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Details of Filing

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



Dated: 29/08/2022 11:52:37 AM AEST

Important Information

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

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Sia Lagos

Registrar



Form 59 Rule 29.02(1)

Affidavit

No. VD519 of 2021

Federal Court of Australia District Registry: Victoria Division: Administrative and Constitutional Law & Human Rights

Rex Patrick

Applicant

Australian Information Commissioner

Respondent

Affidavit of:	Mr Rex Patrick
Address:	28 Union Street, Adelaide
Occupation:	Lord Mayoral Candidate
Date:	29 August 2022

On 29 August 2022 I, Rex Patrick of Adelaide, say on affirmation:

- 1. I am the applicant in this matter.
- I provide this affidavit in response to evidence filed by the respondent, including the affidavits of Ms Hampton and Ms Dowsett which I have read. However, I commence this affidavit updating some facts relating to my personal circumstances since affirming my 10 June 2022 affidavit.

Personal Circumstances

3. On 10 June 2022 I was a senator for South Australia (SA). As foreshadowed in paragraph 1 of my affidavit of that date, I was not returned to the Senate after the Federal Election in May. I served in the Senate from 14 November 2017 until midnight on the 30 June 2022. During that time I served as a full member of the 'Joint Committee for Public Accounts and Audit', the Senate's Select Committee on the 'Multi-Jurisdictional Management and Execution of the Murray Darling Basin Plan', the Senate's Select Committee on the 'Future of Work and Workers', the Senate's 'Foreign Affairs, Defence and Trade' Legislation and

Filed on behalf of (name & role of party)	APPLICANT - REX PATRICIL		
Prepared by (name of person/lawyer)	REX PATRICIL		
Law firm (if applicable)			
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(include state and postcode)	2148 GLYNNESA \$073		
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Reference Committees and the Senate's 'Economics' Legislation and Reference committees. I also served as a participating member of all of the Senate's Legislation and References Standing Committees for which I wasn't a full member, and as a participating member of other select committees such as the Senate Select Committee on COVID-19. I also served for 11 years in the Royal Australian Navy between 1983 and 1994.

- 4. Since leaving the Senate:
 - a. I have registered a business named 'Transparency Warrior' and commenced assisting individuals, organisations and politicians navigate the mind field that is the Commonwealth Freedom of Information (FOI) regime. One of the corporate goals of 'Transparency Warrior' is to force Governments to become so transparent, and FOI processing to be so simple and speedy, that I am out of business.
 - b. I have commenced writing pubic interest journalism articles for Michael West media. Of the five articles published (and for which I am paid) thus far, an FOI experience or outcome has been part of all five stories.
 - c. I have nominated as a candidate for Adelaide Lord Mayor in the SA November local government elections.

Respondent's Evidence

- 5. I have read the affidavits filed on behalf of the Respondent in this proceeding on 5 and 6 August (E Hampton and R A Dowsett), and the affidavit filed on 22 August 2022 (R A Dowsett). The affidavits of Ms Dowsett also contain descriptions of the steps taken in processing eight of my applications for IC Review. Ms Dowsett's affidavits have provided information about what has occurred within the Respondent's office in relation to processing my applications which I have never been privy to before.
- 6. The Respondent's affidavits also contain descriptions of the resource and funding arrangements of the Office of the Australian Information Commissioner. This information indicates to me that the Respondent intends to argue that a lack of resources and a large number of applications is the reason for some or all of the delays in processing my IC Review applications.



8. Under section 11 of the FOI Act, I have a legally enforceable right to obtain access to information in accordance with the Act and that right is not affected by my reasons for seeking access to the information. But, if the explanation for the delay in processing my IC Review applications is "we don't have enough funding or staff to process these applications", then my legally enforceable right is being trampled upon by factors outside the

FOI Act. The impact I suffer from that directly relates to the reasons why I was seeking the information in the first place.

