

FEDERAL COURT OF AUSTRALIA  
 DISTRICT REGISTRY: VICTORIA  
 DIVISION: GENERAL

**REX PATRICK**

Applicant

and

**AUSTRALIAN INFORMATION COMMISSIONER**

Respondent

**INDEX TO THE SUPPLEMENTARY AFFIDAVIT OF ROCELLE DOWSETT DATED 8 SEPTEMBER 2022**

No.	Document ID	Document Description	Paragraph Reference	Pages
		Affidavit of Rocelle Ann Dowsett affirmed on 8 September 2022		1 – 11
1.	RES.00054.02	Resolve Record for IC Review MR20/00054 (as at 7 September 2022)	[9]	12-27
2.	00054.057	Response from the Department of Foreign Affairs and Trade ( <b>DFAT</b> ) to the notice issued under s 55U of the FOI Act	[10]	28-30
3.	RES.00424.02	Resolve Record for IC Review MR20/00424 (as at 7 September 2022)	[13], [18]	31-37
4.	00424.029	Email from the Department of Industry, Science and Resources ( <b>DISR</b> ) to the OAIC dated 3 August 2022	[14]	38-39
5.	00424.030	Email from the OAIC (Review Adviser) to DISR dated 4 August 2022	[15]	40-41
6.	00424.031	Email from the DISR to the OAIC dated 2 September 2022	[16]	42-45
7.	00424.032	Email from the OAIC (Review Adviser) to DISR dated 2 September 2022	[17]	46-50
8.	00424.033	Email chain between members of the OAIC, including an email from the Review Adviser to Rocelle Ago dated 5 September 2022	[19]	51-52
9.	00424.035	File note of phone call between OAIC and DISR on 5 September 2022	[20]	53

10.	00424.034	Email from the OAIC to DISR dated 5 September 2022	[20]	54-58
11.	00544.149	Email from the Attorney-General's Department ( <b>AGD</b> ) to the OAIC dated 3 August 2022	[22]	59-60
12.	00544.149.A1	Attachment to the email from the Attorney-General's Department ( <b>AGD</b> ) to the OAIC dated 3 August 2022 (letter to the OAIC dated 3 August 2022)	[22]	61-62
13.	RES.00613.02	Resolve Record for IC Review MR20/00613 (as at 7 September 2022)	[24]	63-69
14.	GEN.0001	Part 10 of the FOI Guidelines titled " <i>Review by the Information Commissioner</i> " (Version 1.10) dated February 2022	[24], [27], [32]	70-103
15.	RES.00760.02	Resolve Record for IC Review MR20/00760 (as at 7 September 2022)	[27]	104-109
16.	RES.00863.02	Resolve Record for IC Review MR20/00863 (as at 7 September 2022)	[30]	110-122
17.	RES.00922.02	Resolve Record for IC Review MR20/00922 (as at 7 September 2022)	[32]	123-125
18.	01189.014	Email chain between the OAIC and the Department of Prime Minister and Cabinet ( <b>DPMC</b> ), including: <ul style="list-style-type: none"> <li>• Email from DPMC to the OAIC dated 4 August 2022;</li> <li>• Email from the OAIC (Review Adviser) to DPMC dated 4 August 2022</li> </ul>	[36]	126-130
19.	RES.01189.02	Resolve Record for IC Review MR20/01189 (as at 7 September 2022)	[37], [38]	131-135

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2022 9:49:51 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

### Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)  
File Number: VID519/2021  
File Title: REX PATRICK v AUSTRALIAN INFORMATION COMMISSIONER  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 8/09/2022 10:01:11 PM AEST

A handwritten signature in blue ink that reads 'Sia Lagos'.

Registrar

### Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 59  
Rule 29.02(1)

### Affidavit

No. VID519 of 2021

Federal Court of Australia  
District Registry: Victoria  
Division: General

#### REX PATRICK

Applicant

#### AUSTRALIAN INFORMATION COMMISSIONER

Respondent

Affidavit of: **Rocelle Ann Dowsett**  
Address: 175 Pitt Street Sydney NSW 2000  
Occupation: Assistant Commissioner (Freedom of Information)  
Date: 8 September 2022

#### Contents

Document number	Details	Paragraph	Page
1	Affidavit of Rocelle Ann Dowsett affirmed on 8 September 2022	1 – 42	1
2	Exhibit <b>RAD-2</b> (an exhibit comprising a bundle of documents)		11

I **ROCELLE ANN DOWSETT**, of 175 Pitt Street Sydney NSW 2000, Assistant Commissioner (Freedom of Information), sincerely declare and affirm:

1. I am the Assistant Commissioner (Freedom of Information) at the Office of the Australian Information Commissioner (OAIC).



