

FEDERAL COURT OF AUSTRALIA

Patrick v Australian Information Commissioner [2024] FCAFC 93

Appeal from: *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530

File number(s): Error: Reference source not found

Judgment of: **BROMWICH, ABRAHAM AND MCEVOY JJ**

Date of judgment: 11 July 2024

Catchwords: **ADMINISTRATIVE LAW** — the appellant sought a declaration that the legal limits of the Australian Information Commissioner’s authority have been exceeded and his right to an Information Commissioner review unlawfully delayed — where the appellant had several ongoing applications before the Commissioner for review of decisions made by Commonwealth agencies — where there were very significant delays in undertaking the reviews — whether there had been unreasonable delay by the Commissioner in making a decision in the sense required by s 7(1) of the ADJR Act — whether appellant would have been entitled to declaratory relief if he was prima facie entitled to that relief

HELD — no unreasonable delay for the purposes of s 7(1) of the ADJR Act — appeal dismissed

Legislation: *Acts Interpretation Act 1901* (Cth) s 2B and s 25D
Administrative Decisions (Judicial Review) Act 1977 (Cth) s 7 and s 16
Australian Information Commissioner Act 2010 (Cth) ss 5-9, 25
Australian Security Intelligence Organisation Act 1979 (Cth) ss 82L(1), 83ED(2), 83EE(1)
Federal Court of Australia Act 1976 (Cth) s 21
Freedom of Information Act 1982 (Cth) ss 3, 11, 11A, 15, 15AA, 33, 38, 45, 47, 47B-47J, 52-54E, 54W, 54Z, 55, 55G, 55K, 55T, 55U, 56, 57A

Cases cited: *ASP v Commonwealth* [2016] FCAFC 145; (2016) 248 FCR 372
Australian Competition and Consumer Commission v MSY Technology Pty Ltd [2012] FCAFC 56; (2012) 201 FCR 378
BMF16 v Minister for Immigration and Border Protection [2016] FCA 1530

Davis v Military Rehabilitation and Compensation Commission [2021] FCA 1446; (2021) 174 ALD 166
Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2; (2024) 98 ALJR 196
Kable v Director of Public Prosecutions (NSW) [1996] HCA 24; (1996) 189 CLR 51
Minister for Home Affairs v DUA16 [2020] HCA 46; (2020) 271 CLR 550
Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 264 CLR 541
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Plaintiff S297/2013 v Minister for Immigration and Border Protection [2014] HCA 24; (2014) 255 CLR 179
Rural Press Ltd v Australian Competition and Consumer Commission [2003] HCA 75; (2003) 216 CLR 53
Thornton v Reparation Commission [1981] FCA 71; (1981) 35 ALR 485
Warramunda Village Inc v Pryde [2001] FCA 61; (2001) 105 FCR 437
Wei v Minister for Immigration, Local Government and Ethnic Affairs [1991] FCA 268; (1991) 29 FCR 455

Division: General Division

Registry: Victoria

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 78

Date of hearing: 26 February 2024

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Solicitor for the Appellant: MSM Legal

Counsel for the Respondent: Ms Maud SC and Mr Kuganathan

Solicitor for the Respondent: Norton Rose Fulbright

ORDERS

VID 765 of 2023

BETWEEN: **REX PATRICK**
Appellant

AND: **AUSTRALIAN INFORMATION COMMISSIONER**
Respondent

ORDER MADE BY: **BROMWICH, ABRAHAM AND MCEVOY JJ**

DATE OF ORDER: **11 JULY 2024**

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. The appellant is to pay the respondent's costs to be agreed or assessed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

- 1 The appellant, Mr Rex Patrick, made several applications to the respondent, the Australian Information Commissioner (AIC), for access to documents under the *Freedom of Information Act 1982* (Cth) (FOI Act), which were refused. Pursuant to Pt VII of the FOI Act, the appellant sought review by the AIC, described in the FOI Act as an “IC review” (Information Commissioner review), of the decisions to refuse access.
- 2 In 2021, the appellant applied to this Court for declarations and other relief, alleging that there had been “unreasonable delay” in making the IC review decisions for the purposes of s 7(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). The primary judge ordered that the claim for relief in relation to nine of the IC reviews be heard as a separate preliminary question, which was subsequently reduced to seven.
- 3 The primary judge refused the application, concluding that there had not been unreasonable delay. Although this appeal initially related to those seven reviews, the Court was informed since hearing that one of them (the “seventh IC Review”) had been determined. The appellant did not press for declaratory relief in relation to that IC review. We address the grounds only in respect of the remaining six IC review applications.
- 4 The issue on this appeal is whether the appellant has established that the primary judge erred in concluding that, in relation to the six IC reviews, it had not been established that the delay in consideration of those applications was unreasonable. The appellant presses for declarations to be made to vindicate his contention that the legal limits on the AIC’s authority have been exceeded and his right to IC review unlawfully delayed. He expressly stated that he does not seek any order compelling their determination.
- 5 As it transpired, the appeal was able to be addressed by reference to the IC review for which the appellant had the strongest case, being the “sixth IC Review”. If he could not succeed on that IC review, he could not succeed on the other five.
- 6 For the reasons below, the appellant failed in that endeavour. Accordingly, he has not established that he is prima facie entitled to the declaratory relief sought. Even if he had been prima facie entitled to that relief, we would not have granted it in the exercise of discretion, applying well-established principles as to when declaratory relief may be withheld.