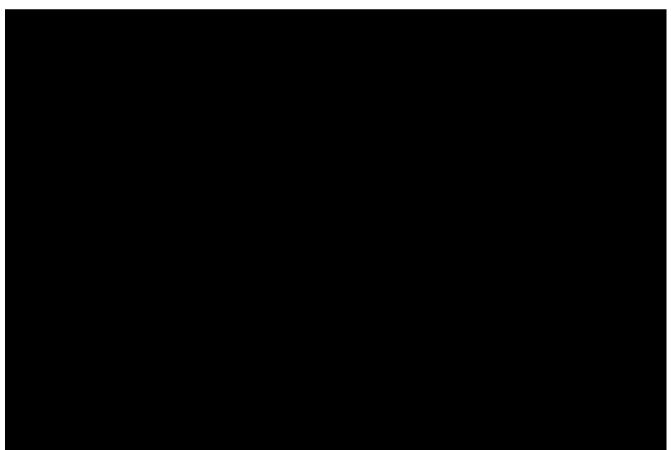
- 9. I made some comments on the effect of delay on my rights in this IC Review at paragraphs 36 and 37 of my affidavit affirmed on 10 June 2022. The reasons why I sought the information and the impact of the delay in processing my application in relation to those reasons is as follows.
- 10. The FOI request that is the subject of this IC Review seeks access to Department of Foreign Affairs and Trade documents (briefs/cablegrams/correspondence) relating to oil/gas processing options for the Greater Sunrise oil and gas fields that lie between Australian and Timor-Leste.
- 11. I made this request on 11 September 2019 just after I returned from Timor-Leste having attended the bringing into force of the *Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundary in the Timor Sea* and celebrations of the 20th anniversary of the Popular Consultation, the national referendum in which the Timorese people voted in favour of their independence.
- 12. The issue of Australia's relations with Timor-Leste and access to its oil and gas resources has been contentious for decades. After my visit to Timor-Leste I became concerned that Australia may be still trying to resist the Timorese in their endeavours to process their oil and gas on the southern coast of Timor-Leste under a project called 'Tasi Mane', and the effect of that resistance on Australia's relationship with Timor-Leste. That was the source of my interest in the requested material.
- 13. I raised my concerns in the media on 22 November 2019. Attached as annexure RLP-1 to this affidavit is a Sydney Morning Herald article headlined '*Could be one of Australia's biggest strategic blunders': Push for inquiry into East Timor gas project*' which raised concerns about China funding the 'Tasi Mane' project as the basis for a substantive move into Timor-Leste.
- 14. The Department made its decision on 18 December 2019 and I lodged my IC Review application on 22 January 2020. From Ms Dowsett's affidavit of 22 August 2022 at paragraph 86, it appears that the Respondent did not at the date of affirming even have possession of the documents which need to be reviewed to make a decision on my merits review application.
- 15. As a result of the IC review delay, I have been unable to either obtain documents which I have a legally enforceable right to obtain, or to progress to merits review in the Administrative Appeals Tribunal under s 57A of the FOI Act. The option to review the IC Review decision to the Federal Court on a question of law is available (under s 56 of the FOI Act) but even if I believed an error had been made, I wouldn't take that option because it would waste more time and resources and would still be unlikely to bring the application to resolution.

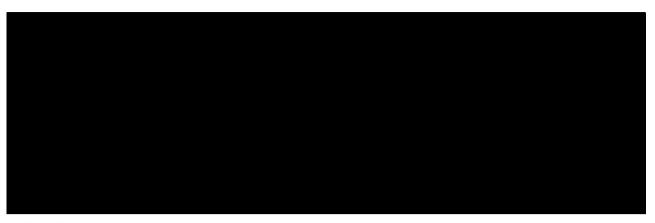
- 16. The delay in me obtaining documents which I potentially have a legal right to obtain has prevented me from exercising secondary rights as a senator to:
 - a. Ask informed written questions on notice to relevant ministers.
 - b. Ask informed oral questions without notice to relevant ministers at question time in the Senate.
 - c. Utilise information from Government to seek the support of the Senate Chamber for an inquiry into the matter.
 - d. Propose a private members Bill to limit Australia's interference in the Tasi Mane project.
 - e. Drawn broader press gallery attention to an issue of concern (whilst I can still exercise that secondary right should the IC review fall in my favour, it is harder to connect with the media as a non-senator)
- 17. On 19 August 2022 the Guardian newspaper published an article headlined '*Timor-Leste* warns it will work with China if Australia insists on pumping Timor Sea gas to Darwin'. This was as I feared (see paragraph 13). Attached as annexure RLP-2 to this affidavit is the Guardian article.
- 18. The delay in me obtaining documents which I potentially have a legal right to obtain continues to prevent me from exercising secondary rights. Had I been granted access to the documents I would have followed the Guardian piece with a piece of my own on the Michael West media platform.
- 19. The delay has also robbed the Australian public of the ability to properly engage in public debate on a significant matter of public interest.
- 20. This issue is ongoing. The request I made in 2019 needs to be updated. I have refrained from exercising my right of access to updated material by making a new request until after this IC review is finalised, so that I can rely on the decision's precedent when I make the request.