Filed on behalf of (name & role of party) Australian Information Commissioner (the Respondent)  
 Prepared by (name of person/lawyer) Andrew Morrison Riordan  
 Law firm (if applicable) Norton Rose Fulbright Australia  
 Tel +61 3 8686 6680 Fax \_\_\_\_\_  
 Email andrew.riordan@nortonrosefulbright.com  
**Address for service** Level 38, Olderfleet, 477 Collins Street, Melbourne, VIC 3000  
 (include state and postcode)



2. I am authorised to make this affidavit on behalf of the respondent, the Australian Information Commissioner (**Information Commissioner**).
3. By making this affidavit, I do not intend and have no authority to waive privilege in any communication, or record of communication, that is the subject of the respondent's legal professional privilege. Nothing in this affidavit ought to be construed as involving a waiver of privilege. To the extent that anything in this affidavit may be construed as involving a waiver of privilege, I withdraw and do not rely on that part of this affidavit.
4. Unless otherwise stated, I make this affidavit from my own knowledge and from my review of records held by the OAIC.
5. I refer to my affidavit affirmed on 22 August 2022 (**First Affidavit**). The primary purpose of this affidavit is to provide the Court with updated information regarding the progress of the eight remaining IC reviews that are the subject of the separate question. In Part B below I have also addressed two additional matters.
6. In this affidavit, unless otherwise indicated, capitalised terms have the same meaning as in my First Affidavit.
7. In Part A of this affidavit, I have referred to correspondence and extracts from the OAIC's Resolve database in relation to the eight Information Commissioner reviews that are the subject of the separate question. Now produced and shown to me and marked **RAD-2** is an exhibit comprising a bundle of documents, including documents in relation to the eight Information Commissioner reviews that are addressed in Part A of this affidavit. Each document in exhibit **RAD-2** has been marked with an individual number or code. In this affidavit, where I intend to refer to a particular document within exhibit **RAD-2**, I have referred to the number or code corresponding to the document in square brackets. Some of the documents in **RAD-2** are emails. Unless relevant, attachments to emails have not been included in exhibit **RAD-2**, on the basis that those attachments are generally not relevant to the issues in dispute in the proceeding and often contain confidential or sensitive information. Some of the documents included in exhibit **RAD-2** have been redacted because the information is privileged, confidential or personal, or because the redacted information relates to reviews being undertaken by the Information Commissioner that are not the subject of this proceeding.

**Part A – Update to the IC Review Applications the subject of the separate question**

***MR20/00054***

8. As stated in paragraph 86 of my First Affidavit, on 25 July 2022, a notice was issued to the relevant officer of DFAT pursuant to s 55U of the FOI Act requiring production of unredacted versions of the documents relevant to this IC review. [REDACTED]

9. The Resolve record for MR20/00054 indicates that on 9 August 2022, documents were produced to the OAIC by DFAT in response to the s 55U notice [RES.00054.02].
10. Also on 9 August 2022, the OAIC received a letter from the Acting Director of DFAT's FOI and Privacy Law Section, which responded to a request in the letter to DFAT dated 25 July 2022 to clarify the exemptions claimed in relation to specific parts of certain documents relevant to this IC review [00054.057]. The letter also stated:

“Should the FOI Commissioner, having the benefit of viewing the material, form the view that the department has not discharged its onus in this matter, the department looks forward to the FOI Commissioner identifying and particularising the basis upon which this view is formed and being provided an opportunity to further respond. The department will then also further consider the matter regarding consultation correspondence.”
11. The next step in this matter is to undertake a detailed review of the documents at issue, having regard to the scope of the applicant's request. Once the Review Adviser is satisfied that all of the relevant documents have been produced, she will consider the exemptions claimed by DFAT having regard to the documents and the parties' submissions. Because one of the exemptions claimed by DFAT is s 33 (documents affecting national security, defence or international relations), if a preliminary view is formed that the documents are not exempt under s 33, it will be necessary to request evidence from IGIS as required by s 55ZB(1) before determining that the relevant documents are not exempt under s 33. Once the Review Adviser determines that no further procedural fairness steps are required, she will proceed to prepare a draft decision which will then be considered by the FOI Commissioner, along with all of the material relevant to the IC review. The FOI Commissioner may either be satisfied that no further step is required in the IC review and proceed to make a decision under s 55K(1), or might identify an issue requiring some further step to be taken, in which case the Review Adviser will implement that step and then revise the draft reasons if necessary for consideration by the FOI Commissioner.