Statutory framework

7 Before addressing the issues in more detail, it is appropriate to commence with a consideration of the statutory scheme, as both parties properly accept that any question of unreasonable delay must be in the context of the relevant statutory framework and the specific facts of the case. The primary judge at [8]-[31] outlined the statutory framework relevant to assessing unreasonable delay. The analysis is not challenged, and we adopt and endorse the descriptions his Honour gave. The applicable Acts are:

- (1) the Australian Information Commissioner Act 2010 (Cth) (AIC Act);
- (2) the FOI Act; and
- (3) the ADJR Act.

8 It is unnecessary to repeat his Honour’s description and summary of the effect of that legislation in its entirety, although it is convenient to recite some aspects of it.

Australian Information Commissioner Act 2010 (Cth)

9 Section 5 of the AIC Act establishes the Office of the Australian Information Commissioner (the Office) which consists of *information officers* (relevantly including the AIC, referred to as the “Information Commissioner” throughout the Act: s 6) and staff. The Information Commissioner has the following functions and powers under the AIC Act, namely the *information commissioner functions* defined by s 7; the *freedom of information functions* defined by s 8; and the *privacy functions*, defined by s 9.

10 The Information Commissioner has powers of delegation: s 25 of the AIC Act. Prior to the commencement of amendments to s 25 on 13 December 2022, the function conferred by s 55K of the FOI Act (making a decision on an IC review) was excluded from the power of delegation: s 25(e). Following those amendments, the Information Commissioner may delegate the decision-making function under s 55K to a member of staff of the Office who is an *SES employee* (that is, a Senior Executive Service employee), or *acting SES employee*: s 25(2)(a). See also *Acts Interpretation Act 1901* (Cth) s 2B.

Freedom of Information Act 1982 (Cth)

11 The relevant objects of the FOI Act are identified in s 3. That Act seeks to increase public participation in government processes, and the scrutiny, discussion, comment and review of government activities: s 3(2). Section 3(4) states an intention that “functions and powers given

by this Act are to be performed and exercised, as far as possible, to facilitate and promote public access to information, promptly and at the lowest reasonable cost”.

12 Section 11 of the FOI Act provides that, subject to that Act, every person has a legally enforceable right to obtain access to documents of an agency and official documents of a Minister. There is an array of exceptions to that right. Certain agencies are excluded from the operation of the FOI Act altogether. Further, Div 2 of Pt IV of the FOI Act contains a range of exemptions, such as:

- (1) documents affecting national security, defence or international relations (s 33);
- (2) documents containing material obtained in confidence (s 45);
- (3) documents disclosing trade secrets or commercially valuable information (s 47); and
- (4) documents to which secrecy provisions of enactments apply (s 38).

13 There are other categories of documents that are conditionally exempt if disclosure would not be in the public interest; a concept that is developed through several provisions of Div 3 of Pt IV of the FOI Act. There are also provisions of the FOI Act that require consultation with various parties before a decision to give access to documents can be made.

14 The FOI Act sets out the process by which a person can seek access to government documents. A person who wishes to obtain access to a document of an agency or a Minister may request access to the document: s 15(1). The manner for doing so is prescribed by s 15(2). Section 11A(3) requires an agency or Minister to give access to documents of the agency or official documents of the Minister that are the subject of a request. Relatively tight timeframes (albeit extendable if the applicant agrees: s 15AA) are imposed for steps which agencies are required to undertake: see s 15(5).

15 Part VII of the FOI Act provides for the review of decisions by the Information Commissioner. Part VII of the FOI Act and the AIC Act commenced on the same day, 1 November 2010. The effect of the addition of Pt VII was to introduce a new process for external review of decisions relating to access to documents under the FOI Act. Two consequential changes were brought about. First, it was no longer necessary to request an internal review of a decision as a precursor to seeking external review, although Pt VI of the FOI Act, which was also added at that time, maintains the ability to apply to an agency for internal review. Second, access decisions by agencies are no longer amenable to review by the Administrative Appeals Tribunal (now the Administrative Review Tribunal). Instead, any application for external review is to be made

first to the Information Commissioner. In turn, decisions of the Information Commissioner may then be the subject of an application for review by the Tribunal: s 57A. In addition, a review party may “appeal” to the Federal Court of Australia on a question of law from a decision of the Information Commissioner: s 56.

