

FEDERAL COURT OF AUSTRALIA

Patrick v Australian Information Commissioner [2022] FCA 1123

File number(s): VID 519 of 2021

Judgment of: **WHEELAHAN J**

Date of judgment: 19 September 2022

Catchwords: **PRACTICE & PROCEDURE** – application by the respondent to amend concise statement to raise new ground of objection – application by the respondent for an extension of time within which to file notice of objection to competency under r 31.05(1) of the *Federal Court Rules 2011* (Cth) – applications granted – consequential vacation of hearing of trial of separate question – hearing re-fixed

Legislation: *Administrative Decisions (Judicial Review) Act 1977* (Cth) sections 7(1)
Australian Crime Commission Act 2002 (Cth)
Federal Court Rules 2011 (Cth) rules 1.39, 31.05(1), 31.24, 31.31, 33.30, 36.72, 40.51
Federal Court Rules 1979 (Cth) order 52 r 18(3), order 54 r 4
Freedom of Information Act 1982 (Cth) sections 54N, 55K(1)
Migration Act 1958 (Cth)

Cases cited: *Coal and Allied Operations Pty Ltd v Industry Research and Development Board* (unreported, 16 November 1992)

Division: General Division

Registry: Victoria

National Practice Area: Administrative and Constitutional Law and Human Rights

Number of paragraphs: 13

Date of hearing: 19 September 2022

Counsel for the Applicant: Ms T Acreman

Solicitor for the Applicant: Mahony's Lawyers

Counsel for the Respondent: Ms Z Maud

Solicitor for the Respondent Norton Rose Fulbright

ORDERS

VID 519 of 2021

BETWEEN: **REX PATRICK**
Applicant

AND: **AUSTRALIAN INFORMATION COMMISSIONER**
Respondent

ORDER MADE BY: **WHEELAHAN J**

DATE OF ORDER: **20 SEPTEMBER 2022**

THE COURT ORDERS THAT:

1. Orders 7 and 8 of the orders dated 28 March 2022 are set aside.
2. Pursuant to r 16.53 of the *Federal Court Rules 2011* (Cth), the respondent has leave to file and serve by 4.00 pm on 20 September 2022 an amended concise statement in response to the applicant's further amended concise statement dated 10 December 2021, substantially in the form annexed to the interlocutory application dated 15 September 2022.
3. Pursuant to r 1.39 of the *Federal Court Rules*, the time by which the respondent may file a notice of objection to competency under r 31.05(1) is extended to 4.00 pm on 20 September 2022.
4. The time within which the applicant is to file and serve any written submissions in reply is extended to a date to be fixed.
5. By 4.00 pm on 30 September 2022, the applicant file and serve any application to amend his further amended originating application dated 10 December 2021 and the further amended concise statement dated 10 December 2021.
6. The proceeding is listed for a case management hearing on at 9.30 am on 10 October 2022.
7. The separate question is re-fixed for hearing commencing 21 November 2022, on an estimate of two days

8. The respondent pay the applicant's costs (if any) of the interlocutory application dated 15 September 2022, and the costs (if any) thrown away by reason of the amendment of the concise statement in response to the further amended concise statement and the vacation of the hearing of the separate question that was listed to commence on 26 September 2022.

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

REASONS FOR JUDGMENT

(Ex tempore)

WHEELAHAN J:

- 1 This proceeding was commenced by an originating application filed 9 September 2021. The applicant, a former member of the Australian Senate, seeks relief against the Australian Information Commissioner pursuant to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). The applicant seeks orders that the respondent make a decision on 23 review applications that were before the respondent in respect of applications made pursuant to s 54N of the *Freedom of Information Act 1982* (Cth) (**FOI Act**). The applicant claims that the respondent has a duty to make a decision on the review applications, and has failed to do so. He claims that he is entitled to relief under s 7(1) of the ADJR Act on the ground that there has been unreasonable delay by the respondent in making the decisions.
- 2 By orders made 8 December 2021, I ordered to be tried as a separate question whether the applicant is entitled to the relief sought in relation to nine of the 23 review applications that were the subject of the originating application. Of those nine review applications, eight remain unresolved by the respondent. The hearing of the separate question is currently fixed for next Monday 26 September 2022. Comprehensive interlocutory steps have been taken by both parties in order to prepare the matter for hearing. Those steps have included amendments to the originating application, detailed concise statements, and outlines of written submissions signed by counsel.
- 3 The parties' exposure to the costs of the trial of the separate question is limited. By an order made on 16 March 2022, which was made by consent, pursuant to r 40.51 of the *Federal Court Rules 2011* (Cth) the maximum costs as between party and party that may be recovered in the proceeding in relation to the trial of the separate question is \$80,000.
- 4 By an interlocutory application filed 15 September 2022, the respondent seeks two orders. *First*, the respondent seeks leave to file and serve an amended concise statement in a form that is annexed to the interlocutory application. The second order sought is an extension of time pursuant to r 1.39 of the *Federal Court Rules* within which the respondent may file a notice of objection to competency under r 31.05(1).

