FEDERAL COURT OF AUSTRALIA

Patrick v Australian Information Commissioner (No 2) [2023] FCA 530

File number:	VID 519 of 2021
Judgment of:	**WHEELAHAN J**
Date of judgment:	26 May 2023
Catchwords:	**ADMINISTRATIVE LAW** — the applicant sought orders under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) directing the Australian Information Commissioner to make decisions on reviews of requests for documents under the *Freedom of Information Act 1982* (Cth) by a specified date — where the applicant 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 the Commissioner's conduct would result in an improper exercise of power — held: no unreasonable delay — no improper exercise of power would result — orders sought by the applicant would involve inappropriate judicial interference with the decisional freedom of an executive body — application dismissed
Legislation:	*Acts Interpretation Act 1901* (Cth) sections 2B, 2C, 15AA and 25D *Administrative Appeals Tribunal Act 1975* (Cth) sections 32(1), 35 and 43 *Administrative Decisions (Judicial Review) Act 1977* (Cth) sections 3(1), 3(5), 5(1)(e), 5(2)(h), 6(1)(e), 6(2)(h), 7(1) and 16(3) *Australian Information Commissioner Act 2010* (Cth) sections 5–12 and 25 *Competition and Consumer Act 2010* (Cth) Part IVD *Crimes Act 1914* (Cth) s 4B(2)–(3) *Data-matching Program (Assistance and Tax) Act 1990* (Cth) *Freedom of Information Act 1982* (Cth) sections 11, 11A, 15AC, 22, 33, 34, 47C, 47G, 54F, 54V, 54W, 54Z, 55, 55B, 55D(1), 55DA, 55F, 55G, 55H, 55K, 55R, 55T, 55U, 56 and 57A *Freedom of Information Amendment (Reform) Act 2010*

Schedule 4

Income Tax Assessment Act 1936 (Cth) sections 170 and 173

Judiciary Act 1903 (Cth) s 39B

National Health Act 1953 (Cth)

Public Governance, Performance and Accountability Act 2013 (Cth) sections 37(1), 39(1) and 46

Telecommunications Act 1997 (Cth)

Information Privacy Act 2014 (ACT)

Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–559 sections 6 and 10(e)

Cases cited:

AQM18 v Minister for Immigration and Border Protection [2019] FCAFC; 268 FCR 424

ASP15 v Commonwealth [2016] FCAFC 145; 248 FCR 372

Attorney-General (NSW) v Quin [1990] HCA 21; 170 CLR 1

Australia Pacific LNG Pty Ltd v Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport [2019] QSC 124

Australian Broadcasting Tribunal v Bond [1990] HCA 33; 170 CLR 321

Australian Heritage Commission v Mount Isa Mines Ltd [1997] HCA 10; 187 CLR 297

Australian and International Pilots Association v Fair Work Australia [2012] FCAFC 65; 202 FCR 200

Australian Securities and Investments Commission v Hellicar [2012]; 247 CLR 345

Bidjara Aboriginal Housing and Land Company Ltd v Indigenous Land Corporation [2001] FCA 138; 106 FCR 203

BMF16 v Minister for Immigration and Border Protection [2016] FCA 1530

Brownsville Nominees Pty Ltd v Federal Commissioner of Taxation [1988] FCA 91; 19 FCR 169

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2) [2012] FCA 403; 187 LGERA 161

Cobell v Norton (2001) 240 F 3d 1081 (DC Cir 2001)

CPCF v Minister for Immigration & Border Protection [2015] HCA 1; 255 CLR 514

Davis v Military Rehabilitation and Compensation Commission [2021] FCA 1446

Fieldhouse v Commissioner of Taxation (1989) 25 FCR 187

In re Barr Laboratories 930 F 2d 72 at 75 (DC Cir 1991)

Kelly v Watson (1985) 8 ALD 385

Marbury v Madison 5 US 87; 1 Cranch 137 (1803)

Minister for Home Affairs v DUA16 [2020] HCA 46; 271 CLR 550

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; 264 CLR 541

Minister for Immigration and Citizenship v Li [2013] HCA 18; 249 CLR 332

PT Pabrik Kertas Tjiwi Kimia Tbk v Minister for Justice and Customs [2000] FCA 18; 60 ALD 203

R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd [1949] HCA 33; 78 CLR 389

Re Federal Commissioner of Taxation; Ex parte Australena Investments Pty Ltd (1983) 50 ALR 577

Repatriation Commission v Morris (1997) 79 FCR 455

Sunland Group Limited v Gold Coast City Council [2021] HCA 35; 394 ALR 385

Telecommunications Research and Action Center v Federal Communications Commission 750 F 2d 70 at 79 (DC Cir 1984)

The Environment Centre NT Inc v Minister for Resources and Water (No 2) [2021] FCA 1635; 399 ALR 68

The Mashpee Wampanoag Tribal Council Inc v Norton 336 F 3d 1094 (DC Cir 2003)

Thornton v Repatriation Commission (1981) 52 FLR 285

Wang v Minister for Immigration and Multicultural Affairs (1997) 71 FCR 386

Wei v Minister for Immigration, Local Government and Ethnic Affairs [1991] FCA 207; 29 FCR 455

Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	204
Date of hearing:	20-21 March 2023
Counsel for the Applicant	Ms T Acreman
Solicitor for the Applicant	Flavio Verlato

Counsel for the Respondent	Ms Z Maud SC and Ms A Wharldall
Solicitor for the Respondent	Norton Rose Fulbright Australia

ORDERS

VID 519 of 2021

BETWEEN:	**REX PATRICK** Applicant
AND:	**AUSTRALIAN INFORMATION COMMISSIONER** Respondent

ORDER MADE BY: **WHEELAHAN J**

DATE OF ORDER: **26 MAY 2023**

THE COURT ORDERS THAT:

1. By 4.00 pm on 2 June 2023, the parties are to confer regarding:
   (a) orders to give effect to reasons;
   (b) costs;
   (c) procedural orders for the further conduct of this proceeding; and
   (d) whether the parties consent to the Court determining the above issues on the papers.
2. By 4.00 pm on 9 June 2023, the parties are to file and serve either:
   (a) a joint memorandum; or
   (b) separate written submissions –

   on the above topics, not exceeding three pages (12 point font, 1.5 line spacing) together with proposed orders.
3. In the event that the parties file separate written submissions, then by 4.00 pm on 14 June 2023, each party may file written submissions in reply, not exceeding two pages (12 point font, 1.5 line spacing).
4. A case management hearing will be fixed on a date to be advised.

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

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REASONS FOR JUDGMENT

WHEELAHAN J:

Introduction

1 The applicant is a former member of the Australian Senate. By this proceeding he claims that there have been unreasonable delays by the Australian Information Commissioner in reviewing several decisions relating to applications that he made when he was a Senator to obtain access to documents of Commonwealth government agencies and official documents of Ministers under s 11 of the *Freedom of Information Act 1982* (Cth) (**FOI Act**).

2 The objects of the FOI Act are to give the Australian community access to information held by the Government of the Commonwealth by requiring agencies to publish the information, and by providing for a right of access to documents. In this proceeding, the applicant claims that the objects of the FOI Act and his right of access to documents have been frustrated by delays on the part of the Australian Information Commissioner in considering and determining his applications for merits-based review of decisions by agencies to deny or restrict access to documents. A review of this nature is referred to in the FOI Act as an *IC review*, and for consistency I will adopt that term.

3 The applicant seeks relief under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) on the ground that the delays by the Information Commissioner in making decisions in relation to his applications for IC review have been unreasonable for the purposes of s 7(1) of the ADJR Act. The applicant also claims that the Information Commissioner has engaged in, or proposes to engage in, conduct that would result in an improper exercise of power on the ground that the result of the exercise of the power would be uncertain, thereby engaging s 6(1)(e) and (2)(h) of the ADJR Act. The relief sought by the applicant includes declarations and orders to compel the Information Commissioner to make a decision on the relevant IC reviews by a time and date fixed by the Court. No claim for relief has been made by the applicant under the general jurisdiction conferred on the Court by the *Judiciary Act 1903* (Cth), s 39B.

4 The originating application that was filed by the applicant complained of delay in relation to 23 applications for IC review. By interlocutory orders made on 8 December 2021, a trial of a separate question as to whether the applicant is entitled to relief in relation to nine of those applications was ordered. Subsequently, the Information Commissioner made decisions in

relation to two of the nine applications with the consequence that, at the commencement of the hearing, the orders for separate trial were varied so that the separate question now concerns seven applications for IC review. Those seven applications will be identified later in these reasons.

Overview

5 The main question in this proceeding is whether, within the framework of the applicable legislation, there have been *unreasonable* delays in the sense that I will explain later in these reasons. 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 affidavit evidence adduced by the Information Commissioner was not challenged by cross-examination. In particular, the deponents were not challenged in relation to the inferences that arise from their evidence. 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. Nor has the applicant established that the Information Commissioner has engaged in, or proposes to engage in, conduct for the purposes of making a decision that would result in an improper exercise of power thereby engaging s 6(1)(e) and (2)(h) of the ADJR Act. Further, and in any event, I would not as a matter of discretion make the orders sought by the applicant to the extent that the applicant sought orders to compel the Information Commissioner to make decisions on his IC review applications. There are other applicants for IC review who have been waiting longer than the applicant. The evidence did not demonstrate that the Commissioner has treated the applicant any differently from any other applicant. The orders sought by the applicant, if granted, would involve an inappropriate interference by the Court with the Information Commissioner's capacity to evaluate the entire workload of her statutory office, to assess the importance of competing priorities, and to determine how best to manage limited resources. An order of the Court placing the applicant's applications for IC review "at the head of the queue simply moves all others back one space and produces no net gain": *In re Barr Laboratories* 930 F 2d 72 at 75 (DC Cir 1991).

The legislation

8 In order to determine whether there has been unreasonable delay by the Information Commissioner, it is necessary to have regard to the evidence in the context of the applicable legislation, namely: (1) the *Australian Information Commissioner Act 2010* (Cth) (**AIC Act**); (2) the FOI Act; and (3) the ADJR Act.

Australian Information Commissioner Act 2010 (Cth)

9 Section 5 of the AIC Act establishes the Office of the Australian Information Commissioner (the **Office**). The Office consists of *information officers* and staff. Section 6 of the Act provides that the *information officers* are –

(a) the Information Commissioner;

(b) the Freedom of Information Commissioner (the **FOI Commissioner**); and

(c) the Privacy Commissioner.

10 Under s 14 of the AIC Act, the Information Commissioner, the FOI Commissioner, and the Privacy Commissioner are appointed by the Governor-General by written instrument. Paragraph 5(4)(d) of the AIC Act provides that the purposes of the Office include the functions of the three *information officers* referred to, respectively, in s 10, s 11, and s 12 of the Act.

11 The Information Commissioner has a number of functions and powers under the AIC Act, namely –

(a) the *information commissioner functions* defined by s 7;

(b) the *freedom of information functions* defined by s 8; and

(c) the *privacy functions*, defined by s 9.

12 The *privacy functions* include specified functions conferred on the Information Commissioner by provisions of the following Commonwealth Acts: the *Privacy Act 1988*; the *Crimes Act 1914*; the *Data-matching Program (Assistance and Tax) Act 1990*; the *National Health Act 1953*; the *Telecommunications Act 1997*; and the *Competition and Consumer Act 2010*, Part IVD. In addition, the evidence was that pursuant to a memorandum of understanding with the government of the Australian Capital Territory, the Office provides privacy services to the Territory's public sector agencies, including responding to enquiries from the public about the *Information Privacy Act 2014* (ACT).

13 Under s 10 and s 11 of the AIC Act, both the Information Commissioner and the FOI Commissioner have *freedom of information functions*. That term is defined extensively by s 8 of the AIC Act, and includes reviewing decisions under Part VII of the FOI Act. Subsection 12(5) of the AIC Act provides that if the FOI Commissioner performs a function, or exercises a power expressed by an Act to be conferred on the Information Commissioner, then the function or power is taken to have been performed or exercised by the Information Commissioner.

14 The Information Commissioner has powers of delegation under s 25 of the AIC Act. Prior to the commencement on 13 December 2022 of amendments to s 25, the function conferred by s 55K of the FOI Act of making a decision on an IC review was excluded from the power of

delegation by s 25(e). The result was that only the Information Commissioner or the FOI Commissioner could make a decision on a review under Part VII of the FOI Act. Following the 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*, or *acting SES employee*: see *Acts Interpretation Act 1901* (Cth), s 2B.

15 Under s 5(4)(b) of the AIC Act, the Information Commissioner is the *accountability authority* of the Office for the purpose of *finance law*, which includes the *Public Governance, Performance and Accountability Act 2013* (Cth). Under s 46 of that Act, the Information Commissioner is required to prepare and give an annual report to the responsible Minister, which in this case is the Attorney-General, for presentation to the Parliament. Amongst other things, the annual report must include a copy of the annual performance statements of the Office which record and explain the Office's performance in achieving its purposes: see s 37(1) and 39(1).

Freedom of Information Act 1982 (Cth)

16 Section 11 of the FOI Act provides that, subject to the Act, every person has a legally enforceable right to obtain access to documents of an agency and official documents of a Minister. The words "subject to this Act" appearing in s 11 are significant. That is because there is an array of exceptions to the right of access. Certain agencies are excluded from the operation of the FOI Act altogether. Further, a range of documents are exempt, such as: (1) documents affecting national security, defence, international relations; (2) documents containing material obtained in confidence; (3) documents disclosing trade secrets or commercially valuable information; and (4) documents to which secrecy provisions of enactments apply. There are other categories of documents that are conditionally exempt, where disclosure cannot be made if it would not be in the public interest, as that concept is developed through several provisions of Division 3 of Part 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.

17 Part VII of the FOI Act provides for the review by the Information Commissioner of decisions relating to access to documents. As I stated earlier, such a review is referred to in the FOI Act as an *IC review*. Part VII of the FOI Act was added by the *Freedom of Information Amendment (Reform) Act 2010*, Sch 4. Part VII of the FOI Act and the AIC Act commenced on the same day, namely 1 November 2010. The effect of the addition of Part 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. Nonetheless, Part VI of the FOI Act, which was also added by the 2010 amending Act, maintains the ability to apply to an agency for internal review of decisions relating to access to documents. The second consequential change was that access decisions by agencies are no longer amenable to review by the Administrative Appeals 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.

18 Section 55 of the FOI Act provides for a process of review by the Information Commissioner that is flexible in nature. The Information Commissioner may conduct a review without holding a hearing, may conduct a review in whatever way is considered appropriate, and may use techniques to facilitate an agreed resolution of the matters in issue. This may be compared with the procedures of the Administrative Appeals Tribunal where public hearings are ordinarily conducted at which parties may be represented: *Administrative Appeals Tribunal Act 1975* (Cth), s 32(1), s 35(1) and (5).