16 The text of the provisions of Pt VII of the FOI Act provide for a process of review and resolution with the following relevant features:

- (1) The Information Commissioner may refer a reviewable decision to the Administrative Appeals Tribunal if satisfied that it is in the interests of justice to do so: s 54W(b), s 57A(1)(b).
- (2) Before undertaking an IC review, the Information Commissioner must inform the person, agency, or Minister who made the decision, or in the case of a review of a decision to grant access, the person who made the request: s 54Z.
- (3) Section 55 provides, in wide terms, for the manner in which an IC review is to be undertaken that is flexible in nature. The Information Commissioner may, *inter alia*:
 - (a) review the decision the subject of the application by considering documents provided to the Information Commissioner;
 - (b) conduct a review without holding a hearing;
 - (c) conduct a review in whatever way is considered appropriate; and
 - (d) use techniques to facilitate an agreed resolution of the matters in issue.
- (4) Section 55 is complemented by the powers to gather information conferred on the Information Commissioner by Div 8 of Pt VII of the FOI Act.
- (5) There are special provisions of the FOI Act in relation to the production of documents that are claimed to be exempt documents. The Information Commissioner may require production of a document for the purposes of deciding whether the document is an exempt document: s 55T(2). In relation to national security documents, Cabinet documents, and Parliamentary Budget Office documents, the Information Commissioner may require production of a document for inspection only if *not* satisfied by evidence on affidavit or otherwise that the document is an exempt document: s 55U(3).
- (6) The broad discretion given to the Information Commissioner in relation to the manner in which an IC review is to be conducted is subject to the exhortations in s 55(4), which

include that the IC review is to be conducted with as little formality and technicality as possible and “in as timely a manner as is possible given” specified matters: the requirements of the FOI Act and any other law and the proper consideration of the matters before the Information Commissioner. See []-[] below.

- (7) The Information Commissioner is authorised by s 55(2)(e) to give written directions in relation to the procedure to be followed in relation to IC reviews generally, or in relation to a particular IC review. Such a direction is not a legislative instrument: s 55(3). The Information Commissioner has published directions in relation to reviews generally.
- (8) At any time while an IC review is on foot, an agency or a Minister may vary, or set aside and substitute, an access refusal decision if, *inter alia*, it would have the effect of giving access to a document in accordance with the subject request. Where there is a variation or substitution of a decision, the Information Commissioner must deal with the IC review application as if it were an application to review the varied or substituted decision: s 55G.
- (9) An important provision is s 55K:

55K Decision on IC review—decision of Information Commissioner

- (1) After undertaking an IC review, the Information Commissioner must make a decision in writing:
 - (a) affirming the IC reviewable decision; or
 - (b) varying the IC reviewable decision; or
 - (c) setting aside the IC reviewable decision and making a decision in substitution for that decision.
- (10) Under s 55K(4), a decision on an IC review must include a statement of reasons for the decision. This obligation attracts the requirements of s 25D of the *Acts Interpretation Act* to set out in the statement the findings on material questions of fact and to refer to the evidence or other material on which those findings were based.

Administrative Decisions (Judicial Review) Act 1977 (Cth)

- 17 As explained above at [], the appellant, by bringing a review pursuant to s 7(1) of the ADJR Act, presses for declarations to be made to vindicate his contention that the legal limits on the AIC’s authority have been exceeded because his right to IC review has been unlawfully delayed.

18 Section 7(1) of the ADJR Act provides that a person aggrieved by a failure to make a decision may apply to the Court for an order of review on the ground that there has been unreasonable delay in making the decision:

7 Applications in respect of failures to make decisions

(1) Where:

- (a) a person has a duty to make a decision to which this Act applies;
- (b) there is no law that prescribes a period within which the person is required to make that decision; and
- (c) the person has failed to make that decision;

a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

Primary Judgment

19 The primary judgment at [5]-[7] accurately summarises his Honour’s conclusions (emphasis in original):

[5] The main question in this proceeding is whether, within the framework of the applicable legislation, there have been *unreasonable* delays in the sense [required to engage s 7(1) of the ADJR Act]. The question raised is not whether there have been significant delays by the Information Commissioner, or whether by reference to the standards of some objective hypothetical applicant for IC review the delays have been unacceptable. A claim that the Information Commissioner has engaged in unreasonable delays in completing the applicant’s applications for IC review must take account of the resources that are available to the Commissioner and the competing demands on those resources. It is for the Commissioner to determine the best and most efficient way to use the resources that are available. The Commissioner must do this having regard to the totality of the Commissioner’s statutory functions, and the need to address the caseload of all applications for IC review, and not only those made by the applicant.

[6] ... The picture that is painted by the evidence is that the Australian Information Commissioner has limited resources to undertake, in accordance with the applicable statutory requirements, the volume of IC reviews that are before her. The evidence supports a conclusion that the Information Commissioner takes account of the interests of all applicants for IC review in managing the best use of those limited resources. It appears that the general position is that IC reviews take a course that involves very significant delays where IC reviews may lie dormant for long periods and take years to complete. That picture was painted with great clarity as a consequence of the fact that the applicant sought relief in respect of seven IC review applications, where the causes of the lengthy delays were common and the combined force of the evidence pointed to an unquestionable shortage of resources. Whether that situation is acceptable is

not a question for the Court to decide. It is commonplace that resources available for government institutions and services such as public hospitals, other care facilities, public transport, government schools, administrative decision-makers, and courts, are finite. The failure to meet the expectations of some users of government services does not, without more, have the consequence that those responsible for the discharge of the relevant public function have acted unreasonably in the eyes of the law. It is ultimately for the Commonwealth Parliament to legislate so as to appropriate monies to the Office of the Australian Information Commissioner in order to enable the discharge of the Commissioner's statutory functions. Any legislative decision no doubt needs to balance competing budgetary demands, which are for the Parliament to consider.