5 By the respondent's outline of written submissions filed on 8 September 2022 for the purposes of the hearing of the separate question, the respondent foreshadows a threshold argument, namely that the respondent's obligation to make a decision pursuant to s 55K(1) of the FOI Act arises only "after undertaking an IC review". The respondent foreshadows a submission that the process of review is ongoing, and therefore a pre-condition to the making of an application under s 7(1) of the ADJR Act is not satisfied. The respondent has foreshadowed a submission that the application is therefore incompetent.

6 In relation to the application to amend the concise statement, the respondent seeks to make a number of amendments. Many of the proposed amendments concern matters of detail. The main matter of substance is that, reflecting the written submissions filed 8 September 2022, the respondent seeks to introduce a claim that because the review is ongoing, the respondent's duty to make a decision has not yet arisen. That claim had earlier been foreshadowed by a letter from the respondent's solicitors to the applicant's solicitors dated 24 August 2022.

7 I have determined that the respondent should have leave to file an amended concise statement in the form proposed. The amendments should be allowed so that the real issues are formally before the Court. As to the amendments going to matters of detail, there was no real opposition advanced. As to the respondent's proposed reliance on the terms of the FOI Act to support an argument that the application is incompetent, this largely involves questions of construction. I do not consider that there is any relevant prejudice to the applicant in allowing the amendments that could not be cured by an adjournment, and an award of costs. In any event, a point of law having been raised by the respondent that would preclude relief, it should be determined. On the assumption that there is merit in the new point raised by the respondent, the application should not proceed on a false legal premise.

8 Although an adjournment of the hearing is undesirous, in this case it is unavoidable. Counsel for the applicant informed the court that if the amendments were allowed, the applicant would seek an opportunity to consider his position, and to add further grounds to support the relief that he seeks. Counsel for the applicant stated that this could not be considered between now and next Monday, and moreover, that counsel would not be in a position to address the new case that the respondent seeks to advance. It is therefore necessary in the interests of justice to vacate the hearing and to re-fix it for 21 and 22 November 2022.

9 As to the application to file out of time a notice of objection to competency, Division 31.1 of the *Federal Court Rules* is concerned with applications for orders of review under the ADJR Act. Rule 31.05 is in the following terms –

31.05 Notice of objection to competency

- (1) A respondent who objects to the competency of an application must, within 14 days after being served with the application, file a notice of objection to competency:
 - (a) in accordance with Form 68; and
 - (b) that, briefly but specifically, states the grounds of the objection.
- (2) The applicant carries the burden of establishing the competency of an application.
- (3) A respondent may apply to the Court for the question of competency to be heard and determined before the hearing of the application.
- (4) If a respondent has not filed a notice under subrule (1), and the application is dismissed by the Court as not competent, the respondent is not entitled to any costs of the application.
- (5) If the Court decides that an application is not competent, the application is dismissed.

10 There are corresponding provisions in rules 31.24, 31.31, 33.30 and 36.72 relating to applications to review decisions under the *Migration Act 1958* (Cth), applications for review of matters arising under s 57 of the *Australian Crime Commission Act 2002* (Cth), appeals from the Administrative Appeals Tribunal, and appeals generally. The precursor of r 31.05 was O 54, r 4 of the *Federal Court Rules 1979* (Cth). However, the former O 54 did not provide for costs consequences of the failure to file a notice of objection to competency in relation to applications under the ADJR Act. However, O 52 r 18(3) provided for cost consequences of appeals generally where an appeal was dismissed by the court as incompetent and the respondent to the appeal did not move for an order dismissing the appeal as incompetent. In *Coal and Allied Operations Pty Ltd v Industry Research and Development Board* (unreported, 16 November 1992) Beaumont J, in the exercise of a discretion as to costs where an application under the ADJR Act was accepted as being not competent, ordered that there be no orders as to costs, referring to the purpose of O 54 r 4 as being clearly intended to encourage a respondent to an application to inform the applicant at the earliest possible date that jurisdiction was in issue.


11 I observe that there are at least three purposes of r 31.05. The first is to give notice to an applicant of an objection to competency. In this proceeding, there have been orders for concise

statements and written submissions that fulfil the purpose of giving notice. The second purpose is to facilitate an application for separate determination of the competency of an application where an objection has been taken. In this case, no separate determination of the competency of the application has been sought by the respondent, other than to the extent that the competency of the application is put in issue for the trial of the separate question. The third purpose is to provide an incentive for questions of competency to be raised by a respondent at the earliest opportunity in the proceeding, and in particular, within 14 days of service. The failure to do so has the consequence that if the respondent does not put in issue the question of competency by filing a notice within 14 days, and the application is dismissed as being incompetent, the respondent is not entitled to any costs of the application: r 31.05(4).

12 I have formed the view that the costs consequences of the respondent's failure to file a notice of objection to competency are more appropriately determined at the conclusion of the proceeding and as a matter of discretion. This is particularly the case having regard to the applicant's proposal to review the grounds on which the application is made, which may result in a newly-formulated case. It may well be the position that there is a sound argument that the respondent should not have any costs of the proceeding to date, or at all, on the ground that it failed to take an objection to competency until very late in the proceeding. However, that is not able to be assessed at the present time. Primarily for this reason, I will make an order enlarging time for the respondent to file a notice.

13 I will hear counsel on orders.

I certify that the preceding thirteen (13) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate: 

Dated: 20 September 2022