19 Section 54F of the FOI Act contains a high-level guide to the Divisions of Part VII, and provides, *inter alia* –

> …
>
> Division 4 provides for the making of applications for review by the Information Commissioner, including the time limits within which applications must be made.
>
> The Information Commissioner may make preliminary inquiries before deciding whether or not to conduct a review. In certain circumstances, the Information Commissioner may decide not to review a decision (or a part of a decision) (see Division 5).
>
> Division 6 provides for the procedure in an IC review, including the parties to the proceeding, circumstances in which a hearing may be held and who bears the onus of proof.
>
> The Information Commissioner may refer questions of law to the Federal Court of Australia at any time during the review.
>
> The Information Commissioner must make a decision on the review in accordance with Division 7.
>
> The Information Commissioner has powers to gather information for the purposes of an IC review (see Division 8).

20 The text of the provisions of Part VII of the FOI Act provide for a process of review and resolution with the following features –

(1) Pursuant to s 54V the Information Commissioner may make preliminary inquiries of the review parties for the purposes of determining whether or not to undertake an IC review.

(2) The Information Commissioner may decide not to undertake an IC review, or not to continue to undertake an IC review if, *inter alia*, the IC review application is frivolous, vexatious, misconceived, lacking in substance, or not made in good faith: s 54W(a).

(3) 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).

(4) 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.

(5) Section 55, to which I referred above, provides in wide terms for the manner in which an IC review is to be undertaken. The Information Commissioner may review the decision the subject of the application by considering documents provided to the Commissioner and without holding a hearing. For this purpose, the Information Commissioner may obtain any information from any person and may make any inquiries that are considered appropriate.

(6) Section 55 is complemented by the powers to gather information conferred on the Information Commissioner by Division 8 of Part VII of the Act. The powers include the power by written notice to require the production of documents: s 55R. The power under s 55R to require production may be exercised by giving notice to a *person*, which includes a body politic or corporate as well as an individual: *Acts Interpretation Act*, s 2C. The power is conditioned on the Information Commissioner having reason to believe that a person has information or a document relevant to the IC review: s 55R(1). It is an offence to breach a requirement of a notice which attracts a penalty of imprisonment for 6 months: see also, *Crimes Act 1914* (Cth), s 4B(2) and (3). The powers of the Information Commissioner also include the power to require a person to appear before the Information Commissioner to answer questions: s 55W.

(7) 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).

(8) 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 a timely manner.

(9) 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 pursuant to s 55(2)(e), and I will refer to some aspects of those directions below.

(10) At any time, a review party may apply to the Information Commissioner and request a hearing: s 55B. If the Information Commissioner holds a hearing, it must be held in public unless the Information Commissioner is satisfied that it is not desirable to do so: s 55(5).

(11) In relation to an IC review relating to a request for access, the relevant agency or Minister has the onus of establishing that the decision under review was justified: s 55D(1).

(12) The Agency or Minister who made the decision that is the subject of an application for IC review must use best endeavours to assist the Information Commissioner to make his or her decision in relation to the review: s 55DA.

(13) Where parties to an IC review reach an agreement in writing as to the terms of a decision on an IC review, the Information Commissioner may make a decision in accordance with the agreement without completing the IC review if satisfied that it is appropriate to do so: s 55F.

(14) 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.

(15) At any time during an IC review the Information Commissioner may refer a question of law to the Federal Court: s 55H.

(16) An important provision is s 55K, which bears some similarities to s 43(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) –

> **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.

(17) 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)

21 The applicant's primary claim for relief is made pursuant to s 7(1) of the ADJR Act, which 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.

22 Under s 3(1) of the ADJR Act, a *duty* includes a duty imposed on a person in his or her capacity as an officer or employee of the Crown: *cf*, *R v Scherger; Ex parte Bridekirk* [1957] HCA 94; 99 CLR 496 at 503-504 (Dixon CJ, Williams, Webb and Taylor JJ).

23 Subsection 3(1) of the ADJR Act defines the term *decision to which this Act applies* as meaning, subject to exceptions not here relevant, a decision of an administrative character made, proposed to be made, or required to be made under an *enactment*. The FOI Act is within the definition of *enactment* in s 3(1) of the ADJR Act. The word *decision* is not itself defined, but in *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; 170 CLR 321 (***Bond***) at 335-6, Mason CJ, with whom Brennan J and Deane J agreed, held that in a context where the ADJR Act was remedial legislation providing for review of administrative action, no narrow view should be taken of the word *decision*. Nonetheless, a *decision* is one that will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of an issue of fact calling for consideration: *Bond* at 337 (Mason CJ); see also the discussion by Toohey and Gaudron JJ at 375-377.

24 In relation to each of the relevant applications for IC review, the applicant claimed that the Information Commissioner had a duty to make a decision to which the ADJR Act applied and that there had been unreasonable delay in making a decision. The Information Commissioner put in issue the question whether a duty to make a decision had arisen, and on the assumption that there was a duty, whether the delays that had occurred were unreasonable.

25 As I have mentioned, the applicant also sought an order of review on the ground that s 6(1)(e) and (2)(h) of the ADJR Act were engaged –

> **6 Applications for review of conduct related to making of decisions**
>
> (1) Where a person has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies, a person who is aggrieved by the conduct 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 conduct on any one or more of the following grounds:
>
> …
>
> (e) that the making of the proposed decision would be an improper exercise of the power conferred by the enactment in pursuance of which the decision is proposed to be made;
>
> …
>
> (2) The reference in paragraph (1)(e) to an improper exercise of a power shall be construed as including a reference to:

…

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain;

…

26 Paragraphs 6(1)(e) and (2)(h) correspond to paragraphs 5(1)(e) and (2)(h), which are the grounds on which an aggrieved person may apply for an order of review in respect of a decision to which the ADJR Act applies that has been *made*. The ground referred to in s 6(1)(e) is available to challenge a *proposed* decision on the basis that it would be an improper exercise of power, permitting the challenge to take place before the making of the decision: see *Bond* at 343 (Mason CJ).

27 Subsection 3(5) of the ADJR Act provides that –

> A reference in this Act to conduct engaged in for the purpose of making a decision includes a reference to the doing of any act or thing preparatory to the making of the decision, including the taking of evidence or the holding of an inquiry or investigation.

28 Conduct is essentially procedural and not substantive in character, and a challenge to conduct is an attack upon the proceedings engaged in before the making of the decision. In relation to conduct, the complaint is that the process of decision-making was flawed: *Bond* at 342 (Mason CJ).

29 The applicant submitted that s 6 of the ADJR Act was engaged so as to entitle him to an order of review in respect of what was claimed to be conduct of the Information Commissioner that was alleged to be improper. I will summarise the submissions of the applicant in more detail later in these reasons.

30 As to remedies, s 16(3) of the ADJR Act provides –

> (3) On an application for an order of review in respect of a failure to make a decision, or in respect of a failure to make a decision within the period within which the decision was required to be made, the Federal Court or the Federal Circuit and Family Court of Australia (Division 2) may, in its discretion, make all or any of the following orders:
>
> (a) an order directing the making of the decision;
>
> (b) an order declaring the rights of the parties in relation to the making of the decision;
>
> (c) an order directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court considers necessary to do justice

between the parties.

31 The applicant sought a declaration under s 16(3)(b) of the ADJR Act directed to each of the IC review applications to the effect that the Information Commissioner had a duty to conduct a review by making a decision and had failed to do so such that each decision was attended by unreasonable delay. The applicant also sought an order that the Information Commissioner make a decision by a time and date fixed by the Court. Corresponding relief was sought in relation to the applicant's claims relying on the grounds under s 6 of the ADJR Act.

Consideration of the principal legal issues

32 Before going to the evidence, I will address four principal legal issues so that the issues raised by this proceeding may be correctly framed.

(1) When does the duty to make a decision on an IC review under Part VII of the FOI Act arise?

33 The first issue is to identify when a duty to make a decision under Part VII of the FOI Act arises. The Information Commissioner relied on an amended notice of objection to competency of the applicant's application. Section 55K, which I have set out under [20(16)] above, provides that "*after undertaking an IC review,* the Information Commissioner must make a decision in writing…" (italics added). The Information Commissioner claimed that, to the extent that the Commissioner had not formed a state of satisfaction that an IC review had been undertaken under Part VII of the FOI Act, alternatively to the extent that an IC review was continuing, the statutory precondition to the existence of the duty to make a decision under s 55K(1) of the Act was not satisfied, and therefore a necessary precondition for an order of review under s 7(1) of the ADJR Act was not engaged. Counsel for the Information Commissioner submitted that Part VII of the FOI Act did not require the Commissioner to make a decision under s 55K because there were a number of circumstances in which a decision by the Commissioner was not required, such as where the application was withdrawn by the applicant, and where the Commissioner determined under s 54W not to undertake or to continue an IC review. Counsel further submitted that Part VII of the FOI Act did not readily permit the point in time at which an IC review had been undertaken to be determined objectively. However, counsel submitted that the expression "after undertaking an IC review" in s 55K(1) should be understood as identifying the point in time where the decision-maker is satisfied that an assessment of the particular IC reviewable decision has been undertaken in accordance with the requirements of Pt VII of the FOI Act, and on the evidence that point in time had not been reached in relation

to any of the relevant IC reviews the subject of this separate trial. The Information Commissioner further claimed that s 55(4)(c) of the FOI Act, which provides that the Commissioner must conduct the IC review in as timely a manner as possible, does not create a duty to make a decision to which the ADJR Act applies.

34 For the above reasons, the Commissioner claimed that, to the extent that the applicant sought an order of review in respect of the conduct of the IC reviews the subject of his claim, a necessary precondition for an application for an order of review pursuant to s 7(1) of the ADJR Act, namely a duty to make a decision, had not been satisfied.

35 Counsel for the Information Commissioner relied on several authorities to support these submissions. In *Brownsville Nominees Pty Ltd v Federal Commissioner of Taxation* [1988] FCA 91; 19 FCR 169, Northrop J dismissed as incompetent an application for an order of review pursuant to s 7(1) of the ADJR Act. The applicant had objected to taxation assessments, which the Commissioner disallowed. The applicant then requested the Commissioner to refer the decisions to a court, which the Commissioner did not do. In light of a decision of the Court on a similar issue in other taxation proceedings that was adverse to the Commissioner, the applicant requested the Commissioner to issue amended assessments. The Commissioner had power under s 170(6) of the *Income Tax Assessment Act 1936* (Cth) to issue amended assessments. Northrop J held at 173 that s 170(1) of the *Income Tax Assessment Act* did not impose a duty on the Commissioner to make an amended assessment, but was enabling in form, and that the construction and effect of s 170(6) had to be understood in a context where the whole purpose of s 170 was to confer a power on the Commissioner to make an amended assessment, but not a duty to do so. It followed that it could not be said that a decision under s 170(6) was a decision required to be made under an enactment, as a result of which the application was incompetent.

36 Counsel for the Information Commissioner also cited *Australian Heritage Commission v Mount Isa Mines Ltd* [1997] HCA 10; 187 CLR 297, *Australian and International Pilots Association v Fair Work Australia* [2012] FCAFC 65; 202 FCR 200 at [147] (Perram J), and *The Environment Centre NT Inc v Minister for Resources and Water (No 2)* [2021] FCA 1635; 399 ALR 68 at [57]-[80] (Griffiths J), which concerned the existence of pre-conditions to the exercise of statutory powers, and a consideration of whether those pre-conditions were objective jurisdictional facts, or the existence of a state of satisfaction by the decision-maker. I understood counsel for the Information Commissioner to rely on these cases to support a

submission that, by parity of reasoning, the question whether an IC review was complete, which on the Commissioner's argument is a pre-condition to the duty under s 55K of the FOI Act to make a decision, involved a subjective evaluation by the Information Commissioner which was only reviewable in limited circumstances such as those identified by Griffiths J in *The Environment Centre NT Inc v Minister for Resources and Water (No 2)*, such as on the ground that the opinion or judgment as to whether the IC review was complete was legally unreasonable.

37 I do not accept the submissions advanced by the Information Commissioner that, for the purposes of s 7(1) of the ADJR Act, a duty to make a decision on an application made under Part VII of the FOI Act arises only upon the completion of an IC review. The ADJR Act is remedial legislation, and consistently with the analysis of Mason CJ in *Bond*, no narrow approach should be taken to its construction. The reference in s 7(1) of the ADJR Act to circumstances where "a person has a duty to make a decision to which this Act applies" is concerned with identifying when s 7(1) might be engaged. The proper construction of the term "duty to make a decision" in s 7(1) will have regard to logic and common sense and the object of the legislation. This requires that s 55K of the FOI Act be seen as part of a scheme, where there are at least implied obligations on the Information Commissioner to implement reasonable processes so as to investigate and consider the matter under review before making a decision in the manner required by s 55K. That is because common law rules of statutory construction imply a requirement that the Information Commissioner must complete those processes within a reasonable time: *Koon Wing Lau v Calwell* [1949] HCA 65; 80 CLR 533 (***Koon Wing Lau***) at 573–574 (Dixon J) and 590 (Williams J); *Re Federal Commissioner of Taxation; Ex parte Australena Investments Pty Ltd* (1983) 50 ALR 577 at 578 (Murphy J); *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [102] (Gageler J); *CPCF v Minister for Immigration & Border Protection* [2015] HCA 1; 255 CLR 514 at [200] (Crennan J), [313] (Kiefel J), [376] (Gageler J), [451] (Keane J); *Repatriation Commission v Morris* (1997) 79 FCR 455 at 461 (Beaumont J).

38 The substance of Part VII of the FOI Act is to confer an obligation on the Information Commissioner to review decisions. Determining whether there is a duty on the Information Commissioner to make a decision, and if so when that duty arises, requires that regard be had to the plan of Part VII. As the guide in s 54F identifies, Part VII sets up a system for review of decisions by the Information Commissioner. The guide provides that the Information Commissioner must make a decision in accordance with Division 7. As the guide indicates, the

point of Part VII is to confer jurisdiction on the Information Commissioner to review decisions that are within its ambit. A review by the Commissioner under Part VII is ultimately an intellectual process which, as with a review by the Administrative Appeals Tribunal under corresponding provisions, requires the Commissioner to make the correct or preferable decision, but subject to the agency or Minister having an onus under s 55D where applicable.

39 A duty to make a decision under an enactment will often be qualified by express and implied requirements as to its discharge. Those conditions might include requirements for investigation, or a hearing, or otherwise allowing interested persons to make representations or submissions. A statute might provide, as here, the manner in which a decision is to be made.

40 The Commissioner's duty to make a decision on an IC review is conditional as to its duration. The duty ceases upon the Commissioner deciding not to undertake or continue an IC review upon one of the conditions in s 54W being engaged, such as satisfaction that the application is frivolous or vexatious, or that the interests of justice make it desirable that the application be determined by the Administrative Appeals Tribunal. The duty to review will also cease if s 55F is engaged, and the Commissioner determines to make a decision in accordance with the parties' agreement without completing the IC review.