MR20/00424 and MR20/00863

- 21. I made some comments on the effect of delay on my rights in these two IC Reviews at paragraphs 46 and 75 of my affidavit affirmed on 10 June 2022. The reasons why I sought the information and the impact of the delay in processing my application in relation to those reasons is as follows.
- 22. These two IC reviews relate to FOI requests seeking access to documentation around the Minister for Industry's decision to select Napandee near Kimba as the site for a National Radioactive Waste Management Facility (**NRWMF**).
- 23. The selection of this site, and the process by which it is done, was of great interest to my constituents.
- 24. As a result of the delay, I have been denied a likely right of access to documents which would have allowed me to exercise secondary rights as a senator to:

- a. Ask informed written questions on notice to the minister in the Senate representing the relevant ministers.
- b. Ask informed oral questions without notice to relevant representing ministers at question time in the Senate.
- c. Utilise information from Government to better support my line of questioning related to inquiries conducted by the Senate.
- d. Utilise information from Government to better support the debates in the Senate Chamber on related bills.
- e. Drawn broader press gallery attention to an issue of concern.
- 25. On 16 August 2022 I was invited to the law offices of Norman Waterhouse in Adelaide to discuss my giving of evidence in proceedings on-foot in the Federal Court seeking judicial review of the Minister's decision. One of the complications of my giving evidence in the court relates to the need for both me and the Court to respect parliamentary privilege. Information that I obtain under FOI is definitely not subject to parliamentary privilege. The IC review delay that has denied me a right of prompt access to information and has denied me a secondary right to fully assist the applicant in those proceedings.
- 26. On 16 August 2022, as is my right, I transferred all documents I had received under FOI (from memory it was between 40 and 50 documents) to Norman Waterhouse. The IC review delay has short-changed me and Norman Waterhouse's client because I believe I have a right to access more information than I have received under the Department's initial decision and its subsequent revised decision.





MR20/00613

- 32. I made some comments on the effect of delay on my rights in this IC Review at paragraph 64 of my affidavit affirmed on 10 June 2022. The reasons why I sought the information and the impact of the delay in processing my application in relation to those reasons is as follows.
- 33. This IC review relates to an FOI request seeking access to COVID-19 modelling assessments carried out by the Department of Treasury.
- 34. The modelling would have had greatest use in informing me in my role as a senator as to the proper legislative and policy response to the COVID-19 pandemic. The delay in the review by the IC has denied me a likely right of access, which completely obliterated a secondary right I had to utilise the information in Senate proceedings.
- 35. The release of the documents now will only be useful in providing an historical perspective to me and academics as to the Government's economic response to the COVID-19 pandemic.

- 36. I made some comments on the effect of delay on my rights in this IC Review at paragraph 68 of my affidavit affirmed on 10 June 2022. The reasons why I sought the information and the impact of the delay in processing my application in relation to those reasons is as follows.
- 37. This IC Review relates to an FOI request seeking access to Snowy Hydro 2.0 Australian Industry Plans and associated reports, the master schedule at contract execution and the current master schedule and milestone payment plan.
- 38. As a result of the IC review delay, I have been denied a likely right of access to documents which would have allowed me to exercise secondary rights as a senator to:
 - a. Ask informed written questions on notice to minister in the Senate representing the relevant ministers(s).
 - b. Ask informed oral questions without notice to relevant representing ministers at question time in the Senate.

- c. Utilise information from Government to better support my line of questioning in Senate Estimates.
- d. Utilise information from Government to better support the debates in the Senate Chamber on the Snowy Hydro scheme.
- e. Drawn broader press gallery attention to an issue of concern.
- 39. I also lost a secondary right to pass some of the documents on to constituent businesses that may have been able to contribute to Snowy Hydro 2.0. Noting the passage of time, almost all of the contracting for Snowy Hydro will have been undertaken, the utility of the provision of such documents to constituent businesses has passed.
- 40. As mentioned in paragraph 37, I was seeking access to schedule information for the project to aid me in determining whether the Snowy Hydro 2.0 schedule had slipped. The IC Review delay denying me a likely right of access to schedule information, denied me a secondary right of pursuing project delays in the Senate. I note that the media is now reporting the project has cost blowouts and delays. Attached to this affidavit, as annexure RLP-4, is a copy of that article.
- 41. The Court may ponder as to why access to information was sought thorough FOI instead of a Senate order for production. The reason for this is that I have a unilateral right to request information under FOI, and review rights which are independent of politics. Powers of compulsion in the Senate require a majority vote, which is not always achievable, and the review rights on public interest immunity claims are often infected by politics.