[7] For the reasons that follow, the applicant has not established that there has been unreasonable delay in the sense required to engage s 7(1) of the ADJR Act. ...

20 As noted above, the primary judge provided a detailed analysis of the legislative scheme at [8]-[31].

21 The primary judge made numerous factual findings in respect to the resources and procedures of the Information Commissioner at [64]-[92]. These were not challenged on appeal.

22 The primary judge then addressed the seven IC reviews in issue and made factual findings as to the conduct of the review before making the assessment as to whether unreasonable delay had been established. Suffice to say that the primary judge was not satisfied in respect to any of the reviews that unreasonable delay had been established. Relevantly, the reviews were addressed as follows: first IC review at PJ [95]-[115], second IC review at PJ [116]-[133], third IC review at PJ [134]-[147], fourth IC review at PJ [148]-[162], fifth IC review at PJ [163]-[179], and sixth IC review at PJ [180]-[183]. The seventh IC review is no longer in issue (see [], above).

Consideration

23 Before addressing the six reviews, it is appropriate to make some general comments.

24 *First*, a preliminary, but not necessarily decisive, issue is whether the primary judge misinterpreted *Wei v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 268; (1991) 29 FCR 455 (*Wei*), with the result that his Honour approached the question of whether the delay was unreasonable in each instance on the basis that, if resourcing was an explanation for the delay, it could not be said to be unreasonable. The appellant pointed to PJ [6] and [200] to illustrate the point.

25 The appellant framed the issue as follows (emphasis in original):

Does under-resourcing of an agency (whether due to decisions beyond the agency's control or decisions as to the allocation of resources between its functions), with the

consequence that it is unable to fulfil its statutory functions within what would otherwise be a reasonable time, mean that such delay is *lawfully authorised*? The appellant contends that, while a lack of adequate resources may be a *cause* of unreasonable delay – it may explain *why* an agency has failed to discharge its statutory function in accordance with law – it should not lead to the conclusion that an otherwise-unreasonable delay is legislatively authorised.

26 The appellant and respondent take fundamentally different approaches to assessing whether a delay is unreasonable.

27 As reflected by the passage just recited, the appellant’s approach treats as axiomatic that an agency is adequately resourced. He submits it is a basic legislative assumption that the AIC would be adequately resourced to perform its functions, and the reasonableness of any delay is to be assessed on that basis. That approach necessarily requires a prior assessment of *what* amounts to adequate resourcing and *whether* an agency is adequately resourced. An assessment of that sort sits uncomfortably with the bedrock separation of powers principle reflected in *Wei* : “it is not for the court to dictate to the Parliament or the Executive what resources are to be made available in order to properly carry out administrative functions under legislative provisions.”: at 477. See also *Davis v Military Rehabilitation and Compensation Commission* [2021] FCA 1446; (2021) 174 ALD 166 (*Davis*) at [21]; *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; (1996) 189 CLR 51 at 117. That the appellant invites the Court to undertake such an assessment without making any overt judgment as to whether an agency is adequately resourced does not assist.

28 The approach is also premised on a timeframe for a decision being otherwise unreasonable if it is presumed that an agency is adequately resourced, such that resourcing is not a relevant consideration in this case. That said, the appellant submitted that he did not want to be too absolute about that as a general proposition, recognising there may be some circumstances (for example, where delay occurred because unexpected circumstances impacted the resources provided to an agency) where resourcing may be considered. That approach limits an assessment that, according to the weight of authority, should be made in “all” the circumstances (see []-[] below).

29 On the other hand, the respondent contended that the better approach is, as part of the usual process of determining whether any particular delay is unreasonable, to treat resourcing as one relevant consideration in that process (provided that resourcing is an, or the, explanation for the delay). That is, there is no special approach to determining an issue of unreasonableness simply because the delay is explained, in part or in whole, by resourcing.

30 In our view, the respondent's approach is correct.

31 *Second*, a proper reading of the primary judgment, viewed as a whole, reflects that the primary judge did not approach the question of unreasonableness on the basis that a delay is not unreasonable provided there was an explanation for the delay (including if resourcing was the, or a part of the, explanation).

32 The primary judge did not misapply *Wei*. To the contrary, the appellant's reliance on [200] of the primary judgment, the high point of his case, does no more than reflect an acceptance that *Wei* explains that a Court can have regard to the lack of resources when considering a question of unreasonable delay, but there is a limit beyond which a delay is unreasonable regardless of resourcing being the explanation for it. The primary judge at [200] refers to *Wei* at 477:

Clearly, it is not for the court to dictate to the Parliament or the Executive what resources are to be made available in order properly to carry out administrative functions under legislative provisions. Equally clearly, however, the situation cannot be accepted in which the existence of a right created by the Parliament is negated, or its value set at nought, by a failure to provide the resources necessary to make the right effective.

33 It is plain from the primary judge's detailed analysis of each IC review application that his Honour considered each delay in the context in which it occurred. An individual assessment was undertaken in relation to each, which turned on the facts of the specific review application.