41 Further, the manner of discharge of the Commissioner's duty is regulated. The performance of the duty involves taking such procedural steps referred to in Division 6 of Part VII as the Commissioner determines or which are otherwise required. Those procedural steps will be informed by matters including the requirement in s 55(4)(b) that the Commissioner is to ensure that each review party is given a reasonable opportunity to present his or her case. As I have alluded to, the terms of s 55K bear some correspondence to s 43(1) of the *Administrative Appeals Tribunal Act*. Section 55K is not to be construed in isolation, but as one component of the scheme of review which Part VII of the FOI Act establishes. Section 55K provides for the making of a written decision supported by reasons after the completion of the IC review, and thereby provides for the manner in which the decision is to be communicated. The focus of s 55K is on functional requirements affecting the way in which the decision-making duty is to be discharged upon completion of the IC review. Those requirements do not have the consequence that for the purposes of s 7(1) of the ADJR Act there is no duty to decide until the IC review is complete. Such a conclusion would involve treating the word *duty* in s 7(1) as meaning an unconditional duty, thereby eliminating for practical purposes the scope of operation of this remedial provision. For these reasons, for the purposes of s 7(1) of the ADJR

Act the conditions attaching to the exercise of the Commissioner's review function do not defer the duty to make a decision until all the conditions are satisfied.

42 By way of comparison, a writ of mandamus does not require that a duty to decide be unconditional or that a particular decision be made. That is illustrated by a passage in the judgment of the Court in *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* [1949] HCA 33; 78 CLR 389 at 399 –

> The writ goes only in order to compel the performance of a public duty and, in the case of a court or other body which is under a duty to hear and determine a matter, the tenor of the writ will require the hearing and determination of the matter, and not the decision of the matter in any particular manner.

43 The difficulties with the construction advanced on behalf of the Information Commissioner are exposed by asking, on the argument advanced, when is an IC review complete thereby crystallising the consequential obligation to make a decision? The Information Commissioner advanced a two-pronged response. The first was that it might be difficult to identify with precision that point in time when an IC review has been completed. The second element of the response was to point to the authorities to which I referred above and to submit that the question was primarily one for the Information Commissioner to determine. These submissions in combination point to a practical outcome on the Commissioner's case that s 7(1) of the ADJR Act is unlikely to attach to the Information Commissioner's obligation to review decisions established by Part VII of the FOI Act, thereby rendering s 7(1) of the ADJR Act quite useless. Under the procedure in Part VII of the FOI Act, until the Information Commissioner makes a written decision under s 55K, the IC review process is likely to be ongoing. The submissions on behalf of the Information Commissioner, when taken to their logical endpoint, would have the likely result that an IC review would not be completed and the duty to make a decision would not arise until the moment in time immediately before the Commissioner makes the decision. This result would be absurd, because there could never be any delay in making a decision and the remedial provision in s 7(1) of the ADJR Act would be rendered ineffective in relation to any unreasonable delay in the IC review process. The "door to *the Law*" established by s 7(1) of the ADJR Act would remain shut to an applicant until such time as a decision is imminent: see the references to the door-keeper in Franz Kafka's *The Trial* in *Wang v Minister for Immigration and Multicultural Affairs* (1997) 71 FCR 386 at 388, 393 and 398 (Merkel J).

44 Faced with a constructional choice of interpreting the word *duty* in s 7(1) of the ADJR Act narrowly, if not artificially, in the way contended on behalf of the Information Commissioner, or in a way that better reflects the remedial purposes of the ADJR Act, the choice is clear. I should prefer a construction that would best achieve the purpose or object of the ADJR Act: *Acts Interpretation Act*, s 15AA. Therefore, the construction that I prefer is that, for the purposes of s 7(1) of the ADJR Act, the Commissioner's duty to make a decision under s 55K arises upon an application for IC review being made under Division 4 of Part VII of the FOI Act. The duty to make a decision is contingent upon the completion of the procedural steps and intellectual processes that are comprised in an IC review, and the duty may be extinguished at one of the exit points in the scheme, such a decision under s 54W not to undertake or continue a review. The manner in which the duty is discharged is subject to s 55K, which requires that the decision be in writing following completion of the IC review. The fact that those contingencies attach does not negate the existence of the duty.

(2) What factors inform whether delay is unreasonable delay for the purposes of s 7(1) of the ADJR Act?

45 The second issue is the basis on which delay might be adjudged to be unreasonable for the purposes of s 7(1) of the ADJR Act. Is the question of reasonableness to be determined by reference to the expectations of the hypothetical reasonable applicant for review, or on some other basis?

46 The resolution of the second issue has been determined by authority. The ADJR Act, of which s 7(1) is an element, is concerned with remedies for legal error in administrative decision-making. It is therefore unsurprising that the quality of unreasonableness required for the purposes of s 7(1) has been held to require unreasonableness by a decision-maker in an objective, public law sense. That is because the reference to "unreasonable delay" in s 7(1) corresponds to the statutory implication that will generally arise that a duty to make a decision must be discharged within a reasonable time: see *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 (***BMF16***) at [22] (Bromberg J).

47 A leading authority concerning s 7(1) of the ADJR Act is the decision of Fisher J in *Thornton v Repatriation Commission* (1981) 52 FLR 285 (***Thornton***). *Thornton* concerned an affirmative decision by the Repatriation Review Tribunal to defer making a determination on the applicant's application for review pending the outcome of an appeal before the High Court

involving a similar issue to that raised by the applicant's application. At 290-291, Fisher J stated –

> In my opinion a delay is unreasonable if it can be said that no reasonable man acting in good faith would in the circumstances have approved the delay. Such a test is akin to that adopted, in relation to the disallowance of by-laws, by the Privy Council in *Slattery v. Naylor* (1888) 13 App Cas 446 where Lord Hobhouse uses the words "fantastic and capricious" and "such as reasonable men could not make in good faith" when considering whether the by-law was reasonable.
>
> …
>
> In my opinion the reasonableness of the delay on the part of the Commission is a matter for objective determination, the question being whether a reasonable man acting in good faith could consider the decision to delay until the High Court hands down its judgment as appropriate or justified in the circumstances, or whether it was capricious and irrational.

48 At 292, Fisher J stated –

> 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. …

49 *Thornton* has been followed by the High Court sitting in original jurisdiction in refusing a writ of mandamus: *Re Federal Commissioner of Taxation; Ex parte Australena Investments Pty Ltd* (1983) 50 ALR 577 (Murphy J). *Thornton* was cited by the Full Court in *Bidjara Aboriginal Housing and Land Company Ltd v Indigenous Land Corporation* [2001] FCA 138; 106 FCR 203 at [20] (Ryan, Drummond and Hely JJ). In *ASP15 v Commonwealth* [2016] FCAFC 145; 248 FCR 372, the Full Court (Robertson, Griffiths and Bromwich JJ) cited at [21] the passage from the judgment of Fisher J in *Thornton* that I have set out at [48] above, and stated at [23] –

> The passage from *Thornton* is an authoritative statement of the appropriate test to be applied in deciding whether or not a delay by an administrative decision-maker is reasonable for the purposes of a statute that does not provide a specific indication of when a decision is required to be made. All parties in the appeal agreed that the *Thornton* test was appropriate to apply here.

50 *Thornton* has also been applied in a number of first instance decisions: *Kelly v Watson* (1985) 8 ALD 385 at 390-391 (Neaves J); *PT Pabrik Kertas Tjiwi Kimia Tbk v Minister for Justice and Customs* [2000] FCA 18; 60 ALD 203 at [59] (Finn J); and *Davis v Military Rehabilitation and Compensation Commission* [2021] FCA 1446 (***Davis***) at [15]-[18] (Logan J). In *Wei v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 207; 29 FCR 455, there was some considerable delay by the Minister's Department in evaluating applications for the grant of permanent resident status by overseas students which Neaves J held to be

unreasonable for the purposes of s 7(1) of the ADJR Act, holding that the evidence failed to establish that any steps had been taken to consider and determine the applications. At 475, his Honour cited *Thornton* in rejecting an argument that the reasons for the delays were not relevant to determining whether the delays were unreasonable. The Minister adduced some evidence to suggest that there were insufficient resources within the Department to deal with an increased number of applications for permanent residency status. At 477, his Honour considered this evidence to be unsatisfactory, holding that the Minister's Department, and the Department of Finance, appeared to have been slow to react to the need to put in place sufficient resources to deal with the number of applications being received. His Honour then stated –

> 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 negatived, or its value set at nought, by a failure to provide the resources necessary to make the right effective.

51 In *BMF16*, Bromberg J considered whether relief should be given under the ADJR Act in relation to delays by the Minister in considering applications for citizenship by two men who were permanent residents of Australia. At [22], Bromberg J cited the statement of Dixon J in *Koon Wing Lau* at 574 that "[w]hat is a reasonable time will depend upon all the facts …", before stating at [25]-[26] –

> 25 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.
>
> 26 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. The provision obviously calls for an objective assessment to be made: *Thornton* at 490 (where Fisher J applied a reasonable person test).

52 In *Davis*, the applicant complained of delay by the Military Rehabilitation and Compensation Commission in determining his claim for compensation for an injury arising out of his military service. The applicant sought relief from the Court under the ADJR Act, and also pursuant to the jurisdiction conferred on the Court by s 39B of the *Judiciary Act*. Logan J cited the decision

of Fisher J in *Thornton*, holding in substance that the considerations referred to in *Thornton* sat well with contemporary expositions of legal unreasonableness, such as that found in *Minister for Home Affairs v DUA16* [2020] HCA 46; 271 CLR 550 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".
>
> (Footnotes omitted.)

53 In relation to the implied requirement of reasonableness of decision-making, Logan J at [14] emphasised the exacting standard of legal unreasonableness, holding that it would not be sufficient to recognise that many people might find a seven-month delay in determining the applicant's claim for compensation to be unacceptable, and that what was required was that the delay was so unreasonable that no reasonable person could fail in the circumstances to have decided the claim, citing *DUA16*.

54 At [19], Logan J applied *Thornton*, holding that the Commission's failure to make a decision in respect of the applicant's claim was not a consequence of neglect, oversight, or perversity, but that it was quite apparent that for some time the resources made available to the Commission by the Parliament had been most inadequate. His Honour observed at [21] that the place of adjudication in relation to inadequate provision of resources is not a court of law, but a court of public opinion, and perhaps at the ballot box. His Honour returned to this topic at [36], stating –

> For the present, I consider that to conclude that an unreasonable time has elapsed would be to go beyond the remit of the judicial branch, either under the ADJR Act or s 39B of the Judiciary Act. The importance of the judiciary staying within that remit for the legitimacy of judicial review cannot be overstated – see in this regard *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 and *Marbury v Madison* 5 US (1 Cranch) 137 (1803).

55 Logan J's citation of the opinion of the United States Supreme Court in *Marbury v Madison* 5 US 87; 1 Cranch 137 (1803), which was an important decision establishing the Supreme Court's power to review the constitutional validity of an Act of Congress and which was cited by Brennan J in *Attorney-General (NSW) v Quin* [1990] HCA 21; 170 CLR 1 at 35, invites brief attention to the way in which courts in the United States have approached issues similar

to those arising in the present case in the context of the federal *Administrative Procedure Act of 1946* which is codified in 5 U.S.C. §§ 551–559, and other legislation conferring jurisdiction on United States courts. Section 6 of the *Administrative Procedure Act* provides that "[e]very agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives", and s 10(e) provides that a reviewing court shall "compel agency action unlawfully delayed or unreasonably delayed".

56 In *Telecommunications Research and Action Center v Federal Communications Commission* 750 F 2d 70 at 79 (DC Cir 1984) (***TRAC***) the Court of Appeals for the District of Columbia Circuit framed the issue as whether the delay by the agency in that case was so egregious as to warrant mandamus. The Court then identified at 80 the "hexagonal contours" of a standard of unreasonableness that emerged from previous cases, and which have been referred to in subsequent decisions as the "*TRAC* factors" –

> Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a "rule of reason," …; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason, …; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; … (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, …; (5) the court should also take into account the nature and extent of the interests prejudiced by delay,…; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed." …
>
> (Citations omitted.)

57 Subsequent decisions in the DC Circuit have emphasised that caution is required in determining whether to grant relief, with courts being slow to assume command over an agency's choice of priorities, which directs attention to the fourth factor referred to in *TRAC*: see, *In re Barr Laboratories* 930 F 2d 72 at 75 (DC Cir 1991); *Cobell v Norton* (2001) 240 F 3d 1081 at 1096 (DC Cir 2001); and *The Mashpee Wampanoag Tribal Council Inc v Norton* 336 F 3d 1094 at 1099-1101 (DC Cir 2003), where the importance of competing priorities in assessing the reasonableness of an administrative delay was emphasised.

(3) Who has the onus of proof?

58 In *BMF16* at [27], Bromberg cited a number of authorities as suggesting that at least the evidentiary onus of demonstrating that a delay is justified, and therefore not unreasonable, falls

upon the decision-maker. At [28], Bromberg J recorded a concession by the Minister that he bore the practical onus of establishing by evidence that there was a reasonable explanation for the delay. A practical onus of this nature will likely arise in many cases where the evidence points to significant delay that invites an explanation, and where in accordance with the principles referred to below the absence of evidence addressing the reasons for delay is material to the question of weight and whether the applicant has discharged the legal onus of proof.

59 Subsequently, in *AQM18 v Minister for Immigration and Border Protection* [2019] FCAFC; 268 FCR 424 (***AQM18***) Besanko and Thawley JJ formulated the relevant principles as to onus at [59] –

> 59 … As to onus, it was for the appellant to show that there was unreasonable delay affecting the jurisdiction to make the decision. If the appellant established a delay which called for explanation, then the persuasive onus might shift to the Minister to establish what that explanation was. In considering whether the appellant discharged her onus of establishing unreasonable delay, the evidence of each party is to be evaluated in accordance with the capacity of each to adduce evidence on the issue: *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969. That is a principle which authorises a particular form of reasoning.

60 I will apply the formulation of Besanko and Thawley JJ in *AQM18* with the result that the legal onus of demonstrating unreasonable delay falls on the applicant, but in determining whether that onus has been discharged any relevant absence of evidence adduced by the Information Commissioner, where the Commissioner is in a position to explain the reasons for delay, may be material to the weight to be given to other evidence in determining whether the applicant's onus of proof has been discharged: see *Australian Securities and Investments Commission v Hellicar* [2012]; 247 CLR 345 at [165]-[167] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

(4) Are s 6(1)(e) and 6(2)(h) of the ADJR Act capable of applying to delay in making a decision on an IC review under Part VII of the FOI Act?

61 Paragraphs 6(1)(e) and (2)(h) of the ADJR Act are set out at [25] above. Counsel for the applicant submitted that the combined process of undertaking an IC review and making a decision under s 55K of the FOI Act is "conduct for the purposes of making a decision to which this Act applies" for the purposes of s 6(1) of the ADJR Act. Counsel submitted that the conduct by the Information Commissioner in undertaking the reviews rendered the making of each of the decisions under s 55K of the FOI Act uncertain, because the result of their exercise was uncertain within s 6(2)(h) of the ADJR Act. Counsel submitted that the uncertainty for the

purposes of s 6(2)(h) had a number of sources. It was submitted that because an IC review may, and in the applicant's experience typically does, take years to complete, there was no certainty that the power in s 55K(1) of the FOI Act would be exercised in a manner consistent with the objectives of the FOI Act, or the right of access conferred upon the applicant under s 11(1). In particular, it was submitted that there was uncertainty as to whether any decision would be made at all.