- 42. I made some comments on the effect of delay on my rights in this IC Review at paragraph 79 of my affidavit affirmed on 10 June 2022. The reasons why I sought the information and the impact of the delay in processing my application in relation to those reasons is as follows.
- 43. This IC reviews relates to an FOI request seeking access to inputs and or records of deliberations of the meetings of the Australian Health Protection Principal Committee in relation to the topic of state border closures.
- 44. I considered prompt access to the information I requested as very important because it involved the restriction of my then constituent's liberties. As a result of the IC review delay, I have been denied a likely right of access to documents which would have allowed me to exercise secondary rights as a senator to:
 - a. Ask informed written questions on notice to minister in the Senate representing the relevant ministers.
 - b. Ask informed oral questions without notice to relevant representing ministers at question time in the Senate.
 - c. Utilise information from Government to better support my line of questioning in the Senate Select Committee on COVID-19 and at Senate Estimates.
 - d. Utilise information from Government to better support the debates in the Senate on the Government's response to COVID-19.
 - e. Drawn broader press gallery attention to an issue of concern.

45. Noting the passage of time, and vaccination roll-out and the reopening of state borders, the release of the documents now will only be useful in providing an historical perspective to me and academics as to the Government's bio-security response to the COVID-19 pandemic.

MR20/01189

- 46. I made some comments on the effect of delay on my rights in this IC Review at paragraph 84 of my affidavit affirmed on 10 June 2022. The reasons why I sought the information and the impact of the delay in processing my application in relation to those reasons is as follows.
- 47. This IC Review, which commenced in late November 2020, relates to an FOI request seeking access to official directions, guidelines, advice or templates used or relied upon by officers of the Department of Prime Minister and Cabinet engaged in drafting submissions, memoranda and/or other papers to Cabinet.
- 48. I have matters before both the IC and the AAT that centre around the question as to whether the documents under request have been bought into existence for the dominant purpose of submission to Cabinet. The requested documents could help me and the IC/AAT on merits review in resolving whether something has or has not been bought into existence for the dominant purpose of submission to Cabinet.
- 49. One such FOI matter commenced in the AAT in July 2021 (that matter was IC Review MR19/00116 which languished with the IC for 2 years and 4 months before a decision was made). The substantive hearing, which took place after a usual submission process, occurred in March 2022.
- 50. The delay in IC Review MR20/01189 has denied me a likely right of access, which in turn has denied me a secondary right to put the material before the AAT in the proceeding relating to IC Review [insert number]. It has also denied me secondary rights in relation to a number of other Cabinet exemption claim matters which I currently have before the IC and the AAT.

Sworn / Affirmed by the deponent at Adelaide in South Australia on 29 August 2022 Before me:



Signature of witness

F. Verlato (1²979) A Commissioner for taking Affidavits in the Supreme Court Court of South Australia

FEDERAL COURT OF AUSTRALIA ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS MELBOURNE REGISTRY

VID519/2021

SENATOR REX PATRICK Applicant

AUSTRALIAN INFORMATION COMMISSIONER Respondent

ANNEXURE RLP-1

The following four pages is the annexure RLP-1 referred to in the affidavit of Rex Patrick made on 29 August 2022 before me:

F. Verlato (Para) A Commissioner for taking Affidavits in the Supreme Court Court of South Australia



The Sydney Morning Herald

Exclusive Politics Federal China relations

This was published 2 years ago

'Could be one of Australia's biggest strategic blunders': Push for inquiry into East Timor gas project



By **Anthony Galloway** November 22, 2019 – 12.45am

The Morrison government is being urged by a key crossbench senator to support a parliamentary inquiry into East Timor's controversial Greater Sunrise oil and gas project, in a bid to stop China funding the project and gaining access to a port 500km off Darwin.

Centre Alliance senator Rex Patrick will put forward a motion in Parliament on Monday to establish an inquiry into the \$50 billion offshore development.





East Timor wants to build a pipeline from its offshore gas fields to the country's south coast. ROB HOMER

East Timor is determined to establish the gas processing facility and port on its south coast via a 150-kilometre underwater pipeline, which potential financiers have so far rejected.

Senator Patrick said the parliamentary inquiry would look at ways to support the Timorese government develop the processing facility onshore to stop Chinese financiers backing the project.

