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Details of Filing

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File Title:	SENATOR REX PATRICK v AUSTRALIAN INFORMATION COMMISSIONER
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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Federal Court of Australia
District Registry: Victoria
Division: General

No. VID519 of 2021

Senator Rex Patrick
Applicant

Australian Information Commissioner
Respondent

RESPONDENT'S SUBMISSIONS IN RELATION TO THE APPLICATION FOR MAXIMUM COSTS ORDER

A. Introduction

1. The applicant seeks an order pursuant to r 40.51 of the *Federal Court Rules 2011* (Cth) (**Rules**) that the maximum costs that may be recovered by either party in this proceeding is $10. In effect, the applicant seeks an order that each party bear its own costs of the proceeding. For the reasons that follow, the interlocutory application should be dismissed.

B. Relevant principles

2. The principles relevant to the determination of this application are not in dispute.[1]

3. The Court has a broad discretion to award costs, although the general principle is that costs ordinarily follow the event, and a successful litigant receives costs, absent special circumstances justifying some other order.[2] An order for costs is compensatory, with an award of costs to a successful party being "principally by way of perceived restorative justice".[3] An order pursuant to r 40.51 of the Rules specifying the maximum costs that may be recovered by either party reflects a departure from the usual order that would otherwise be made, although ordinarily the application of r 40.51 still results in the successful party having its costs, albeit in a capped amount.[4] The object of a rule providing for the fixing of a maximum amount of costs is to enable the Court to "define a budget so that the management of the case might be tailored according to its economic limits".[5]

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1 See Applicant's Submissions dated 22 November 2021 (**AS**) at [4] – [8].
2 ***Ruddock*** *v Vadarlis (No 2)* (2001) 115 FCR 229 at [11] (Black CJ and French J).
3 *Ruddock* at [12].
4 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 at [10].
5 *Sacks v Permanent Trustee Australia Limited* (1993) 45 FCR 509 at 511 (Beazley J, citing a letter from the then Chief Justice to the President of the Law Council of Australia in relation to the introduction of O 62A of the *Federal Court Rules 1979*). See also *McKay Super Solutions Pty Ltd (Trustee) v Bellamy's Australia Ltd (No 2)* (2019) 135 ACSR 278 at [71] (Beach J); *Houston v State of New South Wales* [2020] FCA 502 at [19] (Griffiths J).

4. The particular factors that are relevant to the exercise of the Court's discretion under r 40.51 in the present case are the complexity of the factual or legal issues raised in the proceeding, whether there is a public interest element to the case, whether the applicant's claims are arguable and not frivolous or vexatious and the undesirability of forcing the applicant to abandon the proceeding.[6]

C. Application of relevant factors

Nature of the proceeding

5. In this proceeding, the applicant claims that there has been "unreasonable delay" for the purpose of s 7(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) in making a decision in relation to each of 23 IC Review Applications lodged by the applicant.[7] The applicant seeks an order pursuant to s 16(3)(a) of the ADJR Act that the respondent make a decision within 30 days (or such other time as the Court determines) in relation to 20 of the applicant's IC Review Applications that were lodged six months or more prior to 1 September 2021. Further and alternatively, the applicant seeks certain declarations in relation to the 23 IC Review Applications identified in Appendix A to the Originating Application, to the effect that the respondent's delay in proceeding or considering each application is contrary to the interests of the administration of the FOI Act.

6. **Complexity**. Having regard to the number of IC Review Applications that are the subject of the proceeding, and the nature of the task necessary to determine whether there has been "unreasonable delay" in making a decision in relation to any of the 22 remaining IC Review Applications, it cannot be said that this proceeding is without some factual complexity.

7. As a matter of practicality it falls to the respondent, as the custodian of the information, to adduce evidence as to the decision-making process in relation to each IC Review Application, and to explain the reason for any lengthy period of inactivity.[8] Having regard to the number of IC Review Applications in respect of which the applicant seeks relief, the burden on the respondent of this proceeding is significant. Further, determination of whether there has been unreasonable delay will require consideration of the statutory setting, including the nature of the task required to determine whether exemptions under Pt IV of the FOI Act apply. Accepting the applicant's indication that there is unlikely to be any factual dispute (AS [16]), and that the hearing of this matter may only require two days, nonetheless this proceeding has a moderate degree of factual and legal complexity.

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6 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 at [6]. See also *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of Australian Charities and Not-for-Profits Commission* [2021] FCA 435 at [10].

7 After the Amended Originating Application was filed, a decision was made pursuant to s 55K of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) in relation to one of the 20 applications (MR20/00291).

8 See in a different context *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at [118] (Gordon and Steward JJ).

8. The respondent's legal costs are likely to be significant. The applicant's estimate of the respondent's likely taxed costs of $20,000 - $40,000 is likely to be a significant underestimate. Having elected to seek relief in relation to all of his extant IC Review Applications, rather than a sample, it is unreasonable to close off the possibility of the respondent recovering an amount towards her costs before the merits of the application have been determined.

9. **Public interest.** The respondent accepts that the proceeding raises an issue of public interest, in the sense that there are others within the community who are aggrieved by the time taken to determine their applications for review under Pt VII of the FOI Act, and whether relief is available under the ADJR Act in that circumstance may be a matter that has consequences for persons other than the applicant, although the extent to which that is so is qualified insofar as the assessment of whether there has been unreasonable delay is a fact specific analysis. However, "the fact that litigation can be characterised as being 'in the public interest' does not, of itself, mean that the usual order is not made".[9] The public interest nature of the proceeding is only one of a number of relevant considerations.