62 Judicial review of a decision on the statutory ground of uncertainty of result may be seen as an emanation of review on the ground that a decision is unreasonable on the basis that there is an abuse of a statutory power which either expressly or by implication requires certainty of result as a condition of its exercise: see, *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [81] (Nettle and Gordon JJ), citing *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [72] (Hayne, Kiefel and Bell JJ); *Sunland Group Limited v Gold Coast City Council* [2021] HCA 35; 394 ALR 385 at [19]-[20] (Gordon J). As Besanko J observed in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403; 187 LGERA 161 at [43], the extent or degree of certainty required for a lawful exercise of power depends very much on the statutory context. The authorities that address uncertainty generally concern the terms of written instruments such as directions, notices, orders, and licences made or issued under statute and which have legal effect: see, for example, *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187 at 208 (Hill J). In those cases, the claimed uncertainty is usually concerned with the terms of those instruments.

63 I do not accept that s 6(1)(e) of the ADJR Act, informed by s 6(2)(h), is capable of being engaged in this application in the way submitted on behalf of the applicant. Paragraphs 5(2)(h) and 6(2)(h) of the ADJR act refer to the "result of the exercise of the power" being uncertain. The references to uncertainty in s 5(2)(h) and s 6(2)(h) are references to uncertainty as to what the *result* is, or in the case of s 6(2)(h) what the *result* will be: see *Australia Pacific LNG Pty Ltd v Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport* [2019] QSC 124 at [288] (Bond J) in relation to the corresponding provision in s 23(h) of the *Judicial Review Act 1991* (Qld). While the time at which the power under s 55K of the FOI Act might be exercised in relation to the seven IC reviews may be uncertain, I do not accept that the applicant has made out a tenable case that the conduct of each of the IC reviews is capable of making the *result* of the proposed exercise of power uncertain.

The resources and procedures of the Information Commissioner

64 It is important to the consideration of the applicant's claims of unreasonable delay to make findings in relation to the resources available to, and the procedures adopted by the Information Commissioner in the discharge of her statutory functions. There was a considerable body of affidavit evidence tendered by the Commissioner directed to these issues. The affidavit evidence was drafted in a way that was well organised and detailed. The evidence was in affidavits made by Elizabeth Hampton, a Deputy Commissioner of the Office of the Australian Information Commissioner, and Rocelle Dowsett, the Assistant Commissioner (Freedom of Information). As I have mentioned, the deponents were not cross-examined. In circumstances where there was no cross-examination, the following summary of the evidence concerning the resources and procedures constitutes findings that I make. The findings are set against the applicable statutory framework.

Directions to be followed in IC reviews

65 The Information Commissioner has made directions under s 55(2)(e)(i) of the FOI Act in relation to IC reviews generally. Those directions include the following statements –

(a) in general, IC reviews will be conducted on the papers unless there are unusual circumstances to warrant a hearing (cl 2.4);

(b) full and timely production of documents at issue, submissions and any other information that has been requested is important (cl 2.4);

(c) upon commencing an IC review, the Information Commissioner will request relevant information and documents to progress the review (cl 3.1);

(d) agencies and ministers will have three weeks to respond to the Information Commissioner's request for documents, submissions, or other information unless an extension of time has been sought and granted (cl 3.7);

(e) where an agency or minister fails to provide information and documents within the initial or extended timeframe, or requests another extension, the Information Commissioner may proceed to require the provision of information and the production of documents pursuant to s 55R of the FOI Act (cl 3.8); and

(f) all parties to an IC review will be provided with a reasonable opportunity to present their case on the IC review through written submissions (cl 5.1).

The organisation of the Office of the Australian Information Commissioner

66 The Office of the Australian Information Commissioner is organised into four branches. Reflecting the conferral of different statutory functions on the Commissioner, one branch is the FOI branch. The FOI branch is responsible not only for IC reviews under Part VII of the FOI Act, but also for other activities such as assessing complaints under Part VIIB of the FOI Act. For the financial year ended 30 June 2020 the FOI branch had an average staffing level that was equivalent to 14 full time employees. For the financial year ended 30 June 2021 this had increased to 19 equivalent full time employees. As at 5 August 2022, the FOI branch had the equivalent of 18 full time employees.

67 The number of applications for IC review made to the Information Commissioner annually has increased significantly in recent years. However, while the number of reviews that were resolved also increased, the backlog of unresolved matters has grown. The numbers set out in the following table are sourced from the annual reports of the Information Commissioner that were in evidence together with the evidence of Ms Dowsett –

Year	**IC review applications received**	**IC review applications resolved**	**Outstanding applications as at 30 June**
2016-17	632	515	Not stated
2017-18	801	610	Not stated
2018-19	938	659	851
2019-20	1,066	829	1,089
2020-21	1,224	1,018	1,295
2021-22	1,955	1,380	1,869

68 The rising number of applications received each year has also resulted in an increasing number of IC review applications that have remained open for more than 18 months. In the 2016-17 financial year, there was only one IC review that had been on foot for more than 18 months, whereas by 2020-2021, there were 441 IC reviews that had been open for more than 18 months.

69 The current Information Commissioner, Angelene Falk, was appointed initially as both Acting Information Commissioner and as Acting Privacy Commissioner on 16 August 2018, and is currently the holder of both statutory offices. Although the AIC Act provides for the appointment of an FOI Commissioner by the Governor-General, for some considerable period from January 2015 until August 2021 there was no occupant of that position. An Acting FOI

Commissioner was appointed from August 2021 to April 2022, and then a permanent appointment was made, effective from April 2022. This had the consequence that for a period up until August 2021 there was only one person, namely the Information Commissioner, who was capable of exercising the decision-making function on IC reviews under Part VII of the FOI Act. Recently, on 5 March 2023, the FOI Commissioner gave notice of his resignation, effective 19 May 2023.

70 Having regard to the evidence, for the purposes of this proceeding there are two periods to consider: (1) the period until 1 February 2023 when a restructure of the FOI branch took effect; and (2) the period after 1 February 2023.

Resolve database

71 The Office maintains a database, which was referred to as the *Resolve* database. Extracts from the Resolve database for each disputed IC review application were produced and several references will be made to entries in the Resolve database in what follows.

Prior to 1 February 2023

72 Within the FOI branch there were four teams. Three of those teams, the Intake and Early Resolution Team, the Reviews Team, and the Significant and Systemic Review Team were principally responsible for managing the IC reviews the subject of this proceeding. The Intake and Early Resolution Team undertook the initial triage of IC review applications to determine whether the application was valid, to make an initial assessment of whether the application should proceed for review and whether it should be referred to a particular team for case management, and for initial case management steps such as notifying the agency or the Minister of the application in accordance with s 54Z of the FOI Act. The notice that is given to the agency for the purpose of s 54Z of the FOI Act usually requests production of information relevant to the review. Although the FOI Act contains a number of powers to require production of different kinds of information, the Office almost always requests information initially without use of its coercive powers. It was the experience of Ms Dowsett that, by and large, most agencies will respond to an informal request for information in a notice given under s 54Z in around the three week time frame typically requested by the Office, or the agency might request an extension of time, generally of no more than a few weeks. However, Ms Dowsett observed that from early 2020, many agencies were working on the response to the COVID-19 pandemic, and that until around late 2021 there was an increase in the number of requests by IC review respondents for extensions of time. Ms Dowsett stated that she was aware that

many agencies were affected by the pandemic, either because their staff were working directly on the Commonwealth's response to the pandemic, or staff were transitioning to working remotely and adjusting logistics and staffing arrangements. The remote working environments also created logistical difficulties for agencies when searching for and retrieving documents, and some examples were given in the evidence.

73 The Significant and Systemic Review Team managed IC review applications and FOI complaints that were considered to have particular complexity or to raise systemic issues. As such, the more experienced review advisers were within this team. The Significant and Systemic Review Team also generally managed IC reviews that concerned particular kinds of documents, such as official documents of a minister, the diaries of senior officials or ministers, electronic communications or incoming government briefs, or reviews which raised novel or systemic issues. The staffing levels in this team generally comprised three or four full time equivalent staff, including a Director and two or three review advisers. The Significant and Systemic Review Team had other functions, including preparing guidance material for publication by the Office, preparing material for conferences attended by the Information Commissioner or FOI Commissioner, and assisting in the preparation of briefs in relation to FOI issues in advance of Senate Estimates hearings.

74 As part of the initial assessment process, IC reviews were generally allocated either to the Reviews Team or the Significant and Systemic Review Team. When a matter was allocated to one of those teams, the Resolve database, to which I referred above, was updated to show to which team the matter was allocated. Because of the volume of IC review applications received by the Office each year, and the relatively small number of review advisers in the FOI branch, there was often a significant period of time between the allocation of an IC review to a team, and the allocation of the IC review to a review adviser within that team for further case management.

75 The teams were led by a Director who was primarily responsible for allocating IC reviews to a review adviser within the team. Each full-time review adviser in the Reviews Team and the Significant and Systemic Review Team had between 20 to 30 IC reviews to manage at any one time. The evidence was that when a review adviser had capacity to take on a new IC review, the Director would allocate an IC review from the matters awaiting allocation having regard to –

(a) the date of lodgement;

(b) whether an application raised circumstances that warranted expedition;

(c) whether the application concerned the same materials or raised the same issues as other IC review applications under consideration at the time;

(d) whether there was scope to group the applications into a cohort to be managed by the same review adviser;

(e) whether the Office was waiting on information in relation to a matter that would prevent it being progressed;

(f) the workload of the review advisers and the complexity of the application; and

(g) whether an IC review was suitable to be managed by a particular review adviser having regard to the adviser's experience.

76 Once an IC review was allocated to a review adviser, then the normal procedure was that the adviser determined the next steps, and ultimately was responsible for preparing a draft decision and written reasons for the consideration of the Information Commissioner, and more recently the FOI Commissioner.

77 I referred earlier to the fact that a decision must be accompanied by written reasons that must meet the standard fixed by s 25D of the *Acts Interpretation Act*. The time taken to prepare a draft decision varies with the complexity of the matter. Ms Dowsett deposed to an assumption when planning workflow that, on average, it took a reasonably experienced review adviser in the Significant and Systemic Review Team one week to draft a decision, on the assumption that the adviser worked a 37.5 hour week and spent some limited time case managing other IC reviews. The FOI Commissioner would then review all of the material obtained in the course of the IC review and the draft reasons. If the FOI Commissioner was satisfied that he was able to make a decision, he then settled the written reasons, which when finalised, would be provided to the parties and published. However, on occasion, after reviewing the material, the FOI Commissioner might identify an issue that required further clarification or that had not been addressed, or decide that a further step needed to be taken in the IC review before a decision could be made. In those circumstances, the FOI Commissioner liaised with the review adviser to ensure that the issue was addressed. Once any further case management steps were completed, the review adviser updated the draft reasons as necessary and provided the revised draft to the FOI Commissioner for his consideration.

78 From 2020, challenges were presented to the Office by the COVID-19 pandemic which inhibited the ability of the Office to obtain access protected information while stay at home

orders were in place in Sydney and generally as a result of continued remote working. The Office introduced secure online file sharing arrangements, but this has not been embraced by all agencies in relation to all types of documents, and in many instances the Office must continue to rely upon the physical delivery of hard copy documents.

79 From time to time, review advisers leave employment with the Office. When that occurs, IC reviews must be reallocated by the Director of the team. The departure of a staff member can cause delays in the progress of IC reviews, because it may take some time before another member of the team has capacity to take on additional matters, and it also takes time for a new review adviser to become familiar with the details of IC review applications that have been reallocated. Between 1 January 2020 and 5 September 2022, six review advisers left the Significant and Systemic Review Team, requiring reallocation of the IC reviews that they held.

80 As at 5 September 2022, there were approximately 320 IC review applications that had been assigned to the Significant and Systemic Review Team that were yet to be finalised.

81 As at 13 March 2023, there was a total of 2,035 IC reviews awaiting finalisation by the Office of the Australian Information Commissioner. Of those –

(a) 42 were lodged in 2018, all of which had been allocated to review advisers;

(b) 220 were lodged in 2019, 11 of which were still awaiting allocation to a review adviser; and

(c) 325 were lodged in 2020, 265 of which were waiting for allocation to a review adviser.

After 1 February 2023

82 The Office of the Australian Information Commissioner restructured its FOI branch with effect from 1 February 2023. This restructure was accompanied by some changes to the IC review process. While there remain four teams, the tasks that are performed in relation to IC reviews are now distributed differently. There is now a Reviews and Investigations Team whose main function is to case manage IC reviews with a view to resolving the matters without a decision being required. In addition, review advisers within the Reviews and Investigations Team draft decisions in less complex matters, and also investigate FOI complaints. Most relevant to the present case is the newly-formed Significant Decisions Team. Its primary role is to draft decisions for the consideration of the Information Commissioner or FOI Commissioner under s 55K of the FOI Act. Generally, the Significant Decisions Team will not case-manage IC reviews, but may undertake some incidental case management for reviews allocated to the

team in order to obtain all the information required to make a decision. The restructure has not changed the order of allocation for outstanding IC reviews. The Director of the Significant Decisions Team will now allocate IC reviews to review officers of that team having regard to the criteria to which I referred at [75] above.

83 The restructure has involved the reallocation of existing staff, but not an overall increase in the number of staff employed in the FOI branch. The object of the restructure is to have a greater number of employees focussed on IC reviews. One consequence of the restructure is that members of the FOI branch are in a period of transition with review advisers in the Reviews and Investigations Team and the Significant Decisions Team performing their new roles and continuing to manage previously-allocated reviews.

84 In her affidavit evidence, Ms Dowsett referred to finalising the oldest IC reviews as a primary focus of the FOI branch that had been identified by the FOI Commissioner. Ms Dowsett stated that all outstanding IC reviews from 2018 were allocated to review advisers by January 2023, and all outstanding IC reviews from 2019 were expected to be allocated to review advisers by 31 March 2023. Ms Dowsett stated that review advisers are expected to focus their time on the 2018 or 2019 IC reviews that have been allocated to them, whilst balancing those matters with other IC reviews assigned to them that are close to finalisation.

85 In relation to the new power of delegation of the decision-making function under Part VII of the FOI Act that was brought about by the amendments to s 25 of the AIC Act that commenced on 13 December 2022, the Information Commissioner has executed a delegation of power to make decisions under s 54K of the FOI Act to staff members employed at SES Band 1. Ms Dowsett is the only member of staff of the Office at that level.

The resources of the Information Commissioner

86 The Office of the Australian Information Commissioner is funded through an annual appropriation as part of the Commonwealth Budget process. The Office is required to undertake its functions with the funding allocated to it annually, and within the bounds of the average staffing level cap fixed for the Office as part of the Budget.

87 Each year, the Office receives funding from the Commonwealth which is not tied to a specific purpose or function, but which is provided to enable the Office to perform its ongoing privacy, FOI, and Information Commissioner functions generally. This funding was referred to in the evidence as *base operating funding*. The base operating funding is allocated across all of the

branches of the Office to enable them to perform their various functions. Additional funding may be received from the Commonwealth for specific purposes or functions, which was described as *specific funding*.