"East Timor wants the south coast option and they will [accept] assistance from whomever provides it," he said.

"The Chinese government doesn't think in electoral cycles, they think over decades.





Senator Rex Patrick is moving a motion to establish an inquiry into the Greater Sunrise project. BEN SEARCY

"They already have a presence on the south coast and they will build it up over the decade, and I wouldn't be surprised over time if there is a Chinese naval base on the south-east coast of Timor."

The Timorese government is intent on building the pipeline from the oil and gas fields in the Timor Sea to its south coast, rather than refining the gas in an existing facility in Darwin at a lower cost.

The project is being pursued as part of country's huge Tasi Mane infrastructure project, championed by former president Xanana Gusmao.

While Australia has remained officially neutral about where the processing facility should be located, East Timor's ambassador to Australia has previously stated that working with Chinese companies was a strong possibility if other partners could not be found.

Senator Patrick said he did not know the solution to how Australia could help make the project a reality, but it needed to investigate ways to partner with East Timor to keep the Chinese out.

"Not helping the Timorese with their Tasi Mane project, in circumstances where the Chinese will, could turn out to be one of Australia's biggest strategic blunders," Senator Patrick said.

Coalition and Labor are both expected to not back the motion.



A DFAT spokesman said Australia wanted to see the Greater Sunrise area developed in a commercially sound way that maximised the benefits for the Timorese people and contributed to the country's economic development.

A spokesman for Labor's shadow foreign affairs minister Penny Wong said it was up to the Timorese authorities and their commercial partners to determine the development of the gas fields.

The Greens will support the motion, a party spokesman said: "Given decades of past history, we know governments of both stripes need to be scrutinised extremely closely when it comes to engagement with Timor Leste".

The move to establish an inquiry by the Foreign Affairs, Defence and Trade References Committee comes as the Morrison government has been urged to <u>consider banning the</u> <u>export of sophisticated technologies that could be used by China to boost its military and</u> <u>espionage activities</u>.

The United States government is planning to restrict China's access to certain types of emerging technologies which could include quantum computing, 3D manufacturing and an algorithm that guides artificial intelligence.

In a paper for the China Matters think tank, foreign affairs and security expert John Lee said Australia was "particularly exposed" to the US restrictions and the likely response from China.



Anthony Galloway is political correspondent for The Sun-Herald and The Sunday Age. Connect via email.



FEDERAL COURT OF AUSTRALIA ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS MELBOURNE REGISTRY

VID519/2021

SENATOR REX PATRICK Applicant

AUSTRALIAN INFORMATION COMMISSIONER Respondent

ANNEXURE RLP-2

The following three pages is the annexure RLP-2 referred to in the affidavit of Rex Patrick made on 29 August 2022 before me:

F. Verlato CP 479) A Commissioner for taking Affidavits in the Supreme Court Court of South Australia

Timor-Leste

Timor-Leste warns it will work with China if Australia insists on pumping Timor Sea gas to Darwin

Advertisement

Exclusive: President José Ramos-Horta says his country's leadership 'has to make decisions ... if necessary a trip to China' Follow our Australia news live blog for the latest updates

Get our free news app, morning email briefing or daily news podcast

Christopher Knaus ¥@knausc Fri 19 Aug 2022 03.30 AEST



China's foreign minister Wang Yi with Timor-Leste's president José Ramos-Horta during a visit to
 Dili in June. Photograph: Antonio Dasiparu/EPA

Timor-Leste's president, José Ramos-Horta, has warned his nation will seek Chinese support if Australia and Woodside Energy fail to back a gas pipeline between the resource-rich Timor Sea and his country's southern shore, rather than Darwin.

Ramos-Horta has warned <u>Timor-Leste</u> – Australia's neighbour and ally – would "absolutely" look to Chinese investment to secure what he says is the "national strategic goal" of piping gas from the Greater Sunrise fields to his nation's coast. The comments are likely to heighten concerns about Chinese influence in the Indo-Pacific.

"Timor-Leste would favourably consider partnership with Chinese investors if other development partners refuse to invest in bringing gas via pipeline to Timor-Leste," Ramos-Horta told Guardian Australia.

"Timor-Leste would be in a financial cliff if Greater Sunrise is not operating within the next 10 years. So, very soon, [Timor-Leste's] leadership has to make decisions ... if necessary a trip to China."

The Greater Sunrise oil and gasfields, worth an estimated \$71bn, are critical to Timor-Leste's future. The resources – which sit in the Timor Sea about 150km south of Timor-Leste – have been the source of much tension between the two allies.