**MR20/00424**

12. As stated in paragraph 107 of my First Affidavit, on 29 July 2022, a notice was issued to the relevant officer of the Department of Industry, Science and Resources (**DISR**) pursuant to s 55U of the FOI Act. The s 55U notice requested production of marked up and unredacted copies of the documents claimed to be exempt under s 34 of the FOI Act.
13. The Resolve record for IC review MR20/00424 ([RES.00424.02]) contains an entry made by the Review Adviser in relation to a telephone call with an officer from DISR on



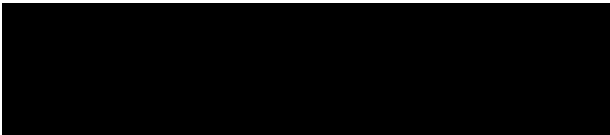
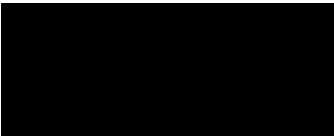
3 August 2022. According to the note recorded in Resolve, the DISR officer informed the Review Adviser that, given that DISR's submissions were from 2020, consideration was being given to whether things had changed and whether they could release some material to the applicant. The note indicates that the DISR officer sought guidance as to whether it was necessary to comply with the s 55U notice or whether DISR could consult with the Department of Prime Minister and Cabinet (**DPMC**) and consider making a revised decision. The Resolve note indicates that, after consulting with the Director of the SSR Team, the Review Adviser had a further conversation with the DISR officer and informed him that the OAIC would agree to a date for the revised decision.

14. Also on 3 August 2022, the DISR officer emailed the Review Adviser seeking "to reply to the OAIC by 2 September 2022" [**00424.029**]. The email states:

"The department will notify the OAIC of the outcome of such consultations and then work with your office to establish next steps, including whether a revised decision is appropriate, or whether the Department will make further submissions and arrange for the secure delivery of the documents to your office.

Please note: due date of 2 September 2022 is based upon the Department receiving the consultation from PM&C in a timely manner, in the (sic) case there is further delays the Department will make further contact with you."

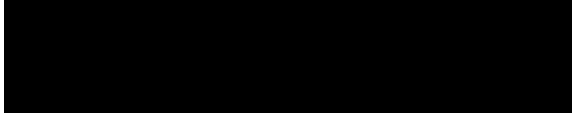
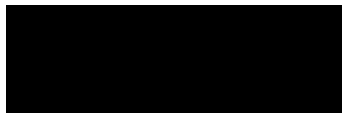
15. In an email from the Review Adviser to the DISR officer dated 4 August 2022 ([**00424.030**]), the Review Adviser informed the officer that the OAIC agreed to the Department advising it by 2 September 2022 of the outcome of its proposed consultation with DPMC and the Australian Radioactive Waste Agency (**ARWA**), and that they would then discuss the next step in the IC review, whether a revised decision or further submissions and the delivery of the documents at issue. The email also stated that the Department was not required to comply with the s 55U notice dated 29 July 2022 by 12 August 2022.
16. On 2 September 2022, DISR advised the OAIC that it had finalised the consultation with the DPMC, however the ARWA had decided to obtain external legal advice regarding the IC review [**00424.031**]. DISR sought a further 30 days to respond to the OAIC regarding how the IC review may be finalised or progressed [**00424.031**].
17. In an email from the Review Adviser to the DISR officer on 2 September 2022 ([**00424.032**]), the Review Adviser advised the officer that the OAIC was considering DISR's request and would respond in due course.
18. The Resolve record for IC review MR20/00424 ([**RES.00424.02**]) indicates that also on 2 September 2020, the Review Adviser attempted to telephone the DISR officer, who was unavailable. The Review Adviser then attempted to telephone another DISR contact, but they were also unavailable.