10. In emphasising the significance of the public interest nature of this proceeding, the applicant relies on a broad conception of the public interest that includes the purposes of the FOI Act (AS [9(c)] and [11]). It is accepted that important public interests underlie the rights conferred by the FOI Act, however the right of access under the FOI Act is not absolute, but qualified by various exemptions, which themselves reflect important public interests.[10] Thus, the FOI Act represents a balance struck between competing public interests. Reliance simpliciter on the objects stated in s 3 of the FOI Act does not assist the applicant.

11. **Merits of the claim.** The respondent does not contend that the claims in the proceeding are not arguable, or are frivolous or vexatious. However, beyond that assessment, it is not possible at this early stage for the Court to form a view about the merits of the applicant's claim, which will turn on consideration of the particular circumstances of each IC Review Application and the statutory framework governing determination of merits review applications under Pt VII of the FOI Act.

12. The public interest nature of this proceeding is undoubtedly a consideration relevant to the question of costs. However, "the degree of public interest in any given case depends at least in part on the underling merit of the arguments."[11] In the absence of evidence that the applicant will not continue

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9 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 at [10] and [45].

10 See for example FOI Act ss 33 (documents affecting national security, defence or international relations), 34 (cabinet documents), 38 (documents to which secrecy provisions of enactments apply) and 45 (documents containing material obtained in confidence).

11 *Australians for Indigenous Constitutional Recognition Ltd v Commissioner of Australian Charities and Not-for-profits Commission* [2021] FCA 435 at [32] (Thawley J).

this proceeding in the absence of a maximum costs order, the appropriate course is for the Court to determine the costs question at the conclusion of the proceeding, when the weight to be given to the public interest nature of the proceeding can be properly assessed in light of the Court's conclusions about the merits.

Whether applicant will be forced to abandon the proceeding

13. In *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, Justice Bennett said at [41]:

> … impecuniosity of one party or claims about the relative financial significance of the cost of proceedings cannot of themselves be determinative. It would not be unusual that fear of exposure to costs acts as a deterrent to litigation. It is in that context that the comment that a party should not be "forced" to abandon litigation because of the possibility of an adverse, uncapped, costs order should be considered. While it may not be necessary to establish that the party was forced to abandon litigation for fear of costs, mere concern as to the effect of an adverse costs order on a party's asset position, or a concern that a party may become bankrupt if unable to meet a costs order are not, by themselves, factors that sufficiently render the applicants' position different from other litigants faced with the usual costs order.

14. There is no evidence that the applicant will be forced to abandon the proceeding if the Court does not make the costs order sought. The evidence of the applicant's solicitor, who is also his Legislation Advisor, is that any cost order "will be paid for by the applicant personally".[12] Ms Majury also deposes that an adverse costs order would be the "most significant contingent cost the Applicant will be exposed to" in this proceeding. Ms Majury states that The Australia Institute paid the filing fee for the proceeding,[13] but does not say that that is the full extent of The Australia Institute's willingness to contribute to the costs of this proceeding. Ms Majury does not give any evidence as to the applicant's capacity to pay an adverse costs order, or his position in the event that the present application is refused. In the circumstances, it is open to the Court to infer that the applicant does not intend to abandon the proceeding in the event that an order limiting his exposure to an adverse costs order to $10 is not made. That is a significant factor in this case that favours the ordinary approach of determining costs at the conclusion of the proceeding when the Court is able to assess all of the relevant information, including the merit of the claim.

Other considerations

15. The respondent accepts that this application was made at the earliest possible opportunity. That is not a factor that weighs in favour of the granting of the relief sought; it merely means that delay is not a factor that counts against exercise of the discretion to fix a maximum costs order (*cf* AS [19]).

16. The fact that an adverse costs order will have a differential impact on litigants is a common feature of litigation, including litigation against a statutory body such as the respondent. The applicant initially

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12 Affidavit of Stella Majury affirmed on 15 October 2021 at [14].
13 Affidavit of Stella Majury affirmed on 15 October 2021 at [13].

engaged counsel on the basis that fees would not be recovered except if a costs order was made in favour of the applicant.[14] For reasons that are not explained, the terms of the retainer were subsequently varied. The terms on which the applicant has engaged counsel is a matter between the applicant and his counsel; the fact that his counsel is prepared to act on a pro bono basis does not mean that the respondent should incur the cost of defending the proceeding without the prospect of recovering any amount towards her costs in the event that the applicant is unsuccessful. As a statutory officeholder and the accountable authority for the Office of the Australian Information Commissioner for the purpose of the *Public Governance, Performance and Accountability Act 2013* (Cth), the respondent must ensure the proper use and management of public resources for which she is responsible.[15] The fact that the individual occupying the office of the respondent at the present time has no personal exposure to costs is irrelevant to the present application (*cf* AS [22]).

E. Conclusion

17. The respondent respectfully submits that the application for an order fixing the maximum amount of costs payable in relation to this proceeding to $10 should be dismissed. Although the proceeding raises issues of public interest, it is premature to order, in effect, that there be no order as to costs when the Court has not had an opportunity to assess the merits of the claim. The complexity of the proceeding, which will involve significant expense for the respondent, and the absence of evidence indicating that the applicant will withdraw the proceeding if a maximum costs order is not made weigh strongly in favour of refusal of the application.

Date: 24 November 2021

Zoe Maud
Counsel for the respondent

[redacted]
Norton Rose Fulbright Australia
Solicitor for the respondent

14 Affidavit of Stella Majury affirmed on 15 October 2021 at [12].
15 *Public Governance, Performance and Accountability Act 2013* (Cth), s 15(1).