88 For the financial years ending 30 June 2017 through to 30 June 2019 the Office received ongoing base operating funding in the amount of approximately $8.2 million to $8.4 million. For the financial years 2020 to 2022 the ongoing base operating funding increased to approximately $9.5 million per year as a result of specific funding relating to particular privacy functions being re-allocated to the base operating funding allocation, with the relevant privacy functions becoming part of the ongoing functions of the Office.

89 Since the 2018-19 financial year, the Office of the Australian Information Commissioner has received a number of funding allocations for the purpose of particular privacy functions. Although the total appropriated to the Office has therefore increased since 2016-17, that primarily reflects grants of specific funding in that period for additional, specific privacy functions conferred on the Office.

90 Since 1 July 2016, the only specific funding allocated to the Office of the Australian Information Commissioner for its FOI functions was $3.9 million over four years and ongoing (approximately $1 million per year), which was allocated in the 2021-22 Budget for the appointment of an FOI Commissioner, one staff member at SES 1 level, which is a role that is part of the Office's executive, and two support staff. As a result of this additional funding, the acting FOI Commissioner was appointed in August 2021 and the full time FOI Commissioner commenced in April 2022. In addition, the additional funding permitted the appointment of the Assistant Commissioner (Freedom of Information) and two additional review advisers in the FOI branch to help manage IC review applications. Other than the specific funding allocated in the 2021-22 Commonwealth Budget for the appointment of an FOI Commissioner and three additional staff to assist with the FOI functions, since 1 July 2016 the Office has not received any increase in its funding (base or specific) to enable more staff to be allocated to undertake IC reviews.

91 In her affidavit, Elizabeth Hampton, a Deputy Commissioner of the Office, deposed that she had previously undertaken work to estimate the number of additional staff that the FOI branch would require in order to be able to respond to the increased number of IC reviews received each year. In October 2019, Ms Hampton estimated that the Office would require an additional nine full time equivalent staff (in addition to the 19 full time equivalent staff in the team at the

time) to process the IC reviews on hand at that time on an assumption that the number of IC reviews that were expected to be received in the 2019-20 financial year would be the same as the number received in 2018-19 (928). In October 2020, based on an assumption that the number of IC reviews received by the Office would continue to increase by 15% each year on the number received in the 2019-20 financial year, Ms Hampton estimated that the FOI branch would require a total of 35 full time equivalent staff in the 2021-22 financial year and 28 full time equivalent staff in the 2022-23 financial year to manage the existing caseload of IC reviews on hand, as well as the number of IC reviews expected to be received in the future over that period. The assumption that the number of IC reviews received by the Office would continue to increase by 15% each year in 2021-22 and 2022-23 proved to be inaccurate because in 2021-22, the Office received 1,955 applications for IC review, which was approximately 60% more than the number received in the previous financial year.

92 In the annual report of the Office of the Australian Information Commissioner for the 2021-22 year, the Information Commissioner stated that during the year the work of the Office continued to increase in volume and complexity. In relation to the Office's complaint and review role, the Commissioner referred to the significant increase of 63% in applications for IC review and a 42% increase in FOI complaints. The Commissioner stated that while each year the Office finalised more IC review applications, it continued to face significant challenges. In the same report, the FOI Commissioner referred to the increase in demand for FOI regulatory services, including a significant increase in the number of IC reviews and FOI complaints received year on year.

The IC reviews

93 The following seven IC reviews that are the subject of the trial of the separate question remain on foot –

(1) The first IC review

Review no:	MR20/00054
Date of application:	22 January 2020
Agency:	Department of Foreign Affairs and Trade (DFAT)

(2) The second IC review

Review no:	MR20/00424
Date of application:	24 April 2020
Agency:	Department of Industry Science and Resources (DISR)

(3) The third IC review

Review no:	MR20/00613
Date of application:	26 June 2020
Agency:	Department of Treasury

(4) The fourth IC review

Review no:	MR20/00760
Date of application:	6 August 2020
Agency:	Department of Industry Science and Resources (DISR)

(5) The fifth IC review

Review no:	MR20/00863
Date of application:	14 September 2020
Agency:	Department of Industry Science and Resources (DISR)

(6) The sixth IC review

Review no:	MR20/00922
Date of application:	24 September 2020
Agency:	Department of Health

(7) The seventh IC review

Review no:	MR20/01189
Date of application:	30 November 2020
Agency:	Department of Prime Minister and Cabinet

94 The progress and current status of each of the IC reviews and my specific findings as to whether there has been unreasonable delay follows.

The first IC review - MR20/00054

95 This application for review concerns a request made by the applicant to the Department of Foreign Affairs and Trade (**DFAT**) in September 2019. The applicant requested access to documents within three specific categories, each relating to the oil and gas processing options for the Greater Sunrise oil and gas fields in the Timor Sea.

96 DFAT determined not to grant the applicant access to any of the requested documents. In a letter dated 18 December 2019 addressed to the applicant, DFAT stated that it had not identified any documents relevant to the first category of the request, and that all documents relevant to the second and third categories were exempt from production under various exceptions under

the FOI Act. The exceptions relied upon by DFAT included that some material within the documents: (1) was irrelevant or fell outside the scope of the request (s 22(1)(a)(ii)); (2) would or could reasonably be expected to damage Australia's international relations (s 33(a)(iii)); and (3) comprised information provided to the Australian Government by representatives of a foreign government on the presumption of confidentiality (s 33(b)). The Department also stated that some material within the documents was conditionally exempt under s 47E(d) because its release would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of DFAT, and under s 47G(1)(a) because its release would, or could reasonably be expected to, unreasonably affect an entity in respect of its lawful business, commercial or financial affairs. DFAT determined that giving access to the conditionally exempt material would be contrary to the public interest and therefore that it was not required to do so: s 11A(5).

97 On 22 January 2020, the applicant applied to the Office of the Australian Information Commissioner for review of DFAT's decision. On about 14 February 2020, the Office's Intake and Early Resolution Team conducted an initial assessment of the application. The assessment recommended, *inter alia*, that the application first be referred to the Intake and Early Resolution Team to perform some preliminary steps, before being referred to the Significant and Systemic Review Team for case management in due course.

98 On 11 March 2020, a representative of the Office notified DFAT of the review pursuant to s 54Z of the FOI Act and requested that DFAT provide further information by 1 April 2020. The Office received emails from DFAT in April, June, July, and August 2020, each requesting extensions of time to comply with the Office's request. DFAT cited various reasons for the requested extensions including the impact of the COVID-19 pandemic on accessing physical documents held in secure locations.

99 In August 2020, a senior review adviser within the Significant and Systemic Review Team reviewed the application. The senior review adviser provided Ms Dowsett with updates in relation to the status of the review application in August and September 2020. In October 2020, the Director of the Significant and Systemic Review Team met with representatives of DFAT. At that meeting, DFAT indicated that it would advise the Office of the Information Commissioner by 20 October 2020 as to how it intended to proceed with the review application.

100 On 19 November 2020, having not yet provided the requested information, DFAT advised the Office that it had decided to revise its original decision as permitted by s 55G of the FOI Act

and that it expected to finalise the revised decision by January 2021. On 1 December 2020, Ms Dowsett instructed Office staff to issue a formal notice under s 55U of the FOI Act requiring DFAT to produce relevant documents and submissions by 15 January 2021. However, it appears that the staff did not act on this instruction and no notice was issued at that time. The Resolve record of the review shows that, on 17 December 2020, the review was reassigned to the "queue" for allocation to a review officer in the Significant and Systemic Review Team for the purpose of progressing the issuing of a s 55U notice. On 12 January 2021, the Director of the Significant and Systemic Review Team provided the applicant with an update in relation to several of his review applications. In relation to the first IC review, the Director advised that it would contact the applicant after DFAT issued its revised decision.

101 On 16 August 2021, the review was allocated to a review adviser in the Significant and Systemic Review Team to continue case managing the matter. The next day, the review adviser sent an email to DFAT noting that it had not yet received the revised decision, and requesting an update by 31 August 2021. The Office remained in regular contact with DFAT throughout the remainder of 2021. On 3 December 2021, a delegate of the Information Commissioner issued a formal direction to DFAT under s 55(2)(e)(ii) of the FOI Act, requesting that by 17 December 2021 DFAT provide a response to the s 54Z Notice dated 11 March 2020 and issue its revised decision. That deadline was later extended to 14 January 2022.

102 On 14 January 2022, DFAT issued its revised decision and provided submissions to the Office of the Information Commissioner. DFAT identified 73 documents as falling within the scope of the applicant's request, and granted access in full to four of those documents. In relation to the other 69 documents, DFAT refused access in full or in part, relying on the same exceptions in the FOI Act as its original 18 December 2019 decision, as well as s 34 of the FOI Act relating to Cabinet documents.

103 On 22 February 2022, Ms Dowsett spoke by telephone with the applicant in which she explained that, due to the complexity of the matter, consideration was being given to whether the Commissioner should exercise her discretion under s 54W(b) of the FOI Act to refer the review to the Administrative Appeals Tribunal. Ms Dowsett referred to the number of responsive documents and the exemptions under the FOI Act applied by DFAT. Ms Dowsett also referred to the security classification of the documents, which meant that they could not be accommodated by the Office's infrastructure, and would have to be viewed at DFAT's office.

104 On or around 14 March 2022, the review was allocated to a different review adviser within the Significant and Systemic Review Team after the original review adviser resigned.

105 On 5 April 2022, the Office received from DFAT redacted versions of the documents to which the applicant had not been granted access, and on 26 April 2022, the applicant provided the Office with his final submissions in reply to DFAT's submissions.

106 On 25 July 2022, a notice was issued to DFAT pursuant to s 55U of the FOI Act requiring DFAT, by 9 August 2022, to produce un-redacted versions of the documents to which the applicant had not been granted access. DFAT provided those documents on 9 August 2022.

107 As at 13 March 2023, the assigned review adviser had finished reviewing the documents and had commenced preparing a draft decision. At that time, there were at least 262 pending IC reviews that had been lodged with the Office of the Information Commissioner earlier in time and which had not yet been finalised. Of those pending reviews, 220 were lodged in 2019 and 42 were lodged in 2018.

108 In oral submissions, counsel for the applicant raised the following four overlapping periods of delay in the review process –

(a) 22 January 2020 to 14 February 2020 (23 days);

(b) 14 February 2020 to 17 December 2020 (10+ months);

(c) January 2021 to 14 January 2022 (approximately one year); and

(d) 28 January 2020 to 22 February 2022 (two years, 25 days).

109 I will deal with each claimed period of delay in turn.

22 January 2020 to 14 February 2020

110 This period is the 23 days that elapsed between the date the applicant lodged his application for IC review and the date of the initial assessment. The submission that there was unreasonable delay by taking a little over three weeks between receiving the applicant's review application and making an initial assessment of the next steps is not tenable. It is not necessary to consider this point any further.

14 February 2020 to 17 December 2020

111 This corresponds to the time between the Office's initial assessment of the application and the reallocation of the review to the Significant and Systemic Review Team for the progression of the s 55U notice. It may be accepted that 307 days is a significant period of time in the context of an applicant awaiting a decision in response to his request. However, as the evidence referred to at [98] above demonstrates, this was not a period during which the Office was inactive. The Office engaged with DFAT in an attempt to obtain information through DFAT's voluntary compliance with the s 54Z notice issued in March 2020. It appears that the delay was largely referable to the Office acceding to several of DFAT's requests for extensions of time within which to comply with that notice. It may be accepted that the Office appears to have acted somewhat leniently in allowing DFAT the extensions of time sought to comply with its requests. However, that is not the statutory question to which s 7(1) of the ADJR Act is directed. The applicant has not shown that the Information Commissioner acted unreasonably in allowing those extensions of time, bearing in mind that the Information Commissioner and her Office must be afforded a measure of freedom to manage their own priorities and processes. This is particularly so given Ms Dowsett's unchallenged evidence as to the resource constraints in which the Office operated. I am not satisfied that this period of delay was in itself unreasonable.

January 2021 to 14 January 2022

112 This is the gap of approximately one year between the time by which DFAT initially stated that it expected to issue its revised s 55G decision and the date when DFAT finally got around to issuing its revised decision. Again, I am willing to accept that it may have been possible for the Office of the Information Commissioner to have taken a firmer stance in exercising its investigative and information-gathering powers. The time taken by DFAT to issue its revised decision was exceptionally lengthy. But I am not satisfied that the conduct of the Information Commissioner in tolerating this delay rises to the level of unreasonableness. The alternatives open to the Information Commissioner included completing the IC review notwithstanding DFAT's stated intention to issue a revised decision. That course would have given rise to resource allocation issues such as the utility of progressing a review towards a decision under s 55K in the knowledge that DFAT proposed to revise its decision. It is also very easy to conduct a hindsight analysis and conclude that a much firmer approach with DFAT might have been warranted. However, the question of unreasonableness must be looked at prospectively in light of the information which the staff of the Information Commissioner had from time to

time, and in light of the significant resource constraints affecting the discharge of the Information Commissioner's functions.

28 January 2020 to 22 February 2022

113 In oral submissions, counsel for the applicant pointed to a note in the Resolve record, apparently dated 30 January 2020, in which a staff member of the Office recorded: "*Could you also please advise the applicant that we will request a schedule of documents from the respondent*?" Counsel submitted, and I accept, that there is no evidence that any member of the Office acted on this request. Accordingly, a schedule of documents was not requested from DFAT at that time. Counsel then referred to an entry in the Resolve record of a file note of the 22 February 2022 telephone conversation between Ms Dowsett and the applicant, to which I referred at [102] above. The file note records Ms Dowsett's account of the reasons why consideration was being given to whether, due to the complexity of the matter, the review should be referred to the Administrative Appeals Tribunal pursuant to s 54W(b) of the FOI Act. Specifically, Ms Dowsett referred to the number of responsive documents, the statutory exemptions that were applied by DFAT, and that the documents could not be accommodated by the Commissioner's infrastructure due to their security classification. Counsel for the applicant focussed attention on a statement in the file note that, prior to DFAT issuing its revised decision on 14 January 2022: "*It was not apparent how many documents there were at the time or the classification of particular documents*." Counsel submitted that, had staff of the Information Commissioner acted on the 30 January 2020 note to request a schedule of documents from the respondent, the complexity of the review would have been immediately apparent at that time. Counsel also submitted that this information would have been discovered had the Office's staff acted on Ms Dowsett's 1 December 2020 instruction to issue a s 55U notice to DFAT, as noted at [100] above.

114 In my view, this submission is speculative. It is framed through a retrospective lens and relies on an unproven assumption that, had the Office of the Information Commissioner sought a schedule of documents from DFAT earlier in the review process, it would have identified from the schedule alone that the documents were of such a security classification that they could only be viewed in person at DFAT's offices. More fundamentally, it is another example of operational choices made by the Commissioner. Sometimes, hindsight might show that different internal policies and choices might have achieved a speedier outcome. But the fact

that staff of the Information Commissioner could have taken different steps to achieve a particular result does not mean that a failure to do so rises to the level of unreasonableness.

