AFFIDAVIT

I, David James BARKER, of Unit 5, 25 Waverley Road TARINGA in the State of Queensland, do hereby solemnly declare that:

1. I am the named "respondent" in QCAT matter 693/22.

2. This matter arose as a result of an application ("the application") filed by the State of Queensland (Department of Communities, Housing and Digital Economy) (the "applicant") on 23 March 2022.

3. I received my copy of the application by ordinary post on 25 March 2022.

4. The application was scheduled by QCAT for a hearing by telephone at 0930hrs on 26 April 2022.

5. Enclosed with the application were a number of other documents from both the applicant and QCAT. One of the documents from QCAT was a copy of the *QCAT Practice Direction No. 2 of 2022* (the "Practice Direction"), which contained information about variations to QCAT procedure for COVID-19.

6. Clauses 18 and 20 of the Practice Direction provide:

> 18. If a party intends to participate in a hearing, the party must advise the relevant registry (see Annexure A for the relevant registry details) and the other party/parties **no later than three (3) business days before the hearing** of the telephone number upon which they will be contactable for the hearing, and, where possible, an additional alternative telephone number.
>
> 20. Failure by a party to do so may result in the matter being dealt with in the party's absence.

7. For the purpose of Clause 18 (and other Clauses in the Practice Direction with a similar time limit which will be referred to later in this Affidavit), the expiry of the period three business days before the hearing was Wednesday 20 April 2022, given that Monday 25 April 2022 was a public holiday for ANZAC Day.

8. Also enclosed with the application was an unsigned affidavit, purportedly made by a person identifying as Mollie Beresford.

Initials:

9. The *Oaths Act 1867*, section 13B provides:

> **13B Jurat of affidavit**
> (1) This section applies in relation to an affidavit made, signed or witnessed under this Act or another law.
> (2) The signatory must ensure the affidavit's jurat states the following matters—
> (a) if applicable, that the affidavit was made in the form of an electronic document;
> (b) if applicable, that the affidavit was electronically signed by the signatory or substitute signatory;
> (c) if applicable, that the affidavit was made, signed and witnessed under part 6A;
> (d) that either—
> i) the contents of the affidavit are true; or
> ii) if the contents of the affidavit are stated on the basis of information and belief—those contents are true to the best of the knowledge of the person making the statement;
> (e) that the signatory understands that a person who provides a false matter in the affidavit commits an offence.

10. Further, Rule 432 of the *Uniform Civil Procedure Rules 1999* (UCPR), to which QCAT submits (see UCPR (3)), provides:

> **432 Swearing or affirming affidavit**
> (1) The person making an affidavit and the person taking the affidavit must sign each page of the affidavit.
> (2) Subrule (3) applies if—
> (a) the affidavit is made by 1 person; or
> (b) although the affidavit is made by 2 or more persons, both or all of the persons are not swearing or affirming the affidavit at the same time before the same person.
> (3) A statement (the jurat) must be placed at the end of the body of the affidavit and must—
> (a) state the full name of the person making the affidavit before the person taking it; and
> (b) state whether the affidavit was sworn or affirmed; and
> (c) state the day and the place the person made the affidavit; and
> (d) be signed by the person making it in the presence of the person authorised to take the affidavit; and
> (e) then be signed by the person before whom the affidavit was taken, above a statement of the capacity of the person to take the affidavit; and
> (f) otherwise be as in the approved form.

11. I submit the view that the affidavit described in [8] is invalid because:
    a) it is unsigned, violating UCPR 432 subrules (1) and (3)(d); and
    b) it violates sections 13B(3)(d) and 13B(3)(e) of the *Oaths Act 1867*, in that the jurat of the affidavit omits the required statements.

12. Should QCAT concur with the view expressed in [11], I request that the affidavit described in [8] submitted by the applicant be excluded from evidence.

Initials:

13. On 8 April 2022, I filed a *Form 42 – Application to extend or shorten a time limit or for waiver of compliance with procedural requirement* by email.

14. The purpose of the *Form 42* was to seek a one-week adjournment of the hearing to allow for the three public holidays (Good Friday, Easter Monday and ANZAC Day) which were to occur in the intervening period. These public holidays severely limited my ability to obtain legal assistance with my response to this matter, especially given the provision of Clause 27 of the Practice Direction (see [19] below).
15. I quoted my contact telephone number as 0402 599170 (my Primary Contact Number) on the *Form 42* that I filed on 8 April 2022.