34 In so doing it is apparent, as the respondent submitted, that the primary judge considered the resources available to the respondent and the workload of the respondent's office in several different ways. The respondent identified four ways. His Honour:

- (1) referred to the resource constraints of the Office as part of the context in which the reasonableness of particular case management decisions (such as decisions to allow extensions of time to agencies to provide information to the Office) were to be assessed: PJ [111], [112], [126], [160], [175]-[176];
- (2) considered that staffing constraints were relevant to the assessment of whether particular alleged failures of process had materially contributed to the delay in determining particular IC reviews: PJ [131]-[133], [146], [160];
- (3) considered the respondent's workload and competing priorities as part of the context for assessment of whether relatively short periods of inactivity indicated unreasonable delay: PJ [142], [157]-[158], [174], [192]; and

(4) considered the resourcing constraints and volume of IC reviews before the respondent as part of the circumstances for considering whether longer periods of inactivity indicated unreasonable delay: PJ [145], [183], [194], [197], [198].

35 This approach illustrates that his Honour undertook a more nuanced consideration of resources in each assessment than that alleged by the appellant. His Honour did not merely identify that the AIC was inadequately resourced and hold it out as the justification in turn. His approach, as reflected in the above outline, was careful and considered, meeting the practical demands of assessing whether the delay was unreasonable in all of the circumstances. That his assessments mainly (or wholly) concerned considerations of resourcing is of no moment. See: []-[] below; PJ at [45]-[47].

36 *Third*, the approach to the assessment of whether it has been established that any of the delays were unreasonable is, as the respondent contends, to be considered like any other matter. That the explanation for the delay is in whole or part due to resourcing is one factor in the assessment. That resourcing may wholly explain the delay does not alter the approach. It does not require a prior assessment of the agency's resources (see [] above).

37 The primary judge correctly identified the principles relevant to the assessment of unreasonable delay: PJ [45]-[57]. It may be accepted that, in the absence of specified time limits, decisions required by statute are to be made within a reasonable time: *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 (*Li*) at [102]. The standard of reasonableness is a matter of statutory construction: *Li* at [67]. It is to be assessed objectively: *Thornton v Reparation Commission* [1981] FCA 71; (1981) 35 ALR 485 (*Thornton*) at 490-491. Whether a delay is unreasonable, or whether a decision has been made within a reasonable time, is to be assessed "in all the circumstances": *Thornton* at 493. See also *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 (*BMF16*) at [26]. It is to be determined by the Court, "having regard to the circumstances of the particular case within the context of the decision-making framework established by the [relevant Act]": *Plaintiff S297/2013 v Minister for Immigration and Border Protection* [2014] HCA 24; (2014) 255 CLR 179 at [37]. An explanation for any delay is always a relevant consideration. In *Thornton* at 492, in a statement frequently cited with approval, Fisher J said:

The question is whether there are circumstances which a reasonable man might consider render this delay justified and not capricious. In the first instance it is, on the evidence, a delay for a considered reason and not in consequence of neglect, oversight or perversity. ...

38 See also *ASP v Commonwealth* [2016] FCAFC 145; (2016) 248 FCR 372 at [21]-[23].
39 In *BMF16* at [25]-[26], Bromberg J succinctly describes the assessment as follows (the passage was recited by the primary judge at [51]):

Whilst a legislative scheme may not specify a time limit, it may nevertheless throw light on what was intended as a reasonable time for the performance of the statutory duty in question. The subject matter of the power, its statutory purpose, the importance of its exercise both to the public and to the interests of the persons it is directed to address, the nature of those interests and the likely prejudicial impact upon interest-holders of any delay, as well as the practical limitations which attend the particular exercise of the power by reason of the nature of the decision required and the preparation, investigation and considerations called for, are all likely to be relevant to what, in the context of the particular legislative scheme, was intended as a reasonable time for the performance of the duty.

To my mind, the question that s 7(1) poses is really this: by reference to the statutory scheme in which the decision-making power is found, has there, in all of the circumstances, been an unreasonable delay in the making of that decision...

40 The “usually high threshold for a conclusion that a power has been unreasonably exercised as a matter of law”, was recently reiterated by the High Court in *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2; (2024) 98 ALJR 196 at [25]. See also *Minister for Home Affairs v DUA16* [2020] HCA 46; (2020) 271 CLR 550 (*DUA16*) at [26] citing *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 (*SZVFW*) at [11], [52], [89] and [135].

41 In this regard the primary judge at [52] quoted *DUA16* at [26]:

A requirement of legal reasonableness in the exercise of a decision-maker’s power is derived by implication from the statute, including an implication of the required threshold of unreasonableness, which is usually high. Any legal unreasonableness is to be judged at the time the power is exercised or should have been exercised. It is not to be assessed through the lens of procedural fairness to the applicant. Instead, whether the implied requirements of legal reasonableness have been satisfied requires a close focus upon the particular circumstances of exercise of the statutory power: the conclusion is drawn “from the facts and from the matters falling for consideration in the exercise of the statutory power”.

42 The appellant pointed to no authority to support the proposition that the consideration of whether a delay is unreasonable starts with an assumption that an agency is adequately resourced, such that the lack of resourcing is a consideration (except in limited circumstances) that is not relevant thereafter. Nor did he point to any authority which suggests that any explanation for a delay that refers to resourcing is not a relevant consideration (or is of limited relevance) in assessing whether it has been established that the delay is unreasonable.