Overall delay in the first IC review

115 While I have addressed the submissions relating to individual periods of delay, I am required to evaluate the overall delay in making a decision in relation to the first IC review. That is because the issue to which s 7(1) of the ADJR Act directs attention is whether there has been unreasonable delay in making a decision, and not whether there have been particular delays in components of the review processes. The evidence is that a review officer is currently preparing a draft decision. Having regard to the apparent complexity of the issues raised by the exemptions and conditional exemptions under the FOI Act that have been invoked by the agency, having regard to all the resourcing issues to which I referred earlier, and having regard to the number of other IC reviews that have been awaiting determination, I am not satisfied that any of the individual periods of delay on which the applicant relied have materially contributed to the overall delay in conducting this IC review. To be clear, the delay is very significant indeed. However, I am not satisfied that there has been unreasonable delay in the sense required by s 7(1) of the ADJR Act.

The second IC review – MR20/00424

116 The second IC review relates to a request made by the applicant to the Department of Industry, Science, Energy and Resources in February 2020. The applicant requested access to documents relating to the selection of a location for a national radioactive waste management facility. The Department did not make a decision within the time limit prescribed by the FOI Act, and so the request was deemed to have been refused on 16 April 2020 pursuant to s 15AC of the Act. Nonetheless, the Department advised the applicant that it would proceed to consider the request. In a letter dated 21 April 2020, the Department provided the applicant with notice of its decision. The Department identified three documents that were responsive to the applicant's request. The Department granted access to the first document in part only, on the asserted basis that it was conditionally exempt because its disclosure would reveal the deliberative processes involved in the functions of the agency and that the public interest did not favour disclosure: s 11A(5) and s 47C. The Department also claimed that the first document contained irrelevant material: s 22. The Department refused access entirely to the second and third documents, on the basis that they were exempt under s 34(1)(a) as they were submissions for the consideration of Cabinet.

117 On 24 April 2020, the applicant applied to the Office of the Australian Information Commissioner for a review of the 21 April 2020 decision. Ms Dowsett conducted an initial assessment of the application on or around 28 April 2020. Ms Dowsett recommended, *inter alia*, that the application first be referred to the Intake and Early Resolution Team to perform some preliminary steps, before being referred to the Significant and Systemic Review Team for case management in due course.

118 On 27 May 2019, the Office sent an email to the applicant stating that the matter was awaiting allocation to a review officer, and that due to the number of IC review applications on hand, this may take up to 12 months.

119 Also on 27 May 2020, the Office issued a s 54Z notice to the Department of Industry, Science, Energy and Resources notifying it of the review and requesting that the Department provide further information by 17 June 2020. The Office received three requests for extensions of time to comply with the notice, each of which was granted. At the time of requesting the third extension of time on 17 July 2020, the Department informed the Office that it was considering issuing a revised decision under s 55G. The Office granted this extension of time to 3 August 2020. The Office corresponded with the Department in relation to the status of its response to the s 54Z notice throughout August 2020. The Department provided its response to the notice on 24 August 2020. The Resolve record of the IC review appears to show that, on 25 August 2020, the review was reassigned from the Office's Early Resolution Team to await allocation to an adviser within the Significant and Systemic Team.

120 On 12 January 2021, the Director of the Significant and Systemic Review Team provided the applicant with an update in relation to several of his review applications. In relation to the second IC review, the Director advised the applicant that he would be informed about the next steps following the Commissioner's review of the documents and submissions received to date.

121 Throughout December 2021 and early 2022, the Office of the Information Commissioner corresponded with the Department regarding an appropriately secure online tool for the delivery of Cabinet documents in respect of which the Department had claimed that the exemption in s 34 of the FOI Act applied.

122 On 29 July 2022, the Information Commissioner issued a notice to the Department pursuant to s 55U of the FOI Act requiring the Department, by 12 August 2022, to produce a marked-up and un-redacted copy of the documents in respect of which the Department claimed that s 34

applied. On 3 August 2022, the Department informed the Office that, in consultation with the Department of Prime Minister and Cabinet, it was considering whether circumstances had changed since it filed its submissions in August 2020 such that it could release more of the requested documents to the applicant, and accordingly whether the Department would issue a revised decision under s 55G of the Act. The Office agreed to allow the Department until 2 September 2022 to advise it of the outcome of this consideration. The Office advised the Department that the Department was not required to comply with the s 55U notice in the meantime. On 2 September 2022, the Department requested a 30 day extension of time within which to respond. An employee of the Office responded on 5 September 2022 by sending an email to the Department requesting that it "promptly, as soon as possible" comply with the s 55U notice, and agreeing to allow the Department another two weeks to make a further submission or to issue a revised decision. On 26 September 2022, the Department complied with the s 55U notice by providing copies of the requested documents. The Department requested, and was granted, a further extension of time to 30 September 2022 to provide its submissions or issue a revised decision.

123 On 24 February 2023, the Office enquired of the Department's external lawyers as to the status of the submissions or revised decision. A few days later the Department, through its lawyers, requested a four-week extension to make submissions and potentially issue a revised decision. On 2 March 2023, the Office refused this request on the basis that the Department had not provided a sufficient explanation as to why the extension was required.

124 As at 14 March 2023, the second IC review was still awaiting allocation to a review adviser within the Review and Investigations Team. As at 13 March 2023, approximately 85 IC review applications that were lodged earlier in time than the second IC review, and which had been allocated to the Office's Reviews and Investigations Team, were also awaiting allocation to a review adviser.

125 In oral submissions, counsel for the applicant raised the following four periods of delay in the second IC review –

(a) 24 April 2020 to 25 August 2020 (4+ months);

(b) 28 April 2020 to 29 July 2022 (2 years, 3+ months);

(c) 24 August 2020 to 3 August 2022 (1 year, 11+ months); and

(d) 30 September 2022 to 24 February 2023 (4+ months).

24 April 2020 to 25 August 2022

126 This is the approximately four month gap between the time when the applicant lodged the application for review and when the Office assigned the matter to the queue for allocation to an adviser in its Significant and Systemic Review Team. The submission that this gap constituted an unreasonable delay is rejected. The evidence, summarised at [118] above, shows that the Office was actively case managing the review throughout this period. The steps taken by the Office included issuing the s 54Z notice and liaising with the Department to obtain a response to that notice, including by granting extensions of time. The early management of the review during this time appears to be entirely consistent with Ms Dowsett's initial assessment in April 2020, in which she recommended that the Office's Early Resolution Team deal with preliminary matters before allocating the review to the Significant and Systemic Review Team in due course. I do not accept that the Information Commissioner acted unreasonably in managing the review in this way. Nor do I accept that the extensions of time granted to the Department to comply with the s 54Z notice, individually or cumulatively, were unreasonable. Although it might be said that the Commissioner or her staff acted leniently in acquiescing to the Department's repeated requests for more time, the applicant has not shown that it was objectively unreasonable for the Commissioner to manage the application in this way, in light of the competing priorities and operational choices that confronted the Commissioner which is a recurring issue in evaluating the question whether there has been unreasonable delay. In any event, even if the Commissioner had refused the extensions of time sought by the Department, it remains unclear whether that would ultimately have reduced the time which the Department would have taken to comply with the s 54Z notice.

28 April 2020 to 29 July 2022

127 Counsel for the applicant referred to an entry dated 28 April 2020 in the Resolve record for the second IC review, in which the review adviser made the following note: "*Consider whether document at issue is required under s 55U*." Counsel submitted that the period of some 2 years and 3 months that elapsed between the recording of this entry on 28 April 2020 and the issuing of the s 55U notice on 29 July 2022 constituted an unreasonable delay.

128 This submission is speculative and insufficiently supported by evidence. The submission rests on an assumption that, had the Office issued the s 55U notice in 2020, it would have reached its final decision on the review application sooner. The applicant did not point to any evidence that would support of this assumption. In fact, the unchallenged evidence of Ms Dowsett was

that, as at 14 March 2023, the second IC review had still not been allocated to a review adviser, and that approximately 85 review applications lodged earlier in time had also not been allocated. In those circumstances, it seems that issuing the s 55U notice more promptly would, in all likelihood, ultimately have had little or no effect on the time taken to complete the review. It appears that the delay in resolving this review application is attributable to the resourcing constraints within the Office, not to the alleged failure to issue notices expeditiously. Further, the 28 April 2020 note on the Resolve record only goes as far as showing that an employee of the Office suggested that it consider a notice under s 55U of the FOI Act. The evidence does not support a finding that in all the circumstances it was unreasonable to wait until July 2022 before issuing the notice.

24 August 2020 to 3 August 2022

129 Counsel for the applicant drew attention to the communication from the Department to the Office on 3 August 2022, to which I referred at [122] above. This communication was to the effect that the Department was considering issuing a revised decision as circumstances may have changed since it originally provided its submissions to the Office on 24 August 2020. Counsel submitted that this communication demonstrated that the amount of time taken by the Office to progress the review was so extensive that the information became stale. This, in turn, was said to have caused even more delay due to the many additional steps needed to be taken during the course of the assessment and resolution of the review.

130 I accept that the time taken to conduct the second IC review has been very considerable. A consequence of the very considerable delay is that relevant external circumstances may have changed throughout this period of time. As a result of the delay, matters may have needed to be re-assessed in light of fresh information, which itself may have further contributed to the extent of the delay in determining the review. However, as I have emphasised already, the existence of delay in reaching a decision, even very considerable delay, does not in itself satisfy the statutory threshold required by s 7(1) of the ADJR Act. The applicant must show that the period of delay is *unreasonable* in the sense that I discussed at [45]-[57] above. It is not enough for the applicant to point to a period of delay and to the negative consequences of that delay.

30 September 2022 to 24 February 2023

131 This is the period of just under five months between the date by which it was agreed that the Department would either provide its submissions or issue a revised decision, and the date on which the Office eventually followed up with the Department. Counsel submitted that in

circumstances where the Department had not taken the opportunity to provide its submissions or request a further extension of time to do so, it was unreasonable for the Office to wait interminably for the Department to do so.

132 I accept that the Office did not provide any explanation for this delay, which was of a significant duration. It appears that the Office simply failed to turn its attention to progressing the review during this time. However, as with the second period of delay addressed above at [127]-[128], the applicant has not shown that the Office's failure to act during this period had any material effect on the overall delay in making a decision on the review. It appears that the bottleneck that was the operative cause of all the delay was the unavailability of a review adviser to be assigned to progress the review. In those circumstances, I am not satisfied that this period of inactivity contributed to unreasonable delay.

Overall delay in the second IC review

133 Viewed as a whole, I am not satisfied that any of the individual periods of delay relied upon by the applicant materially contributed to an overall delay in conducting this IC review. I find it particularly significant that, as at the date of the hearing, this IC review was still awaiting allocation to a review adviser. The lack of resources available to the Information Commissioner casts a shadow over the applicant's criticisms of particular actions or inactions of the Commissioner throughout the life of the review. The decisions made by the Commissioner and her staff took place in an environment where, regardless of the steps taken to progress the review towards a final determination, there appeared to be an inevitable inability to allocate reviews to an adviser in a timely manner. The applicant has not demonstrated that, having regard to the resourcing challenges and competing priorities of the Information Commissioner, the overall delay in completing the second IC review has been unreasonable.

The third IC review – MR20/00613

134 The third IC review arose from a request made by the applicant to Treasury in May 2020. The applicant requested that Treasury grant him access to documents relating to the modelling or assessments of the economic impacts of COVID-19. In its response dated 22 June 2020, Treasury identified 11 documents within the scope of the applicant's request. Treasury refused access to any of the 11 documents on the basis that they were exempt under s 34(1)(c) and s 34(3) of the FOI Act. Those provisions relate to documents that are brought into existence to brief a Minister on Cabinet submissions, or that contain information the disclosure of which would reveal Cabinet deliberations or decisions.

135 On 26 June 2020, the applicant applied to the Office for a review of Treasury's decision. An initial assessment was conducted on 28 July 2020. As with the other IC reviews addressed above, the Office decided on the initial assessment that, *inter alia*, the review should initially be allocated to the Intake and Early Resolution Team before being referred to the Significant and Systemic Review Team in due course. On 3 August 2020, the Office issued a notice to Treasury pursuant to s 54Z of the FOI Act. The notice requested that Treasury provide certain information, including submissions in relation to the exemptions claimed under s 34(1)(c) and s 34(3).

136 On 27 August 2020, Ms Dowsett sent an email to the Director of the Office's Intake and Early Resolution Team asking that consideration be given to whether the Commissioner should, in relation to the third IC review and two other reviews being case managed with it, exercise her discretionary power under s 54W(b) of the FOI Act to not continue the IC review on the ground that it was desirable that the review be undertaken by the Administrative Appeals Tribunal. On 31 August 2020, while still awaiting a response to the s 54Z notice, the Office sent an email to Treasury asking whether Treasury would object to the Commissioner making a referral under s 54W(b). The Office granted Treasury two extensions of time, on 31 August 2020 and again on 17 September 2020, to respond to the s 54Z notice. Treasury provided its response on 29 September 2020. In its submissions, Treasury stated that it did not consider that it would be appropriate for the Office to refer the review to the Administrative Appeals Tribunal pursuant to s 54W(b). Treasury also provided four attached documents, and claimed confidentiality over three of these documents. In the result, the third IC review has continued.

137 On 2 October 2020, the third IC review was assigned to the queue for allocation to a review adviser in the Significant and Systemic Team.

138 In late 2021, the Office of the Information Commissioner sought approval from various government departments for the use of a secure online platform for the transfer of material classified at the "Protected" level, including Cabinet documents. At that stage in the COVID-19 pandemic, staff of the Office were working remotely, at least in part. This made it logistically difficult to arrange delivery of Protected information by the ordinary, hard copy delivery protocol, which was referred to in the evidence as "Safehands".

139 On 21 December 2021, the Office of the Information Commissioner enquired with Treasury whether it would be open to using a secure online file transfer platform to facilitate the transfer to the Office of Protected security documents which were the subject of ongoing IC reviews,

including the third IC review, and which Treasury claimed were exempt from production to FOI applicants. The Office stated that, if Treasury were open to using the secure online platform, it would be issued with a notice under s 55U of the FOI Act requiring it to produce the documents. On 6 April 2022, Treasury advised that it could use the online file transfer program. The Information Commissioner then issued the foreshadowed s 55U notice on 31 May 2022, requesting the claimed exempt material by 22 June 2022. However, on 3 June 2022, Treasury sent an email to the Office stating that it had received advice that Cabinet documents could not be provided through the online file transfer program. Accordingly, on 24 June 2022, Treasury provided the requested documents through the Safehands hard copy delivery mechanism.

140 As at 14 March 2023, the third IC review had not yet been allocated to a review adviser. Due to the restructure of the Office, it is to be allocated to a review adviser in the Reviews and Investigations Team, rather than the Significant and Systemic Team. As at 13 March 2023, approximately 134 IC review applications that were lodged earlier in time than the third IC review and which had also been allocated to the Office's Reviews and Investigations Team, were also awaiting allocation to a review adviser.