19. On 5 September 2022, I received an email from the Review Adviser setting out a draft email to the FOI Commissioner which provided a timeline for the IC review and sought input as to whether the OAIC should require DISR to comply with the s 55U notice and produce unredacted copies of certain documents, and at the same time, continue its internal consultation and provide further submissions or a revised decision within two weeks. Later that day I spoke to the FOI Commissioner about MR20/00424. I subsequently sent an email to the Review Adviser to the effect that the FOI Commissioner and I agreed that she should proceed as proposed in her draft email. The email chain of 5 September 2022 is marked **[00424.033]**.
20. The Resolve record for MR20/00424 indicates that on 5 September 2022, the Review Adviser telephoned the DISR officer and left a voicemail requesting that DISR provide the OAIC with the documents at issue as soon as possible and to provide any submissions and/or revised decision by 19 September 2022 **[00424.035]**. An email was subsequently sent to the DISR officer later on 5 September 2022 which stated that the OAIC requested DISR to “promptly, as soon as possible”, provide the unredacted documents in accordance with the s 55U notice dated 29 July 2022, and that the OAIC agreed to DISR making a further submission or revised decision within 2 weeks **[00424.034]**.
21. The next step in this matter is to wait for production of the unredacted documents at issue and any further submissions and/or revised decision from DISR. Following receipt of those materials, the Review Adviser will review the documents, submissions and any revised decision and consider whether any further procedural step is required. For example, if DISR does proceed to make a revised decision, the OAIC’s usual practice is to seek an indication from the applicant as to whether he is satisfied with the decision or wishes to continue the IC review, in which case he would be given an opportunity to make submissions in relation to the revised decision. Any further submissions would then be shared with DISR, and it would be given an opportunity to respond. Once the Review Adviser is satisfied that no further information or procedural fairness step is required, they will proceed to prepare a draft decision on the IC review for consideration by the FOI Commissioner. The FOI Commissioner will then review all of the material, and if satisfied that no further step is required in the IC review, he will proceed to make a decision under s 55K(1). If after reviewing the material the FOI Commissioner identifies an issue requiring some further step to be taken, the Review Adviser will then implement that step and then revise the draft reasons if necessary for consideration by the FOI Commissioner.
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**MR20/00544**



**MR20/00613**

24. As at 5 September 2022, there has been no further progress in relation to application MR20/00613. The Resolve record for MR20/00613 is included in RAD-2 **[RES.00613.002]**. As stated in paragraph 165 of my First Affidavit, the next step is for MR20/00613 to be allocated to a Review Adviser within the SSR team. The OAIC's records indicate that the submissions received from the Department on 29 September 2020 have not yet been provided to the applicant. As outlined in paragraph 10.103 of the Guideline **[GEN.0001]**, as a general rule, submissions made by the agency will be made available to the IC review applicant, and to other parties as considered appropriate. Once MR20/00613 is allocated to a Review Adviser, the Review Adviser will consider whether the submissions provided by the Department raise any issues including any new grounds of exemption that require further consideration and/or clarification, prior to providing the Department's submissions to the applicant to seek their submissions in response.
  25. Once the Review Adviser is satisfied that no further information or procedural fairness step is required, they will proceed to review the material received from the parties and prepare a draft decision on the IC review for consideration by the FOI Commissioner. The FOI Commissioner will then review all of the material, and if satisfied that no further step is required in the IC review, he will proceed to make a decision under s 55K(1). If after reviewing the material the FOI Commissioner identifies an issue requiring some further step to be taken, the Review Adviser will then implement that step and then revise the draft reasons if necessary for consideration by the FOI Commissioner.
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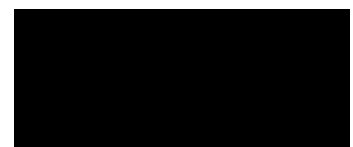
26. As at 5 September 2022, there were 141 IC Review applications that have been assigned to the SSR team but not yet allocated to a Review Adviser that were lodged with the OAIC prior to MR20/00613.