43 Certainly, none of the judgments to which the appellant drew specific attention, being *Wei*, *BMF16* and *Davis*, in which applications for relief based on unreasonable delay were at least partly sought to be explained by a lack of resources in the relevant agency, adopt that approach. Rather, each of those judgments, as with the primary judgment, considered evidence of the explanation for the delay as a relevant consideration, together with others, in reaching a conclusion. Further, it may be noted that, in *BMF16*, the Court ultimately concluded that the evidence failed to establish that resourcing was a significant cause of delay: at [104]-[105]. In *Wei*, in the context of evidence being adduced suggesting inadequate resources, the Court rejected the submission that the reasons were for delay were not relevant: at 475.

44 As the primary judge correctly observed, *Thornton* — where Fisher J considered the factors relevant to assessing whether a delay may be unreasonable for the purposes of the ADJR Act s 7(1) — has been repeatedly applied, including in *Wei*, *BMF16* and *Davis*: PJ [47]-[52]. In doing so the primary judge at PJ [52] also referred to the comments in *Davis*, where Logan J held that the considerations referred to in *Thornton* sat well with contemporary expositions of legal unreasonableness, such as that found in *DUA16* at [26] (recited above at []).

45 That said, care must be taken in considering those cases, and others, in what was said as to the lengths of delays under consideration. Each conclusion is case specific: whether a delay is unreasonable is to be assessed in all the circumstances. Significantly, each case will be considered in the context of the relevant statutory scheme. For example, the FOI Act is not directly concerned with matters affecting the liberty of a person, unlike a migration context where detention may be in issue, which may impact on any assessment of whether a delay is unreasonable: cf *BMF16*.

46 An assessment in all the circumstances does not preclude a finding that a delay is unreasonable in circumstances where the explanation provided refers to resourcing of the agency. Nor is that finding precluded by the principle reflected in *Wei* at 477: “it is not for the Court to dictate to the Parliament or the Executive what resources are to be made available in order to properly carry out its administrative functions under the legislative provisions” (see [] above).

47 *Fourth*, the broad discretion given to the Information Commissioner in relation to the manner in which an IC review is to be conducted is subject to the exhortations in s 55(4) of the FOI Act. The exhortations include that the IC review is to be conducted with as little formality and technicality as possible and “in as timely a manner as is possible given” specified matters (ss 55(4)(a), (c)).

48 The appellant contended that the express statutory exhortation to a decision-maker to perform a function “in as timely a manner as is possible” is exceptional and emphasises the legislative intention that reviews should be completed without undue delay. He submitted that the language is only used when the Parliament wishes to place emphasis on expedition.

49 The respondent submitted that, to the contrary, the exhortation to conduct an IC review “in as timely a manner as is possible” does not require the pursuit of timeliness at the expense of the proper administration of the FOI Act or the proper consideration of the issues arising in a particular IC review. It was submitted that those issues include the application of exemptions directed to protection of important public interests. It was noted that the expression used in s 55(4)(c) is “in as timely a manner as is possible given the matters mentioned in subparagraphs (a)(i) to (iii)”, which contemplates consideration of what is practical having regard to those specified matters (being the requirements of the Act, the requirements of any other law, and a proper consideration of the matters before the Information Commissioner).

50 So much may readily be accepted. Contrary to the appellant’s submission, the terms of s 55(4)(c), read in context, are not properly characterised as emphasising “expedition” in the sense the appellant contends, namely that the reviews must be completed without undue delay. No time limit has been imposed, in contrast to an FOI application: s 15(5)(b) of the FOI Act. Rather, Parliament chose aspirational language in the provision to be considered within a broad framework. This approach recognises that the practical application of the IC review process and need for a proper consideration of the specific matter exist together with an applicant’s interest in the timely outcome of the process.

51 The appellant was at pains to stress that s 55(4)(c) is “exceptional”, despite the respondent pointing to provisions in similar terms in other statutes: see, e.g., *Australian Security Intelligence Organisation Act 1979* (Cth) at ss 82L(1), 83ED(2) and 83EE(1). In any event, the statutory context highlighted by the respondent demonstrates that timeliness is a competing, rather than an overriding, priority.

52 We also note that s 55(4) is not intended to limit s 55(2), which provides that the Information Commissioner may conduct the IC review in whatever way they consider appropriate, use any technique they consider appropriate to facilitate an agreed resolution, allow a person to participate in a review by any means of communication, obtain any information from any person and make any inquiries considered appropriate, and to give written directions as to the conduct of reviews.

53 *Fifth*, and relatedly, the appellant's submission is that even the shortest of the delays relied on, being three months, is unreasonable. It was submitted that the importance of timeliness is reflected in the fact that the applicant is required to be notified of the decision of their initial FOI request within 30 days: FOI Act s 15(5)(b). He submitted that where decisions are required to be made at first instance in 30 days, regardless of the complexity of the review process, at no point in the process should there be a delay of three times the original timeframe to undertake any one step in the review process.

54 In effect, the appellant characterised three months as the outer limit as a reasonable time in which to conduct an IC review. However, that approach is flawed. The relevant application being decided is an IC review application, not a decision of an applicant's initial FOI request.