16. QCAT refused the application in [13] on 21 April 2022.

17. At approximately 1430hrs on 20 April 2022, aware of my obligation to comply with Clause 18 of the Practice Direction (and not wishing to fall foul of the effects of Clause 20), I attempted to call QCAT to check and confirm that the contact telephone number held on file for me was correct. I was particularly concerned that QCAT would attempt to call me on the telephone number 0490 060778 (my Secondary Contact Number) which was quoted on the original application by the applicant. At the time, this telephone number was not active.

18. I was unsuccessful in my attempt to contact QCAT on 20 April 2022. Despite the timing of my call, I received a recorded message advising that I had called outside QCAT's calling times, which allegedly expired at 1500hrs. I called a second time in case there had been a mistake, but I again received the recorded message.

19. Clauses 25 – 27 of the Practice Direction provide:

> 25. In order for the Tribunal to hear and determine matters properly and efficiently, it is very important that the Tribunal has all of the documents that each party to the proceeding wishes to rely. For hearings dealt with by remote conferencing, it is particularly important that occurs before the hearing date.
>
> 26. It is expected that applicants file all of the documents that they wish to rely upon with their application, and that the parties file any documents they wish to rely upon at hearing as soon as possible.
>
> 27. It is directed that all parties must provide all documents the party wishes to rely on at hearing to the relevant registry and the other party/parties to the proceeding **no later than three (3) business days before the hearing** (see Annexure A for the relevant registry details).

20. I note that the language used in these Clauses expresses an imperative desire by QCAT to have documents filed as early as possible in order for all parties (including QCAT) to have adequate time to consider them.

21. Clause 27 has the same expiry time as mentioned in [7] above.

22. At 0916hrs on 21 April 2022, the applicant sent additional material by email to both QCAT and myself, consisting of a large number of photographs, all but one of which were dated before the original application was made.

Initials:

23. Notwithstanding the provisions of the *QCAT Act 2009*, section 28(4), I submit the view that the submission of these documents by the applicant should not have been accepted by QCAT because, with the exception of the photograph taken on 5 April 2022, they were in the possession of the applicant at the time the original application was made and could have been submitted at that time. Clause 26 of the Practice Direction encourages this. Instead, the applicant waited until the morning after the expiry of Clause 27, violating the provision of that Clause and denying QCAT and myself a fair and reasonable amount of time to consider the evidence. This action is particularly egregious given the large volume of material that was submitted.

24. At 1241hrs on 21 April 2022, I called QCAT on 1300 753 228 to raise my concerns outlined in [23] above. I was advised that my call was #102 in the queue. I waited about 18 minutes before requesting a callback, by which time I had moved up to #90 in the queue.

25. At 1522hrs on 21 April 2022, I heard my phone ring twice and twice only. I did not have time to answer the call. The call was from a private number and I suspect it was the QCAT callback. I did not get to express my concerns about the late admission of evidence.

26. Over the ANZAC Day long weekend, I realised that the situation described in [17] above had not been resolved. I attempted to log in to the online account for my Secondary Contact Number to investigate its status and possibly attempt to reinstate the service but I was unsuccessful. I realised I would have to call the service provider directly. As this could only be done during business hours, the next available opportunity was Tuesday 26 April 2022, which was the scheduled date of the hearing. Although I knew that there would only be one or two hours to reinstate the service, I was confident that this could be achieved based on previous experience.

27. At 0801hrs on 26 April 2022, I called the service provider for my Secondary Contact Number. I learned that the account had been closed for inactivity on 17 April 2022. Reinstatement was possible, but it would take 5 business days. I went ahead with the process anyway, in the hope that perhaps it could happen within an hour or so.

28. I tested the Secondary Contact Number a number of times between approximately 0850hrs and 0925hrs. When the last of these was unsuccessful, I realised the real possibility of the situation described in [17] coming to pass, and an imminent invocation of Clause 20 of the Practice Direction. I immediately left my home and went to visit the QCAT Registry at 259 Queen Street.

29. Neither my Primary Contact Number nor my Secondary Contact Number received any calls between 0830hrs and 1000hrs on 26 April 2022.

30. I arrived at the QCAT Registry 259 Queen Street at approximately 1015hrs and explained to receptionist Darryl the details contained in [17-18] and [24-29].

31. I quoted my Primary Contact Number to Darryl, who advised that he would pass it on to the relevant person and that someone would be in contact with me later. I then left the QCAT Registry to return home.