**MR20/00760**

27. As at 5 September 2022, there has been no further progress in relation to application MR20/00760. The Resolve record for MR20/00760 is included in RAD-2 [RES.00760.02]. The next step is for MR20/00760 to be allocated to a Review Adviser within the SSR team for further case management. The OAIC's records indicate that the submissions received from the Department on 29 July 2021 have not yet been provided to the applicant. As outlined in paragraph 10.103 of the Guideline [GEN.0001], as a general rule, submissions made by the agency will be made available to the IC review applicant, and to other parties as considered appropriate. Once MR20/00760 is allocated to a Review Adviser, the Review Adviser will consider whether the submissions provided by the Department raise any issues, including any new grounds of exemption that require further consideration and/or clarification, prior to providing the Department's submissions to the applicant to seek their submissions in response.
28. Once the Review Adviser is satisfied that no further information or procedural fairness step is required, they will proceed to review the material received from the parties and prepare a draft decision on the IC review for consideration by the FOI Commissioner. The FOI Commissioner will then review all of the material, and if satisfied that no further step is required in the IC review, he will proceed to make a decision under s 55K(1). If after reviewing the material the FOI Commissioner identifies an issue requiring some further step to be taken, the Review Adviser will then implement that step and then revise the draft reasons if necessary for consideration by the FOI Commissioner.
29. As at 5 September 2022, there were approximately 155 IC Review applications that have been assigned to the SSR team but not yet allocated to a Review Adviser that were lodged with the OAIC prior to MR20/00760.

**MR20/00863**

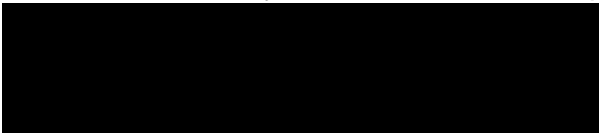

30. As at 5 September 2022, there has been no further progress in relation to application MR20/00863. The Resolve record for MR20/00863 is included in RAD-2 [RES.00863.02]. The Review Adviser responsible for managing this IC review application has been unable to progress this IC review as they have been assigned additional matters following the departure of another Review Adviser in the SSR Team.



**MR20/00922**

31. As at 5 September 2022, there has been no further progress in relation to application MR20/00922. The Resolve record for MR20/00922 is included in RAD-2 [RES.00922.02]. The next step is for MR20/00922 to be allocated to a Review Adviser within the SSR team.
32. The OAIC's records indicate that the submissions received from the Department on 5 November 2020 have not yet been provided to the applicant. As outlined in paragraph 10.103 of the Guideline [GEN.0001], as a general rule, submissions made by the agency will be made available to the IC review applicant, and to other parties as considered appropriate. Once MR20/00922 is allocated to a Review Adviser, the Review Adviser will consider whether the submissions provided by the Department raise any issues including any new grounds of exemption that require further consideration and/or clarification, prior to providing the Department's submissions to the applicant to seek their submissions in response.
33. Once the Review Adviser is satisfied that no further information or procedural fairness step is required, they will proceed to review the material received from the parties and prepare a draft decision on the IC review for consideration by the FOI Commissioner. The FOI Commissioner will then review all of the material, and if satisfied that no further step is required in the IC review, he will proceed to make a decision under s 55K(1). If after reviewing the material the FOI Commissioner identifies an issue requiring some further step to be taken, the Review Adviser will then implement that step and then revise the draft reasons if necessary for consideration by the FOI Commissioner.
34. As at 5 September 2022, there were approximately 165 IC Reviews that have been assigned to the SSR team but not yet allocated to a Review Adviser that were lodged with the OAIC prior to MR20/00922.

**MR20/01189**

35. I refer to paragraph 227 of my First Affidavit.
  36. On 4 August 2022, the OAIC received an email from an officer in the FOI and Privacy Section of the DPMC, which requested a one-day extension, until 9 August 2022, to provide the documents in response to the s 55U notice issued on 25 July 2022 [01189.014]. The email stated that the extension was to enable the documents to be collected on Monday 8 August and delivered to the OAIC on Tuesday 9 August by safe hands, the DPMC having been informed that it was not possible to pick up documents for safe hands delivery on Fridays or days preceding public holidays, for delivery on the next business day. The Review Adviser replied to the email confirming that a 1-day
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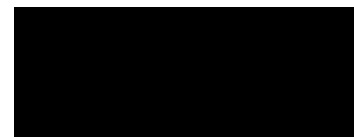
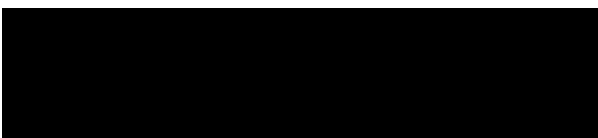
extension for the provision of documents in response to the s 55U notice was granted [01189.014].