55 By its nature, given the procedures set out in the FOI Act, as explained above, there are steps to be undertaken before the review can even take place (and steps not necessary in relation to the initial decision given that is made by the department holding the documents sought). For example, the reviewing body must obtain the material to conduct a merits review, which is always held by another department or agency. How quickly that is complied with depends on the type of material sought. The type of request dictates the procedure that must be followed (for example, exempt or conditionally exempt material, see [] above). The steps to be undertaken, and by implication the complexity of the process, depends on the nature of the information sought under the FOI Act. Examples in this case include requests for extensions to the provision of information, or that the agency notified the applicant that it intended to reconsider the original decisions. This highlights that there is no one size fits all approach, such that it would be incorrect to approach the assessment of whether a delay is unreasonable in any application by considering any nominated time frame as an outer limit, let alone one of three months.

56 *Sixth*, there is a difference between the parties as to their characterisation of the right in question. The appellant contends that it is the right to access information in accordance with the FOI Act, and not simply the right to seek a review under s 55K. It was contended that it is incorrect to separate the review process from the underlying general right. On the other hand, the respondent submitted that the relevant right is the review application, because that is a particular step in the process which is not necessarily undertaken and has its own procedures.

57 It should be noted that, as the respondent submitted, the right to access material of an agency is not unqualified. The right is qualified in at least two ways: it is “subject to this Act”, and the right does not extend to exempt documents: FOI Act s 11(1)(a).

58 That said, the precise description of the right reflects a difference without a distinction. Although there must be a focus on the application in question, being the review application, the focus must be against the background of the scheme of the FOI Act which includes the (qualified) right to documents.

59 *Finally*, whether a delay is unreasonable is a binary decision; the assessment admits of only one right answer. It is accepted by the parties that it is necessary for this Court to decide whether delay was unreasonable and whether the primary judge’s reasoning is in that regard correct: *SZVFW* at [18], [20], [56]-[57]. It is also accepted that in this case the assessment is to be done based on the fact finding of the primary judge, as no factual findings are challenged. Moreover, it is also to be conducted in a context where the only basis for unreasonableness relied on in the appeal are various periods of time where there is said to be a lack of activity in the conduct of the review. The corollary of that is that there is no suggestion that there is any unreasonableness based on decisions made during the IC review process, nor any suggestion of irrationality in those decisions. For example, there are instances where in a review time is taken because the agency informed the Office of Information Commissioner that it intended to issue a revised decision (see, e.g., PJ [100], [112], [119], [166], [169]-[170], [177]), that agencies requested extensions of time to provide material (see, e.g., PJ [98], [111], [119], [122]-[123], [126], [136], [153], [160], [165]-[171], [177]-[178]) and arrangements needed to be made to enable secure material to be appropriately handled (for example, PJ [121], [138]-[139]).

60 Although the appellant submitted in relation to some IC reviews that the AIC failed to progress the matter such that it resulted in unreasonable delay, there is no challenge to the primary judge’s conclusions as to how the AIC handled such issues. Similarly, but importantly, there is no challenge to the decisions made by the Information Commissioner as to the allocation of resources. There is no suggestion that those decisions were unreasonable or irrational.

61 In this context it is also appropriate to recognise that it is the overall delay in the conduct of the review that is in issue, not the individual delays. That is because, as accepted by the appellant, the issue to which s 7(1) of the ADJR Act directs attention is whether there has been unreasonable delay in making a decision, not whether there have been particular delays in components of the review processes.

The IC reviews

62 Apart from the approach to the assessment of unreasonableness, referred to above, the error the appellant pointed to in each IC review is not in the primary judge's reasoning, but in each of his conclusions that unreasonableness had not been established. That is, if this Court were to come to a different conclusion in relation to any of the IC reviews, an error would have been established in relation to the primary judge's conclusion on that review.

63 The delays at the time of the hearing before the primary judge ranged from three and a half months in the fourth IC review, through to two years and six months delay in the sixth IC review. We note the seventh IC review had a three-month delay; the appellant made the submissions summarised at []-[] prior to that review's determination (see []).

64 The appellant candidly submitted that the sixth IC review was the high point of his case. It follows that if the appellant did not succeed with this review, he could not succeed on the remaining five reviews where the facts were not as favourable to his case on delay.

65 The primary judge addressed the sixth IC review at PJ [180]-[183]. This review arose from a request to the Department of Health to access documents related to meetings of the Australian Health Protection Principal Committee since 29 May 2020 on the topic of State border closures. Ten documents fell within the request. The Department refused access to all of those documents based on the exemption in s 47B of the FOI Act, which establishes a conditional public interest exemption in relation to documents if, amongst other things, disclosure of the document would, or could reasonably be expected to, cause damage to relations between the Commonwealth and a State: PJ [180]. As at the time of the hearing before the primary judge, the IC review was awaiting allocation to a review adviser in the Reviews and Investigations Team, a team within the Office tasked with case managing IC reviews with a view to resolving those matters for which a decision is not required: PJ [82]. At that time there were approximately 193 other IC review applications also awaiting allocation to a review adviser that had been lodged earlier in time than the sixth IC review: PJ [182].