141 In oral submissions, counsel for the applicant raised the following four periods of delay in relation to the third IC review, which overlap –

(a) 26 June 2020 to 28 July 2020 (32 days);

(b) 27 August 2020 to 20 March 2023 (2 years and 6+ months);

(c) 2 October 2020 to 20 March 2023 (2 years and 5+ months); and

(d) 29 September 2020 to late 2021 (approximately 1+ year).

26 June 2020 to 28 July 2020

142 The applicant raised the 32 days that elapsed between the applicant first filing the application for IC review and the Commissioner conducting the initial review. In light of the Commission's workload and competing priorities, I find that there is no merit in the claim that this constituted or contributed to unreasonable delay.

27 August 2020 to 20 March 2023

143 Counsel for the applicant directed attention to the 27 August 2020 email of Ms Dowsett to the Director of the Intake and Early Resolution Team, in which Ms Dowsett asked that

consideration be given to whether a decision should be made under s 54W(b) of the FOI Act referring the IC review to the Administrative Appeals Tribunal. Counsel submitted that, as at the date of the hearing on 20 March 2023, there was no evidence that the Commissioner or any of her staff had actually considered or determined whether a decision should be made under s 54W(b). Counsel submitted that this constituted or contributed to unreasonable delay.

144 This submissions rests on an incorrect factual premise. The evidence of Ms Dowsett, at [80] of her 6 March 2023 affidavit, was that a member of the Office sent an email to Treasury on 31 August 2020 asking whether Treasury objected to a decision being made under s 54W(b) of the FOI Act not to continue the review on the ground that it was desirable that the decision be reviewed by the Administrative Appeals Tribunal. After receiving Treasury's submission which opposed this course, the Intake and Early Resolution Team determined to continue with the review. I referred to this evidence at [136] above. On that footing, the applicant's submission that the Commissioner did not consider the issue of a referral to the Tribunal under s 54W(b) is rejected.

2 October 2020 to 20 March 2023

145 This is the period of about two and a half years between the time when the third IC review application was placed in the queue for allocation to a review adviser, and the final hearing of the applicant's application to the Court. I am not prepared to find that there was an unreasonable delay for the purposes of 7(1) of the ADJR Act simply because the Commissioner did not have adequate resources, and specifically review advisers, at her disposal to deal with the volume of review applications. As I have already recounted, the Information Commissioner adduced detailed, unchallenged evidence as to the significant resourcing constraints faced by the Office of the Information Commissioner, and how those constraints inevitably result in delay in the completion of IC reviews. The Commissioner's choices must be viewed in light of these practical constraints. Therefore, I do not consider that this period of approximately two and a half years constituted or contributed to unreasonable delay.

29 September 2020 to late 2021

146 This is the period of over one year between Treasury first providing its response to the s 54Z notice, and the Office of the Information Commissioner approaching Treasury to attempt to facilitate a secure online delivery of the Protected-level documents the subject of the review. Counsel submitted that, upon receiving Treasury's response to the s 54Z notice in September 2020, members of the Office would have realised that they would need to view the protected

documents to perform the review. Counsel submitted that the Office engaged in unreasonable delay by effectively sitting on this knowledge for over a year before it eventually made inquiries as to how it could access the documents. In light of the fact that the IC review remained in the queue for allocation to a review adviser throughout this period, and the significant workload faced by the Office in managing the large volume of IC reviews with limited staffing, I am not satisfied that this inactivity caused or contributed to any unreasonable delay by the Commissioner in making a decision on the third IC review.

Overall delay in the third IC review

147 Overall, there are no particular features of the delay in determining the third IC review that would lead me to find that it was unreasonable in the sense required by s 7(1) of the ADJR Act.

The fourth IC review – MR20/00760

148 This application for review concerns a request made by the applicant to the Department of Industry, Science, Energy and Resources on 27 April 2020. The applicant requested access to documents relating to the Snowy 2.0 hydropower project. In its response dated 15 June 2020 the Department identified four documents that were relevant to the applicant's request. Of these four documents, the Department decided to –

(a) grant access to one document in full;

(b) grant access to one document in part only; and

(c) refuse access to two documents in full.

149 The Department stated that the documents in respect of which complete access was refused were exempt, in whole or in part, under the FOI Act because the following exceptions applied: (1) the documents contained material obtained by the Department in confidence (s 45); (2) disclosure of the documents would reveal commercially valuable information (s 47(1)(b)) and; (3) the documents contained material irrelevant to the applicant's request (s 22).

150 On 14 July 2020, the applicant requested the Department of Industry, Science, Energy and Resources to conduct an internal review of its earlier decision. The internal review only considered the application of the exemption under s 45 of the FOI Act, namely that the requested documents contained material obtained by the Department in confidence. On 31 July 2020, the Department notified the applicant that it had decided to affirm its earlier decision.

151 On 6 August 2020, the applicant applied to the Information Commissioner for review of the Department's decision. The Director of the Intake and Early Resolution Team conducted an initial assessment of the application on 18 November 2020. As with other applications, the Director recommended, *inter alia*, that the application first be referred to the Intake and Early Resolution Team to perform some preliminary steps, before being referred to the Significant and Systemic Review Team for case management in due course.

152 On 23 December 2020, the Office of the Information Commissioner sent a letter to the Department of Industry, Science, Energy and Resources giving notice of the IC review under s 54Z of the FOI Act, outlining the issues raised by the IC review and requesting, among other things, a marked-up and un-redacted copy of the documents at issue and submissions in relation to the exemptions claimed under sections 22, 45 and 47(1)(b). The information was requested by 15 January 2021. On 12 January 2021, the Office provided an update to the applicant regarding several of his ongoing review applications. In relation to the fourth IC review, the applicant was advised that the Office would contact him in relation to next steps following the review of the documents and submissions.

153 On 7 April 2021, the Department requested an extension of time to 16 June 2021 to provide the material requested by the s 54Z notice. The Department stated that the reasons for the extension request included changes in staff, unexpected periods of leave, and competing priorities. An employee of the Office of the Information Commissioner responded to the Department by email on 15 April 2021 requesting that, by 29 April 2021, the Department provide further submissions in support of its request for an extension of time. The employee referred to the extension of time requested by the Department as "significant." The Department responded on 20 April 2020, in an email which stated that the Department's FOI team "were dealing with unexpected periods of leave, changes in staff and managing competing priorities with very limited resourcing." Consequently, a backlog of IC review applications had developed. The email outlined the various steps that had been undertaken in relation to the review to that point and confirmed that the Department sought an extension of time to 16 June 2021. The Office of the Information Commissioner did not advise the Department whether or not the extension had been granted.

154 On 16 June 2021, the Department requested a further two week extension of time to 2 July 2021 to comply with the s 54Z notice. This request was granted, but the Office noted that if the response was not provided by 2 July 2021, a formal notice of production of information would

be issued. The Department provided its response to the s 54Z notice via email on 2 July 2021. Due to a technical issue in accessing the attachments to the 2 July 2021 email, the Department sent its response again on 29 July 2021.

155 The next step is that the fourth IC review will be allocated to a review adviser. Due to the restructure of the Office, it is to be allocated to a review adviser in the Reviews and Investigations Team, rather than the Significant and Systemic Team. As at 13 March 2023, there were approximately 164 IC review applications lodged with the Office before the applicant's fourth IC review, and which had been assigned to the Reviews & Investigations Team but which had not yet been allocated to a review adviser.

156 In oral submissions, counsel for the applicant appeared to raise the following three periods of delay in the review process –

(a) 6 August 2020 to 18 November 2020 (3+ months);

(b) 15 January 2021 to 2 July 2021 (6+ months); and

(c) 29 July 2021 to 20 March 2023 (1 year, 7+ months).

6 August 2020 to 18 November 2020

157 The applicant referred to the gap in time of approximately three and a half months between the applicant lodging his application for the third IC review with the Information Commissioner on 6 August 2020, and the Office performing its initial assessment on 18 November 2020.

158 The Commissioner did not provide any specific explanation for this delay. Counsel for the Commissioner submitted that delay of this order of duration did not indicate unreasonableness, having regard to what the Office's Intake and Early Resolution Team were managing at that time in terms of volume of matters. For the same reasons that I have previously expressed in several instances above, I am inclined to view the time taken to assess this IC review application as being a product of the resourcing and operational constraints faced by the Commissioner, and not as the result some aberrant decision to delay this review, or some unreasonable omission. In these circumstances, the applicant has not established that this period of delay was unreasonable.

15 January 2021 to 2 July 2021

159 The applicant referred to the several extensions of time which the Office of the Commissioner granted to the Department throughout the first half of 2021 to provide a response to the s 54Z

notice. Counsel for the applicant noted that, although the Office had originally requested a response by 15 January 2021, the Department did not provide its response until 2 July 2021.

160 For two reasons, I find that this period of time did not constitute or contribute to unreasonable delay. *First*, it has not been shown that any of the individual extensions of time granted during the first half of 2021 were not reasonable operational decisions in response to requests made by the Department, in light of the reasons proffered by the Department and the workload faced by the Office of the Commissioner. As I have mentioned, counsel for the applicant did not cross-examine Ms Dowsett, and therefore no aspect of her evidence or the inferences that arise therefrom were challenged. *Second*, as at the date of the hearing, the fourth IC review application remained in the queue awaiting allocation to a review adviser. In those circumstances, I am not persuaded that the decisions to grant the Department extensions of time, even if any of those decisions was individually unreasonable, had any material effect in delaying the determination of the fourth IC review.

29 July 2021 to 20 March 2023

161 The last period of delay relied upon by the applicant was the period of over 19 months that, prior to the hearing, the IC review application had been in the queue awaiting allocation to a review adviser. For the same reasons stated at [145] above in relation to the third IC review, this delay is to be attributed to the limited number of review officers available to the Commissioner, rather than to any unreasonableness on the part of the Commissioner in the sense required by s 7(1) of the ADJR Act.

Overall delay in the fourth IC review

162 Overall, there are no particular features of the delay in determining the fourth IC review that would lead me to find that there has been unreasonable delay in the sense required by s 7(1) of the ADJR Act.

The fifth IC review – MR20/00863

163 This application for IC review concerns a request made by the applicant to the Department of Industry, Science, Energy and Resources, initially made on 2 July 2020 and then revised on 17 July 2020. The applicant requested access to briefings and correspondence sent to or from the General Manager of the Department's National Radioactive Waste Management Facility Taskforce, within a specified timeframe and containing certain phrases. The Department did not make a decision in relation to the FOI request within the time limit prescribed by the FOI

Act, and so the request was deemed to have been refused on 14 September 2020 pursuant to s 15AC of the Act.

164 On 14 September 2020, the applicant applied to the Office of the Australian Information Commissioner for review of the deemed access refusal decision. Two weeks later, on 28 September 2020, the Department of Industry, Science, Energy and Resources issued its decision. The Department stated that it had identified 11 documents relevant to the applicant's request. The Department decided to grant access to three of these documents in part only, and to refuse access to eight documents in full. The exceptions relied upon by the Department included that some material within the documents: (1) was of such a nature that it would be privileged from production in legal proceedings on the grounds of legal professional privilege (s 42); (2) would, if disclosed, give rise to an unreasonable disclosure of an individual's personal information (s 47F(1)); and (3) was irrelevant to the applicant's request (s 22). On 1 October 2020, the applicant advised the Office that he wished to proceed with the IC review.

165 The Director of the Intake and Early Resolution Team conducted an initial assessment of the fifth IC review application on or around 17 November 2020. The Director decided, *inter alia*, that the application first be referred to the Intake and Early Resolution Team to perform some preliminary steps, before being referred to the Significant and Systemic Review Team for later case management. On 7 January 2021, the Office issued a s 54Z notice to the Department notifying it of the review and advising that a key issue in the review was whether the Department had taken all reasonable steps to identify the documents relevant to the scope of the applicant's request. The Department was requested to provide, amongst other things, a copy of any document that recorded the searches conducted by the Department, and submissions in support of its decision. The Office requested that the Department respond by 21 January 2021. On 7 April 2021, the Department requested an extension of time to submit its response to the s 54Z notice, on the basis that changes in personnel, unexpected periods of leave, limited resources, and competing priorities had resulted in a backlog of reviews. The Office granted an extension of time to 30 May 2021. The Department provided its response to the s 54Z notice on 1 June 2021.

166 On 26 August 2021, the fifth IC review was allocated to a review adviser within the Significant and Systemic Review Team. The following day, the adviser asked the applicant whether he intended to proceed with the review and if so, to provide submissions by 10 September 2021. The applicant confirmed that he wished to proceed and provided submissions on 10 September

2021. On 14 September 2021, the review adviser provided the applicant's submissions to the Department by email. In that email, the adviser invited the Department to consider whether it would be appropriate for the Department to issue a revised decision under s 55G of the FOI Act. On 28 September 2021, the Department provided further submissions in response.

167 On or around 3 November 2021, the fifth IC review application was re-allocated to an assistant review adviser in the Significant and Systemic Review Team, because the review adviser who had originally been allocated the review already had a relatively large workload and other competing priorities at the time. On 5 November 2021, the assistant review adviser emailed the Department requesting that, by 19 November 2021, it provide a marked up and un-redacted copy of the documents at issue in electronic form, and any further submissions in support of any exemptions claimed over the material. The Department requested, and was granted, an extension of time to 3 December 2021. On 2 December 2021, the Department provided the further requested material.

168 On 7 December 2021, after considering the material provided on 2 December 2021, the assistant review adviser emailed the Department requesting that further information and material be provided by 14 December 2021. In particular, the assistant review adviser noted that the Department appeared to have had edited some of the documents that were responsive the request, and the adviser requested a full copy of one of the documents so that the Commissioner could determine whether it was appropriate to have edited the document. The adviser also requested information regarding the nature of edits made by the Department to other documents. On 9 December 2021, the Department requested and was granted an extension of time to 22 December 2021 to provide the further information and materials. The Department provided the requested material on that date. However, on 22 February 2022, the assistant review adviser sent a further email to the Department in which the adviser requested, by 8 March 2022, that the Department provide further submissions as to the basis on which under s 22 of the FOI Act it had deleted various parts of three of the documents responsive the FOI request. On 7 March 2022, the Department requested an extension of time to 31 March 2022. The Office granted an extension, but only to 24 March 2022. On 22 March 2022, Office granted the Department a further extension of time to 31 March 2022.

169 On 31 March 2022, the Department advised the Office that it proposed to make a revised decision under s 55G of the FOI Act, to release in full two documents the subject of the review, with only redactions to which the applicant had agreed. Throughout April 2021, the Department

and the applicant exchanged proposals in relation to some documents the subject of the review. The Office effectively acted as an intermediary between the applicant and the Department. This concluded on 20 April 2022 with the assistant review adviser emailing the Department setting out the applicant's proposal and requesting an update from the Department by 4 May 2022. On 21 April 2022, the fifth IC review was reallocated to a new review adviser because the assistant review adviser who had been managing the review had resigned.