The former Coalition government's **pursuit of lawyer Bernard Collaery** and former intelligence officer Witness K, who revealed Australia had spied on Timor-Leste's government during 2004 negotiations over access to the lucrative resources, caused continued frustration and anger among key Timor-Leste leadership figures, including Ramos-Horta and the former prime minister Xanana Gusmão.

A new agreement was struck between Australia and Timor-Leste on the

Timor Sea maritime boundary in 2019, but progress on the development of the Greater Sunrise resources has been slow.

The current preference of Woodside Energy, the Australian corporate giant seeking to exploit the gasfields, is to pipe the gas through Darwin for processing.

But the Australian Financial Review **reported this week** that Timor-Leste's petroleum minister, Víctor da Conceição Soares, viewed the construction of a pipeline to Timor-Leste's southern coast as the "only acceptable option for the people of Timor-Leste".

Ramos-Horta's comments go further still, giving an explicit warning that Timor-Leste will seek Chinese investment to help it achieve what he described as a "national strategic goal of a wide spectrum of Timorese political leadership".

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"I wouldn't consider this to be detrimental to Australia's strategic interests," he said. "After all, the Chinese literally own the Darwin port and this does not seem to concern too much Canberra."

The Department of Foreign Affairs and Trade said Australia recognised the "importance to Timor-Leste of developing the Greater Sunrise gas and condensate fields".

"The Australian government is committed to developing Greater Sunrise in a way that is commercially viable, supports the economic development of Timor-Leste and maximises the benefits to all parties, consistent with the maritime boundary treaty between Timor-Leste and Australia," a spokesperson said.

The decision on where to build the pipeline is ultimately a commercial one, though the Australian government is working with Timor-Leste on regulatory and taxation arrangements under the maritime boundary signed in 2019.

As it stands, Woodside has a 33.44% stake in Greater Sunrise, while Timor GAP - the Timor-Leste national oil company - holds a stake of 56.56%, after buying out ConocoPhillips and Shell. Japan's Osaka Gas holds a 10% stake.

The Greater Sunrise fields are much closer to Timor-Leste, sitting about 150km south of the nation's coastline, compared with 450km to Darwin. The new maritime boundary agreement puts most of the resources within Timor-Leste's jurisdiction.

Woodside has generally argued that piping the gas to Darwin would be more commercially viable.

The Greater Sunrise gasfields are split from the Timor-Leste coast by the 3,300 metre-deep Timor Trench, which experts have argued would complicate efforts to pipe the gas there.

But Florentino Soares Ferreira, president of Timor-Leste's National Authority of Petroleum and Minerals, told the AFR this week that independent reports have shown "that it is technically viable".



"Ultimately, now they [Woodside] are just blindly rejecting the Timor projects, but they're not the majority shareholder."

Woodside said it understood the broader interest in the pipeline's development but such discussions may be premature.

Woodside's current focus was striking a production sharing contract, something required under the 2019 maritime boundary agreement, a spokesperson said. That contract would act as a precursor to any "future development activities being contemplated".

"Woodside remains committed to the development of Greater Sunrise provided there is fiscal and regulatory certainty necessary for a commercially viable development to proceed," the spokesperson said.

"We understand and respect Timor-Leste's desire to process Sunrise gas in Timor-Leste, however any development plan will need to be assessed against the criteria established in the maritime boundary treaty."



FEDERAL COURT OF AUSTRALIA ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS MELBOURNE REGISTRY

VID519/2021

SENATOR REX PATRICK Applicant

AUSTRALIAN INFORMATION COMMISSIONER Respondent

ANNEXURE RLP-3

The following three pages is the annexure RLP-3 referred to in the affidavit of Rex Patrick made on 29 August 2022 before me:

F. Verlato (1977) A Commissioner for taking Affidavits in the Supreme Court Court of South Australia





Office of Senator the Hon Michaelia Cash Attorney-General Minister for Industrial Relations Deputy Leader of the Government in the Senate

AGD reference: FOI20/3 OAIC reference: MR20/00544

Ms Carly Warren Assistant Review Adviser (Legal) Office of the Australian Information Commissioner

By email: carly.warren@oaic.gov.au

Dear Ms Warren,

MR20/00544 - Request for further information

I write in response to your letter of 24 September 2021 (the RFI letter) requesting further information from the Attorney-General's Office (the office) with respect to the single document that was identified within the scope of an FOI request decision made by the former Attorney-General (the document).

