

Notice of appeal

No. VID 519 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General Division

On appeal from the Federal Court

Rex Patrick

Appellant

Australian Information Commissioner

Respondent

To the Respondent

The Appellant appeals from the judgment as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence. You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing: [Registry will insert time and date. NOTE: This would usually be the date of the next callover]

Place: [address of Court]

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	The Appellant, Rex Patrick
Prepared by (name of person/lawyer)	S A McDonald SC
Law firm (if applicable)	MSM Legal
Tel 08 8161 5088	Fax
Email	ms@msmlegal.com/au

Address for service
(include state and postcode)





The Appellant appeals from orders 2, 3, 4 and 5 of the judgment of the Federal Court (the Honourable Justice Wheelahan) given on 22 August 2023 at Melbourne. (Reasons supporting the orders made were delivered on 26 May 2023 at Melbourne: *Patrick v Australian Information Commissioner (No 2)* [2023] FCA 530.)

Grounds of appeal

1. The primary Judge erred in holding that the Appellant had not established that there had been unreasonable delay in the sense required to engage s 7(1) of *the Administrative Decisions (Judicial Review) Act 1977* (Cth) in connection with the IC Reviews under the *Freedom of Information Act 1982* (Cth) (**FOI Act**) the subject of the separate question, and in failing to make declarations to that effect. In particular:
 - a. The primary Judge erred in failing to give effect (or in the alternative, appropriate effect) to s 55(4)(c) of the FOI Act and the objects of the FOI Act in the construction of the FOI Act and consequently in the determination of whether there had been “unreasonable delay”.
 - b. The primary Judge erred in failing to approach the concepts of “in as timely a manner as is possible”, “within a reasonable time” and “unreasonable delay”, as determined as a matter of statutory construction of the FOI Act, as matters to be considered:
 - i. on the statutory assumption that the Information Commissioner would be adequately resourced to perform the functions of her office in accordance with the law;
 - ii. on the basis that inadequacy of funding or resources is not admissible as a relevant “reason” for delay;
 - iii. on the basis that inadequacy of funding could not be allowed to frustrate, negative, or set at naught the value of, the enjoyment of statutory rights and/or the performance of statutory duties under the FOI Act; and/or
 - iv. without regard to the number or progress of other applications for IC Review that were lodged earlier in time than the applications under consideration.
 - c. The primary Judge erred in approaching the question of what was reasonable as a matter to be determined by treating inadequacy of resources as a relevant “reason” for the delay bearing upon the reasonableness of the delay, as opposed to merely a cause of delay within the Office of the Australian Information Commissioner.



- d. In relation to each individual file the subject of the separate determination, the delays and periods of inaction were such that the primary Judge ought to have concluded that the IC review in respect of each of those matters was not conducted “in as timely a manner as is possible” within the meaning of s 55(4)(c) of the FOI Act and that, in each case, there had been “unreasonable delay” for the purposes of the FOI Act.

Orders sought

1. Appeal allowed.
2. Set aside the orders 2, 3, 4 and 5 made by the Federal Court (Wheelahan J) on 22 August 2023 and in lieu thereof, make the following orders:

- a. The separate question stated in paragraph 2 of the orders made on 8 December 2021, as varied by order made on 20 March 2023, is answered as follows –

Question: Whether the Applicant is entitled to the relief sought in the further amended originating application filed in accordance with order 1 of these orders in respect of the IC review applications marked with the words “separate question” in Appendix A to the further amended originating application, excluding MR19/00010 and MR20/00544.

Answer: Yes, the Applicant is entitled to declarations that there has been unreasonable delay in connection with each of those IC review applications (noting that the remainder of the relief originally sought is no longer pressed).

- b. There be declarations that there has been unreasonable delay in connection with the making of decisions in respect of each of the IC review applications marked with the words “separate question” in Appendix A to the further amended originating application, excluding MR19/00010 and MR20/00544.
- c. The Respondent is to pay the appellant’s costs of the trial of the separate question, fixed in the amount of \$80,000.
3. The proceeding is otherwise remitted to a single Judge of the Court to be determined in accordance with the reasons of the Full Court.
4. The Respondent is to pay the Appellant’s costs of the appeal.

Appellant’s address

The Appellant’s address for service is:

Place: MSM Legal, 117 Wright Street, Adelaide SA 5000

Email: ms@msmlegal.com.au

The Appellant's address is



Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 18 September 2023

A handwritten signature in blue ink, appearing to read 'MSM'.

Signed by Mitchell Simmons
Lawyer for the Appellant