170 Throughout late April until early June 2022, the Department requested, and was granted, three extensions of time to provide an update in relation to its proposed revised s 55G decision. The Department issued its revised decision on 8 June 2022. On 9 June 2022, the applicant advised the Office that he was satisfied with the revised decision insofar as it concerned one document, and that the applicant wished to remove that document from the scope of the IC review. The Applicant relied on his previous submissions in relation to the remaining documents the subject of the review. On 22 June 2022, the Office informed the Department that the applicant intended to proceed with the IC review in relation to the balance of the documents.

171 As at the time of Ms Dowsett's affidavit affirmed on 8 September 2022, the review adviser managing the IC review had been unable to progress the review due to the allocation of additional matters following the departure of another review adviser. On 16 November 2022, the review adviser sent an email to the Department requesting that it provide, by 7 December 2022, un-redacted copies of additional documents that the Department had initially identified but excluded as irrelevant to the applicant's request. After not providing any substantive response by the requested deadline or asking for additional time, the Department sent an email to the Office on 3 January 2023. The Department referred to the "elapse in time, and personnel changes" and requested an extension of time to provide the documents by 31 January 2023. The Office agreed to this extension and the documents were provided on 30 January 2023.

172 The next step in progressing the fifth IC review is for the review adviser to consider whether the Office has received all the information and submissions necessary to proceed to a decision. As at 13 March 2023, the review adviser had not finished reviewing the documents provided on 30 January 2023, nor had the review adviser formed a view about the further conduct of the review. As at 13 March 2023, there were at least 262 pending IC reviews that had been lodged earlier in time which had not yet been finalised by the Office. Of those pending reviews, 220 were lodged in 2019 and 42 were lodged in 2018.

173 In oral submissions, counsel for the applicant raised the following periods of delay –

(a) 30 September 2020 to 17 November 2020 (1+ month);

(b) 17 November 2020 to 23 June 2021 (7+ months);

(c) 14 December 2021 to 8 June 2022 (5+ months)

30 September 2020 to 17 November 2020

174 This is the period that elapsed between the applicant confirming that he would like to proceed with the fifth IC review and the Office making its initial assessment. Given the large volume of matters that the Office's Intake and Early Review Team had to process, I do not find that this constituted or contributed to unreasonable delay for the purposes of s 7(1) of the ADJR Act.

17 November 2020 to 23 June 2021

175 The applicant referred to the approximately seven month period between the Office's initial assessment on 17 November 2020 and the date when the Resolve recorded showed that the fifth IC review was placed in the queue for allocation to a review adviser. Counsel for the applicant acknowledged that it appeared that the Office had intentionally waited to place this IC review in the allocation queue until the Department provided its response to the s 54Z notice. Counsel submitted that there was no necessary reason for the Office to wait to receive the Department's response to the s 54Z notice before placing the IC review in the queue for allocation to a review adviser.

176 In my view, this did not constitute unreasonable delay. A common theme in the applicant's case is a failure to acknowledge that the Commissioner and her staff must be afforded some degree of freedom to manage their own priorities and processes. The Office was entitled to take the operational position that it would be more efficient to wait until it received the preliminary information from the Department in response to the s 54Z notice before allocating the matter to a review adviser. The choices made by the Office must be viewed in the wider context in which the Office was seeking to deal with a large volume of IC review applications, rather than by focusing exclusively on a single application. Viewed in that overall context, I am not satisfied that it was unreasonable for the Office to wait to receive the s 54Z response before placing the fifth IC review in the queue for allocation to a review adviser.

14 December 2021 to 8 June 2022

177 Counsel drew attention to the series of extensions of time and follow-up requests that were exchanged between the Department and the Office of the Information Commissioner from around 14 December 2022, being the date by which the Department was originally requested to provide some further information, and 8 June 2022, being the date on which the Department issued its revised s 55G decision. The occasions for these extensions of time are set out at [168] to [170] above. Counsel for the applicant submitted that this indicated a reticence on the part of the Commissioner to use the powers available to her to move the IC review process along.

178 I do not accept that any delay occasioned by the extensions of time granted to the Department was unreasonable, in the sense required by s 7(1) of the ADJR Act, bearing in mind that the Commissioner and her Office must be afforded a measure of freedom to manage their own priorities and processes. Each of the individual extensions granted was relatively short. The applicant did not point to any evidence suggesting that the Office had not given appropriate consideration to each request on its merits, and as I have mentioned, counsel for the applicant did not cross examine Ms Dowsett. In those circumstances, this period did not constitute unreasonable delay.

Overall delay in the fifth IC review

179 Overall, there are no particular features of the delay in determining the fifth IC review that would lead me to find that it was unreasonable in the sense required by s 7(1) of the ADJR Act.

The sixth IC review – MR20/00922

180 The sixth IC review arose from a request made by the applicant on 25 August 2020 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. The Department of Health issued its response on 22 September 2020. The Department refused access to any of the ten documents falling within the scope of the request based on the exemption in s 47B of the FOI Act. Section 47B 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.

181 On 24 September 2020, the applicant lodged an application for IC review of the Department of Health's decision to refuse access to the documents. The applicant provided the Office of the

Information Commissioner with the Department's decision on 1 October 2020. The Director of the Intake and Early Resolution Team conducted an initial assessment on 1 October 2020. The Director decided that the review should initially be allocated to the Intake and Early Resolution Team before being referred to the Significant and Systemic Review Team in due course. The Office of the Information Commissioner issued a s 54Z notice to the Department of Health on 26 October 2020 and received a response from the Department on 5 November 2020.

182 On 27 October 2022, the sixth IC review was allocated to a review adviser within the Significant and Systemic Review Team. However, this allocation was made in error and the allocation was subsequently reversed, with no effect on the order in which the application will be allocated to a review adviser. As at 14 March 2023, the sixth IC review was still awaiting allocation to a review adviser. Due to the restructure within the Office, it is to be allocated to a review adviser in the Reviews and Investigations Team. As at 13 March 2023, there were approximately 193 IC review applications that were lodged earlier in time than the sixth IC review that had been allocated to the Office's Reviews and Investigations Team and which were also awaiting allocation to a review adviser.

183 In oral submissions, counsel for the applicant raised a single period of delay, being the period of approximately two and a half years between 1 October 2020 when the IC review was placed in the queue for allocation to a review adviser and the first day of the hearing of this application, 20 March 2023, at which time the IC review remained in the queue for allocation. Two and a half years is a very long period of time for the sixth IC review to have remained, effectively, untouched by the Information Commissioner while it awaited allocation to a review adviser. However, as with several periods of delay already addressed in these reasons, 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.

The seventh IC review – MR20/01189

184 The seventh IC review arose from a request made by the applicant on 21 October 2020 to the Department of Prime Minister and Cabinet. The applicant requested access to the current official directions, guidelines, advice or templates used or relied on by officers of the Department engaged in drafting submissions, memoranda or other papers for Cabinet. The Department of Prime Minister and Cabinet issued its decision on 27 November 2020. The

Department identified 23 documents responsive to the applicant's request. The Department decided to refuse access in full to 21 of these documents on the basis that: (1) the documents contained information the disclosure of which would reveal a previously undisclosed Cabinet deliberation or discussion (s 34(3)); or (2) disclosure of the documents would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of the agency (s 47E(d). The Department granted access to the remaining two documents, subject to the deletion of irrelevant material pursuant to s 22 of the FOI Act.

185 On 30 November 2020, the applicant lodged an application for IC review of the Department of Prime Minister and Cabinet's decision to refuse access to the documents. The Director of the Intake and Early Resolution Team conducted an initial assessment on 5 March 2021. As with other IC reviews referred to earlier, the Director decided that the review should initially be allocated to the Intake and Early Resolution Team before being referred to the Significant and Systemic Review Team in due course. The Director also suggested the Information Commissioner should send a letter to the Department requesting documentation, including evidence supporting the exemptions claimed.

186 The Office of the Information Commissioner issued a s 54Z notice to the Department of Prime Minister and Cabinet on 3 May 2021, which noted that a key issue in the IC review was whether the Department had correctly determined that the documents the subject of the FOI request were exempt under s 34(3) and s 47E(d) of the FOI Act. The Office requested that certain information, including marked-up and un-redacted copies of certain documents and submissions in relation to the exemptions claimed, be provided by 24 May 2021. On 24 May 2021, the Department sought a 7-day extension of time within which to respond. It appears that the Office of the Information Commissioner did not respond to that request. The Department provided its response to the s 54Z notice on 1 June 2021.

187 On 26 August 2021, the IC review was allocated to a review adviser. At an internal meeting within the Office of the Information Commissioner on the same day, it was decided that the Commissioner should issue a notice under s 55U of the FOI Act to the Department of Prime Minister and Cabinet requesting production of the Cabinet documents that were claimed to be exempt pursuant to s 34 of the Act. At the meeting, it was also decided that, before the s 55U notice would be issued, arrangements should be made with the Department in relation to the method for delivery of documents to the Office.

188 I referred at [138] above to the endeavours by the Office of the Australian Information Commissioner to have departments use a secure online platform for the sharing of protected documents, including Cabinet documents. Ultimately, in March 2022, the Department of Prime Minister and Cabinet advised that it would not use the online platform for Cabinet documents and that hard copy delivery via the "Safehands" mechanism was required.

189 On 25 July 2022, the Office issued a notice to the Department under s 55U of the FOI Act requiring, by 8 August 2022, that the Department produce marked up and un-redacted copies of the documents that were claimed to be exempt under s 34 of the FOI Act. On 4 August 2022, the Department requested a one-day extension to provide the documents requested by the s 55U notice, which was granted. The Office accepted delivery of the documents on 9 August 2022.

190 On 12 August 2022, the seventh IC review was reallocated to a new review adviser following the departure of the previous adviser. As at 14 March 2023, no further action had been taken to progress this review. According to a handover note stored on a Resolve record dated 5 August 2022, the next steps are that the review adviser will review the material produced by the Department in response to the s 55U notice and consider whether any further submissions are required before the Information Commissioner can proceed to make a decision. As at 14 March 2023, there were at least 262 pending IC reviews that had been lodged earlier in time which had not yet been finalised. Of those pending reviews, 220 were lodged in 2019 and 42 were lodged in 2018.

191 In oral submissions, counsel for the applicant raised the following periods of delay in the seventh IC review –

(a) 30 November 2020 to 5 March 2021 (3+ months);

(b) 5 March 2021 to 26 August 2021 (5+ months);

(c) 26 October 2021 to 25 July 2022 (approximately 9 months); and

(d) 9 August 2022 to 20 March 2023 (7+ months).

30 November 2020 to 5 March 2021

192 Counsel for the applicant raised the delay of slightly over three months between the date when the applicant first lodged the IC review application and the date when the Office's Intake and Early Resolution Team conducted the initial assessment. For the same reasons stated in relation

to other IC reviews at [142], [157] and [174] above, the initial delay in getting to this review has not been shown to have been unreasonable for the purposes of s 7(1) of the ADJR Act.

5 March 2021 to 26 August 2021

193 This is the period of approximately five months that elapsed between the initial assessment conducted by the Office in March 2021 and the allocation of the IC review to a review adviser in August 2021. Counsel submitted that the extent of this delay was unreasonable.

194 Viewed in the context of the resourcing constraints and volume of IC reviews before the Commissioner, and without re-stating much of the analysis already undertaken earlier in these reasons, I am not persuaded that a five month delay in allocating the IC review to an adviser was unreasonable within the meaning of s 7(1) of the ADJR Act. In fact, five months appears to be a relatively quick allocation in contrast to many of the other IC review applications that are the subject of this application. In any event, Ms Dowsett's evidence demonstrates that the Office was not wholly inactive during this period of time. On 3 May 2021, the Office issued the s 54Z notice to the Department, requesting further information in relation to the FOI request.

26 October 2021 to 25 July 2022

195 Counsel for the applicant referred to the several months that elapsed while the Office was corresponding with the Department about the possibility that the Department might use an online platform to transfer Cabinet documents to the Office that had been requested by a s 55U notice. Counsel noted that the Resolve record showed that the Office had approached the Department about this issue by at least 26 October 2021. However, it was not until March 2022 that it was determined that the Department would only be willing to provide the Cabinet documents via the hard copy "Safehands" mechanism. The Office did not issue the s 55U notice until 25 July 2023.

196 In my view, it cannot be said that it was unreasonable, in the statutory sense, for the Office of the Information Commissioner to make efforts to establish a mechanism for the provision of Cabinet documents by online means. I accept that those efforts were ultimately unsuccessful. However, a point that I have already made is that the Office's decisions must be analysed prospectively, and not through the lens of hindsight. It is also important, as I have previously stated, to bear in mind that the Office was dealing with a significant volume of IC review applications while under severe resourcing constraints. The Office was required to make

operational choices with a view to deal with the large backlog of IC reviews as a whole; not just those IC reviews pursued by the applicant. Viewed in that context, it is perfectly understandable why the Office might have considered it to be worthwhile to establish a system for the online delivery of high-security documents. In any event, this falls short of the standard of unreasonable delay required to engage s 7(1) of the ADJR Act.

9 August 2022 to 20 March 2023

197 This is the period of approximately seven months between the date when the Department provided the Cabinet documents sought by the s 55U notice, and the first day of the hearing of this application. Counsel for the applicant submitted that nothing appeared to have happened with the IC review since the Cabinet documents were provided on 9 August 2022. As stated at [190] above, Ms Dowsett deposed that the next steps for the seventh IC review required the review adviser to review the material produced by the Department in response to the s 55U notice and to consider whether any further submissions are required before the Information Commissioner can proceed to make a decision.

198 I do not consider this seven month delay to be unreasonable in the sense required by s 7(1) of the ADJR Act. Once again, I am prepared to attribute the delay to the volume of IC review applications and the significant resourcing constraints, which is an inescapable and unchallenged inference arising from the evidence adduced on behalf of the Commissioner.

Overall delay in the seventh IC review

199 It follows from my preceding analysis that, viewed as a whole, the overall delay in the Office's handling of the seventh IC review did not rise to the level of unreasonableness required to engage s 7(1) of the ADJR Act.

Remedies

200 It has not been shown that there has been unreasonable delay in making a decision in any of the seven IC reviews the subject of this separate trial. In any event, I would not make orders requiring the Information Commissioner to decide the applicant's IC review applications by a specified date. In *Wei v Minister for Immigration, Local Government and Ethnic Affairs*, in a passage that I cited at [50] above, Neaves J recognised that 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. On the other hand, his Honour also stated that "the situation cannot be accepted in which the existence of a right created by

the Parliament is negatived, or its value set at nought, by a failure to provide the resources necessary to make the right effective". That bald proposition has its boundaries, and must be understood as being subject to the appropriate limits on the exercise of judicial power to which Neaves J referred.

201 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.

Conclusions

202 The respondent's objection to competency is overruled.

203 The separate question whether the applicant is entitled to the relief sought in respect of the seven applications for IC review that are the subject of the separate trial is answered, "No".

204 I will hear the parties on –

(a) the form of orders to give effect to these conclusions;

(b) costs;

(c) the further conduct of this proceeding; and

(d) whether the parties consent to the Court determining the above issues on the papers.

I certify that the preceding two hundred and four (204) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Wheelahan.

Associate:

Dated: 26 May 2023