required under s 50.

In addition, the Guideline makes clear the civil standard of proof applies, meaning that Tri-Star “must find for the exemption to apply that the factors against disclosure are greater than 50% as compared to those in favour of disclosure”.<sup>9</sup> Tri-Star hasn’t even outlined how the disclosure of information will impact their business, let alone meet this threshold of proof.

Section 2, 3 and 4 of this letter have highlighted the various ways in which Tri-Star’s request to extend their exemption should be rejected. Section 2 showed that Tri-Star’s request does not meet the threshold of ‘unreasonably to disadvantage’ as required under s 57(1)(b) of the *Information Act*. Section 3 emphasised that Tri-Star did not show how the disclosure of

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<sup>7</sup> *Information Act* 2002, p.39.

<sup>8</sup> Information Commissioner’s Guideline: A Guide to FOI Exemptions, p.39.

<sup>9</sup> Information Commissioner’s Guideline: A Guide to FOI Exemptions, p.41.

information is ‘likely’ to impact their business as required under s 57(1)(b). Section 4 stressed that Tri-Star did not show how the disclosure of information ‘is not in the public interest’ as required under s 50. For these reasons, Tri-Star’s request to extend their exemption should be rejected and the disputed information should be made publicly available.

## **5. ALEC considers the FOI documents to be in the public interest**

The *Information Act* in s 3(1)(a) makes clear that the premise of the legislation is that the public has a right to access official documentation.<sup>10</sup> It is the third party’s, in this case Tri-Star, and/or the organisations responsibility to show that it ‘is not in the public interest’ under s 50 of the Act. As emphasised in Section 4 above, Tri-Star has failed to consider and outline how the disclosure of this information ‘is not in the public interest’.

ALEC’s motivation to access these documents is not concerned with the disclosure of commercial or financial information, but to understand the nature of the activities being undertaken in the Pedirka Basin by Tri-Star. As mentioned above s 57(1)(b), provides a high-threshold for information to be exempt that is of a business, commercial or financial nature - information that is “likely to expose the undertaking unreasonably to disadvantage”. As *Attachment A* makes clear, ALEC is interested in material that is focused on: information about activities proposed for upcoming years (as at 2013/14 and 2014/15), including proposed work programs, the rationale for particular activities and location information; and, annual breakdowns of proposed activities (as at 2013/14 and 2014/15) and options for future action dependent on outcome of those activities. ALEC in its FOI request is not interested in the financial circumstances of Tri-Star.

Tri-Star in the Letter asks the Commissioner to “recognis[e] that some directional and locational data is already in the public realm through the Environmental Plan Summary, Tri-Star hereby requests the five year period be extended to seven years and exemptions be granted”.<sup>11</sup>

The *Environmental Plan Summary New Crown 1* (EPS) is a six-page document which is extremely limited in detail. Compared to its contemporary equivalent, the Environment Management Plan (EMP) which may be several hundred pages in length, the EPS is highly simplified and its conclusions opaque. The EPS should not be recognised by the Commissioner under s 57(6) as evidence to justify an exemption of the FOI material to be extended. The EPS does not provide the public with sufficient information around Tri-Star’s activities at EP 134.

Based on the partial release of documents that ALEC has received as a result of the FOI, it remains unclear what activities are proposed by the proponent at EP 134. ALEC remains unsure whether Tri-Star is going to extract coal-seam gas (CSG) or extract the gas through underground coal gasification (UCG). These processes vary significantly in their environmental impacts and it is in the public interest that the nature of the activities proposed at EP 134 are known publicly. In addition, whether CSG or UCG is adopted raises significant

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<sup>10</sup> *Information Act* 2002, p.1.

<sup>11</sup> *FOI IR2017/11 - APPLICATION FOR EXTENSION OF TIME UNDER SECTION 57(6) OF THE INFORMATION ACT* 2002, p.2.

questions around the current regulatory system and whether the relevant Acts currently provide adequate safeguards. Both CSG and UCG are not established industries in the Northern Territory. The development of CSG or UCG activities would require the regulatory environment to be substantially updated, in a similar way to that of the shale gas industry. It is in the public interest that emerging industries which have the potential to have significant environmental impacts are publicly identified and the processes are understood.

There is a common law precedent set by the High Court defamation case *Lange v ABC* (1997) 189 CLR 520, which recognises that there is a public interest in political processes and political debates. The court ruled that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia".<sup>12</sup>

While there is no definition of what constitutes a 'political matter', the potential expansion of unconventional gas activities in the Northern Territory is certainly one. Unconventional gas activities such as CSG or UCG are political matters to the public due to their greenhouse gas emissions and their contribution to climate change, in addition to their impact upon water resources, biodiversity and culture. Unconventional gas activities also impact social and economic structures regionally as well as at a Territory/ State and national level, with the expansion of fossil-fuel related industries often coming at the expense of other sectors.

There are many examples of unconventional gas activities being embroiled in political controversy and projects of national significance. Whether it be shale gas activities in the Beetaloo Basin in the Northern Territory, CSG developments in the Pilliga Forest in North-West NSW, the recently scrapped Keystone XL pipeline in Canada, or the many nations around the world which have banned fracking. The proposed activities by Tri-Star constitute a political matter affecting the people of the Territory and Australia.

The Geotechnical reports of coal, coal seam gas and water resources in the Pedirka Basin conducted by the Australian Government were published after the approval of EP 134. This information shines a light on how coal and CSG activities may have substantial environmental, social and cultural impacts on the region. This includes potential impacts as a result of dewatering processes upon the National Heritage site Dalhousie Springs within the Great Artesian Basin.<sup>13</sup> It is in the public-interest that this information requested in the FOI is publicly available due to the development's potential impacts on sites of national heritage significance.

### Regulatory changes

Significant regulatory changes have occurred since Tri-Star was granted EP 134. At the time the original licence was granted, little to no information relating to the project was publicly available. However, today, all petroleum activities in the Northern Territory are experiencing substantially greater regulatory scrutiny than the activities currently undertaken by Tri-Star. This is in the form of EMPs, in addition to recommendations emerging out of the Pepper Inquiry.

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<sup>12</sup> p.571

<sup>13</sup> Description of the water-dependent asset register for the Pedirka subregion: product 1.3 for the Pedirka subregion from the Lake Eyre Basin Bioregional Assessment, p.16.

Notably, the shale gas industry has undergone a significant inquiry and assessment as a result of the Pepper Inquiry, and the current implementation of all 135 recommendations. Central pillars of the Pepper Inquiry were that information around shale gas activities needed to be publicly available, transparent and for the industry to undergo rigorous regulatory scrutiny. The Final Report of the Pepper inquiry stated that:

“trust is a critical element of [gaining] a social licence to operate. While trust takes time to be established, it can very easily and very quickly be eroded if it is not well managed. Trust is built through open and transparent communication between all parties”.<sup>14</sup>

While these are the current protocols guiding petroleum activities in the Northern Territory, Tri-Star remains steadfast in preventing information around its development to be public knowledge. It is in the public interest, as has been recognised around shale gas activities in the Northern Territory, that greater transparency is required for all petroleum and coal-gas activities.

Alexander Vaughan - Policy Officer



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<sup>14</sup> Scientific Inquiry into Hydraulic Fracturing in the Northern Territory Final Report, p.334.