66 The length of the delay awaiting allocation (with the matter being untouched during this time) was approximately two and a half years. The primary judge recognised that was a very long period of time. His Honour concluded at [183]:

...the cause of that delay appears primarily to be the significant volume of review applications which must be dealt with, together with the resourcing constraints within the Office. I therefore do not consider that the delay has been unreasonable within the

meaning of s 7(1) of the ADJR Act.

67 At [201], under the heading Remedies, his Honour concluded:

It has not been shown that the applicant has been singled out for delay. It has not been shown that the Information Commissioner has acted unreasonably in the way that the resources available for the discharge of her statutory functions have been allocated. In any event, in light of the usually high threshold to show legal unreasonableness referred to by the High Court in *Minister for Home Affairs v DUA16* at [26], the Court would be very slow to judge such a question. For similar reasons, the Court should not normally interfere with the decisional freedom of the Information Commissioner to decide how to allocate resources, and how to balance competing priorities amongst the heavy caseload of IC reviews. There are no circumstances of this case which make it appropriate for the Court to make orders that interfere with the Information Commissioner's conduct of her Office and the procedures for the orderly handling of the large backlog of applications for IC review.

68 We refer also to his Honour's conclusions, recited above at [].

69 We observe also that this appeal is in a context where, importantly, the appellant does not seek any order to compel the respondent to have this, or any of his other IC reviews determined.

70 As explained above at [], there is no challenge to the primary judge's conclusions as to the management of IC reviews: see PJ [64]-[92] for a summary of the evidence accepted by the primary judge. Nor is there any challenge to his Honour's conclusion that it had not been shown that the Information Commissioner had acted unreasonably in the way "that the resources available for the discharge of her statutory functions have been allocated": PJ [201].

71 Given that, the explanation for the delay in this case relates to resourcing. The procedures in place for the management of this IC Review (the reasonableness of which is not challenged) have the sixth IC review awaiting allocation, in its turn. The delay has not occurred because of any act of capriciousness, negligence or oversight. There is nothing illogical or irrational about the actions which have resulted in the sixth IC review being delayed.

72 The structure of the FOI Act is described above and is unnecessary to repeat. Although, as the appellant contends, the review is to be conducted in a manner as timely as possible, the FOI Act provides no time limits and entrusts the Commissioner with the freedom of designing the process and allocating the resources, which are finite.

73 Recognising the delay is very lengthy, we nonetheless are not satisfied that this delay, although unfortunate, is unreasonable in the vitiating sense required to engage s 7(1) of the ADJR Act. The usually high threshold for a conclusion of unreasonableness of that kind has not been met. The question is not whether it should be expected that such processes would have been quicker,

but whether, considering the circumstances of this review, in the context of the statutory scheme, this delay is unreasonable in that sense. The concept is not absolute or abstract, but rather contextual both in relation to the statute in question and the particular facts of the case at hand.

74 In our view the primary judge was correct to conclude that, in respect to the sixth IC review, the appellant had not established the delay was unreasonable. Nor has any error otherwise been established in the primary judge’s approach.

75 As this review is the high point of the appellant’s case, having considered the material in relation to the other reviews, we are also not persuaded that the lesser periods of time in the remaining reviews are unreasonable, having regard also to the fact that a number of the other reviews have additional complexity because of the nature of the documents sought and various procedural steps (for example, applications for extensions, notification of a revised decision, etc.). We note also, as the respondent demonstrated, that in some of those reviews there was activity in the periods described by the appellant as ones of inactivity. No error has been established in relation to the remaining reviews.

Discretion

76 Declarations are necessarily a form of discretionary relief obtainable under s 21 of the *Federal Court of Australia Act 1976* (Cth) and s 16(3)(b) of the ADJR Act. The appellant seeks no other relief. Rather, in substance he seeks no more than the convenience of a public statement of what he asserts is a failure by the respondent to comply with a statutory duty. He does not explain why, if that had been established, an adjudication on that issue and the recording in a judgment of this Court of a finding to that effect would not suffice. As the Full Court pointed out in *Warramunda Village Inc v Pryde* [2001] FCA 61; (2001) 105 FCR 437 at [8], endorsed in *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2012] FCAFC 56; (2012) 201 FCR 378 (*MSY Technology*) at [35], it is not appropriate to use the remedy of declaration merely as a summary recording of conclusions reached in reasons for judgment, especially when this is not relied upon to advance any right or liability, as would be achieved by an order to comply with the duty, which is eschewed by the appellant. See also *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75; (2003) 216 CLR 53 at [95], in which the High Court emphasised the need for utility in making declarations, in that case, as described in *MSY Technology* at [35] as “setting out of the basis of the liability found and, in turn, in the basis for the penalties imposed”.

77 It follows that even if the breach of statutory duty alleged by the appellant had been established, it would not have been appropriate to grant the declaratory relief sought.

Conclusion

78 As the appellant has failed to establish any error on the part of the primary judge, the appeal must be dismissed. Even if error had been established, that the appellant did not seek the most appropriate remedy in these circumstances, being an order requiring that the relevant statutory duty be complied with, we would not, in the exercise of our discretion, have made the declarations sought. It follows that the respondent should have her costs of the appeal.

I certify that the preceding seventy-eight (78) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Bromwich, Abraham and McEvoy.

Associate:

Dated: 11 July 2024