Background

On 18 August 2021, the Office of the Australian Information Commissioner (the OAIC) wrote to the Attorney-General's Department (the department) seeking confirmation as to whether the current Attorney-General, Senator the Hon Michaelia Cash, was in possession of the document.

On 2 September the department wrote to the OAIC advising that the office had made enquiries and had advised the department that the office were not in possession of the document.

Your request

In the RFI letter you sought "further information from the current Attorney-General to establish that they are not in possession of the document at issue in the [Information Commissioner] review".

My decision

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the Attorney-General's Office.

In making my decision, I have taken the following into account:

- the terms of your request,
- advice provided to me by officers with responsibility for matters to which your request relates,



- the provisions of the FOI Act, and
- the Guidelines issued by the Australian Information Commissioner under section 93A of the FOI Act (the Guidelines).

Section 24A of the FOI Act relevantly provides that an agency or Minister may refuse a request for access to a document if all reasonable steps have been taken to find the document and the agency or Minister is satisfied that the document:

- is in the agency's possession but cannot be found, or
- does not exist.

When considering a decision to refuse access under section 24A of the FOI Act, the Guidelines relevantly provide at paragraph 3.89 that:

What constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment or the minister's office.

The Guidelines further provide at paragraph 3.89 that an agency or minister should take comprehensive steps to locate documents, having regard to:

- the subject matter of the documents,
- the current and past file management systems and the practice of destruction or removal of documents,
- the record management systems in place,
- the individuals within an agency or minister's office who may be able to assist with the location of documents, and
- the age of the documents.

As noted in the RFI letter, paragraph [2.36] of the FOI Guidelines provides that:

'Possession' of a document is not limited to actual or physical possession, but can include constructive possession where an agency has the right and power to deal with a document, regardless of where and by whom it is stored.

As is also noted in the RFI letter, the decision in this matter was made by the former Attorney-General. Paragraph [10.27] of the Guidelines relevantly states that

Where a minister is party to an IC review and there is a change of minister in the course of the review, the new minister is the respondent. If the requested document is not in the possession of the new minister, the FOI Act will not apply and the IC review cannot continue as the document is no longer an 'official document of a minister'.

Reading paragraphs [2.36] and [10.27] of the Guidelines together, it can be reasonably inferred that, although "possession" of a document may arise where an agency has the right and power to deal with a document (i.e. constructive possession), the existence of such a "right and power" of possession on the part of a new minister will not arise automatically, or as a matter of course, following a change of minister. Rather, it must be separately determined that the requested document is in the possession of the new minister.

To ascertain whether the document was in possession of the current Attorney-General, on or around 1 September 2021 an adviser in the office arranged for members of staff in the office who might plausibly have held material relevant to the subject matter of the request – myself as Chief of Staff,

the adviser responsible for internal legal advice and significant legal issues, and the adviser formerly responsible for FOI matters – to conduct searches of their document holdings. Despite these steps, the office was unable to identify any records within the office's possession for the request.

Having regard to the provenance of the document, on 1 September 2021 an adviser in the office also contacted the adviser responsible for FOI matters in the former Attorney-General's Office (the former Attorney-General's adviser), who was familiar with the document and the Information Commissioner review of which it was the subject. Our adviser enquired as to whether the former Attorney-General's Office were aware, or had any record, of having transferred the document to the current Attorney-General's Office. Our adviser was advised by the former Attorney-General's adviser that no such transfer had taken place, nor was there any reason, in the former Attorney-General's adviser's view, why the current Attorney-General's Office would be in possession of the document.

Having regard to the above, I am satisfied that reasonable steps to locate the document were undertaken. I am also satisfied that the document is not within the possession, "constructive" or otherwise, of the Attorney-General or her office.

Yours sincerely

Daniel Try

Chief of Staff Office of the Attorney-General

6 October 2021



FEDERAL COURT OF AUSTRALIA ADMINISTRATIVE AND CONSTITUTIONAL LAW AND HUMAN RIGHTS MELBOURNE REGISTRY

VID519/2021

SENATOR REX PATRICK Applicant

AUSTRALIAN INFORMATION COMMISSIONER Respondent

ANNEXURE RLP-4

The following four pages is the annexure RLP-4 referred to in the affidavit of Rex Patrick made on 29 August 2022 before me:

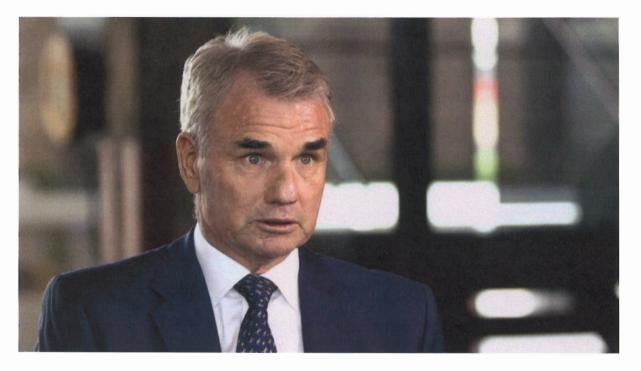
F. Verlato CP 2979) A Commissioner for taking Affidavits in the Supreme Court Court of South Australia

MNEWS

Snowy Hydro boss Paul Broad resigns amid Snowy 2.0 project delays

ABC South East NSW / By Keira Proust

Posted Fri 26 Aug 2022 at 1:40pm, updated Fri 26 Aug 2022 at 3:24pm



Snowy Hydro chief executive Paul Broad has resigned. (ABC News)

The boss of Snowy Hydro has resigned amid reported cost blowouts and delays on the Snowy 2.0 project in the NSW Snowy Mountains.

Chief executive and managing director, Paul Broad, has led the company since 2013.

His resignation comes amid claims by the contractor Future Generation Joint Venture that the project has blown out by \$2.2 billion.

In a statement to the ABC earlier this week, Mr Broad said the Snowy 2.0 project had been

Key points:

- Paul Broad has resigned from Snowy Hydro after nearly a decade
- It comes amid reported cost blowouts and delays on the Snowy 2.0 project

impacted by the COVID-19 pandemic and supply chain issues, but he rejected the contractor's cost blowout claims. The Snowy Board will now start the recruitment process

"Snowy Hydro rejects the reported \$2.2 billion claim," Mr Broad said in a statement.

"Snowy Hydro has paid all amounts that Future Generation Joint Venture is contractually entitled to."

Mr Broad said all claims submitted by the contractor were assessed "appropriately," in accordance with the contractual requirements.



nowy 2.0 project aims to link two dams through 27 kilometres of tunnels. *(ABC News: Macmillan)*

Climate Change and Energy Shadow Minister Ted O'Brien said in a statement he was concerned about reports that Mr Broad had been sacked from the role.

"Reports that Chris Bowen has directed Snowy Hydro's executive board to sack Snowy Hydro chief executive Paul Broad today for providing advice that he disagrees with is deeply concerning," Mr O'Brien said.



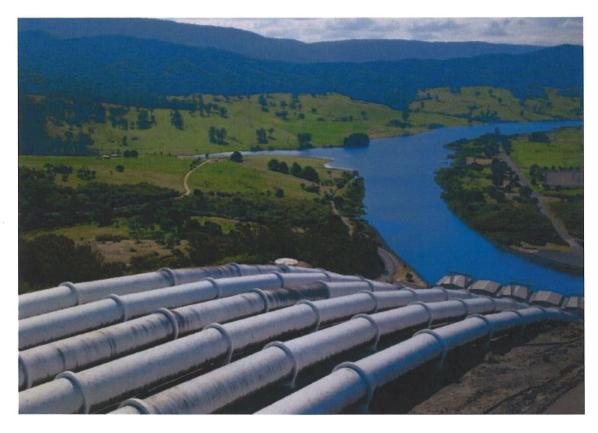
"[Mr] Bowen is on an energy rampage as he seeks to shut down the voices of industry experts that have a different point of view."

Climate Change Minister Chris Bowen did not respond to direct questions from the ABC about Mr O'Brien's claims.

In a statement, a spokesperson said the government valued Snowy Hydro and the "critical role" it played in supporting a changing grid.

"The Albanese Government notes the resignation today of Snowy Hydro CEO Paul Broad after almost ten years of service," a spokesperson said.

"[It] thanks him for his work in the energy market over that period."



nowy 2.0 project has been hit with significant construction delays. *(Supplied: Snowy*)

The \$5.1 billion Snowy Hydro 2.0, first announced by then-prime minister Malcolm Turnbull in 2017, is 19 months behind schedule.

It has pushed expected electricity production beyond the planned start of 2025.

In a statement, Snowy Hydro said the board would start recruitment to fill Mr Broad's position.



"The Snowy Board will now commence a process to identify new leadership," the statement said.

It said chief operating officer Roger Whitby would lead the organisation on an interim basis, with support from Mr Broad to facilitate a smooth transition.

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