37. On 9 August 2022, the OAIC accepted safe hands delivery of the documents in response to the s 55U notice [RES.01189.02].
38. On or about 12 August 2022, MR20/01189 was reallocated to a new Review Adviser following the departure of the Review Adviser who had been case managing MR20/01189 [RES.01189.02].
39. The Resolve record for MR20/01189 includes a handover note dated 5 August 2022 from the Review Adviser who had been case managing the IC review up to that point. The handover note sets out a short summary of the IC review and states:

“In relation to the material it has exempt under s 34(3), we issued a s 55U notice to the Department for the production of those documents and the Department is delivering those documents via safe hand delivery on Tuesday, 9 August 2022. Once the material is produced under s 55U and reviewed, consider whether any further submissions are required from the parties before this matter can proceed to a decision under s 55K of the FOI Act.”

#### **Part B – Other Matters**

40. None of the eight remaining IC reviews that are the subject of the separate question are yet at the stage where draft reasons have been prepared by a Review Adviser for the FOI Commissioner’s consideration. When an IC review reaches the stage where the Review Adviser, in consultation with the Director of the SSR team, considers that it is possible to make a decision, the Review Adviser prepares draft reasons for the FOI Commissioner’s consideration. The FOI Commissioner will then review all of the material obtained in the course of the IC review and the draft reasons. If the FOI Commissioner is satisfied that he is able to make a decision, he then settles the written reasons, which when finalised, are provided to the parties and published on the OAIC website and AUSTLII. However, on occasion, after reviewing the material, the FOI Commissioner may identify an issue that requires further clarification or has not been addressed, or decides that a further step needs to be taken in the IC review before a decision can be made. In those circumstances, the FOI Commissioner liaises with the Review Adviser to ensure that the issue is addressed. Once any further case management steps are completed, the Review Adviser will update the draft reasons as necessary and provide the revised draft to the FOI Commissioner for his consideration.
41. I refer to paragraph 41 of my First Affidavit. Between 1 January 2020 and 5 September 2022, six Review Advisers left the SSR Team, requiring reallocation of the IC reviews that they were case managing to other Review Advisers.





42. I refer to paragraph 42 of my First Affidavit. As at 5 September 2022, there were approximately 320 IC Review applications that have been assigned to the SSR team which are yet to be finalised.

Affirmed by the deponent  
at Sydney NSW  
on 8 September 2022  
Before me:

)  
)  
)  
)  
)



Signature of deponent



Signature of witness

Witness's qualification: An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria)

Witness's address: Level 38, 477 Collins Street, Melbourne VIC 3000

Making the affirmation and the signing of this affidavit by the deponent, were witnessed by means of audio-visual link, in accordance with s14G of the *Electronic Transactions Act 2000* (NSW).

This affidavit is being signed electronically in accordance with paragraph 4.1 of Federal Court Practice Note SMIN-1 due to a lack of available scanning technology.

## Exhibit Certificate

No. VID519 of 2021

Federal Court of Australia  
District Registry: Victoria  
Division: General

**REX PATRICK**

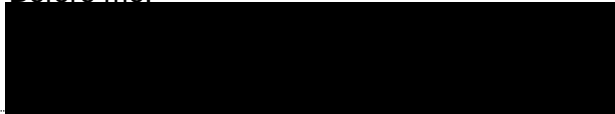
Applicant

**AUSTRALIAN INFORMATION COMMISSIONER**

Respondent

### EXHIBIT "RAD-2"

Before me:

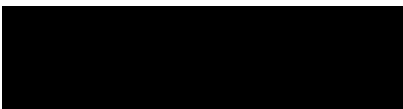


Signature of witness

Witness's name:

Witness's qualification: An Australian legal practitioner within the meaning of the Legal Profession Uniform Law (Victoria)

Witness's address: Level 38, 477 Collins Street, Melbourne VIC 3000



Signature of person taking affidavit

Dated: 8 September 2022

Making the affirmation and the signing of this affidavit by the deponent, were witnessed by means of audio-visual link, in accordance with s14G of the *Electronic Transactions Act 2000* (NSW).

This affidavit is being signed electronically in accordance with paragraph 4.1 of Federal Court Practice Note SMIN-1 due to a lack of available scanning technology.