32. At 1045hrs, I received a call on my Primary Contact Number from a private number. The caller was from QCAT confirming my Primary Contact Number. I was requested to return to QCAT immediately. At the time, I was on a train between Roma Street and Milton. I alighted at Milton and boarded a train back into the city.

Initials:

33. I arrived back at QCAT approximately 1110hrs. I was directed to the hearing room.

34. Inside the hearing room were adjudicator William LeMass and a few support staff.

35. Clause 23 of the Practice Direction provides:

> 23. In cases where the Tribunal permits the personal appearance of a party, that person shall, before being admitted to the hearing room, provide, in writing, their full name, address, and contact telephone number and confirmation that the person:
> a) has not been currently diagnosed with COVID-19;
> b) is not presently awaiting the results of a COVID-19 test;
> c) has not been in close contact with another who already has COVID-19 such as to require the person to self-quarantine (in accordance with Queensland Government guidelines and recommendations); and
> d) is not suffering any of the symptoms of COVID-19.

36. None of the provisions of Clause 23 were followed prior to my admission to the hearing room. While I believe I was not affected by COVID at the time, I submit the view that it should have been prudent, especially in the light of the seriousness with which QCAT seems to regard COVID (including the necessity for the issue of the Practice Directions in the first place), that I should have at least been tested for COVID prior to my entry to the hearing room. As I was not expecting to visit either the QCAT Registry or the hearing room on that day, I did not get tested for COVID myself beforehand.

37. Adjudicator LeMass proceeded to reopen the hearing. Representatives for the applicant had been contacted by telephone.

38. I was not prepared for this. All my documents were still at home. I was still rather flustered by the events of the previous three hours. The phone call I received at 1045hrs (see [32]) did not mention that the hearing was to proceed upon my arrival.

39. During this hearing, adjudicator LeMass:

> a) appeared to make allusion to the subject in [36] above in a discussion with a support staff member but dismissed it as unnecessary;
> b) attempted to explain why the matter had been reopened and the extraordinary circumstances leading to my correct contact number being advised to QCAT (possibly through the *Form 42* referred to in [13]), but that information somehow not being noticed at the original scheduled time of 0930hrs; and
> c) made brief mention that b) above may invoke a right for me to have the matter reopened, without clarifying whether that comment referred to the current hearing or a possible later one.

40. Adjudicator LeMass' comments of [39(c)] were not made until after a considerable time (possibly 10 minutes or more) into the hearing.

41. During the hearing, the applicant introduced new evidence in the form of photographs taken after the submission referred to in [22] above. Neither adjudicator LeMass nor myself had access to these photographs. The applicant discussed these photographs at length.

42. Notwithstanding the provisions of the *QCAT Act 2009*, sections 28(3)(c) and 28(4), I submit the view that both the photographs and associated discussion should have been disregarded by the adjudicator on the ground that neither of us had access to the documents being discussed.

43. Due to the deprivation of access to my copy of the relevant documents of the matter, I felt obliged to present my case solely from head knowledge of the facts. My defence of the matter was severely injured by this limitation.

44. I was not aware, nor was I made aware of any rights I may have had to a later hearing. Adjudicator LeMass' comments of [39(c)] did not expressly indicate this.

45. In light of the foregoing, I submit the view that the hearing conducted by Adjudicator LeMass on 26 April 2022 did not proceed in a manner which provided me with a fair and equitable opportunity, in violation of the *QCAT Act 2009*, section 28(3)(a).

46. Should QCAT concur with the view in [45] above, I request that QCAT issue an order revoking the Warrant of Possession which was issued on 26 April 2022 (the effective date of that Warrant being 10 May 2022), and an order either:
    a) That the matter be adjourned for another hearing at a time and place to be advised by QCAT; or
    b) That the application 0693/22 be dismissed.

47. Should QCAT concur with the view expressed in [23] above, I request:
    a) with all due respect, that Adjudicator William LeMass be excused from presiding over any further involvement in this matter due to his exposure to the material described therein, and the real potential for that to irrevocably adversely affect his reasoning; and
    b) that the material submitted by the applicant described in [22] above be excluded from evidence.

And I further declare that the contents of this my affidavit are, to the best of my knowledge, a true representation of the facts of the of the matter.

I understand that a person who provides a false statement in an affidavit commits an offence.

Sworn by me at BRISBANE on this ninth day of May, two thousand and twenty-two.

DAVID JAMES BARKER

In the presence of:

(a Justice of the Peace)