

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Submissions
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 6/05/2021 6:12:13 PM AEST

Registrar

### Important Information

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## **Ben Roberts-Smith v Fairfax Media/The Age/Federal Capital Press**

Federal Court of Australia Proceedings NSD1485/1486/1487 of 2018

### **Respondents' submissions on Person 35 objection to subpoena**

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#### **A. Introduction**

1. These submissions are filed in response to an objection by Person 35 to the production of one document (**Person 35 Document**) pursuant to a subpoena issued to him dated 1 April 2021 (**Subpoena**). The Person 35 Document appears to record adverse findings made against Person 35 by the Inspector-General of the Australian Defence Force (**IGADF**) in the Afghanistan inquiry.
2. The submissions filed for Person 35 (**Submissions**) set out 7 grounds of objection to the Subpoena. These may be grouped into two broad categories:
  - (a) the Subpoena should be set aside as it seeks irrelevant material and lacks any legitimate forensic purpose (Submissions, sections B and C); and
  - (b) the Subpoena should be set aside, or the Commonwealth should claim public interest immunity over the whole Person 35 Document, on various procedural fairness and related grounds (Submissions [10], sections A, D, E, F, G).
3. The Respondents accept that Person 35 has standing, as an interested person, to apply to have the Subpoena set aside. The application should otherwise be dismissed. The Subpoena has a legitimate forensic purpose as it seeks material directly relevant to the credit of Person 35. There is no reason to reconsider the Commonwealth's determination that the public interest only requires partial redaction of the Person 35 Document. All procedural fairness concerns are addressed by the proposed redactions. The same redaction regime has been applied to address similar concerns in cognate material already produced in respect of the Applicant and other witnesses.
4. These submissions address the following matters:
  - (a) **Section B** summarises the reasons and orders made by Colvin J to facilitate production by the IGADF of a Potentially Affected Person (**PAP**) notice issued to the Applicant, the Applicant's response, and a notice recording the IGADF's findings (that is, similar material to that sought under the Subpoena).

- (b) **Section C** addresses the legitimate forensic purpose of the Subpoena.
- (c) **Section D** addresses the public interest immunity and procedural fairness issues raised in the Submissions.

**B. The Applicant's PAP notice and response**

- 5. On 11 November 2020, Justice Colvin made orders and delivered reasons concerning a claim by the IGADF of public interest immunity over a PAP notice given to the Applicant, and the Applicant's response to that PAP notice: *Roberts-Smith v Fairfax Media Publications Pty Limited* (No 8) [2020] FCA 1630 (**Reasons**). His Honour upheld the claim for public interest immunity in part, and ordered that the PAP notice and response be produced to the Respondents, subject to two categories of redactions:
  - (a) information given by the Applicant to the IGADF's Inquiry or any material derived by the Inquiry (directly or indirectly) as a result of disclosure by the Applicant; and
  - (b) information acquired compulsorily by the Inquiry from persons other than the Applicant who, in the reasonable assessment of the IGADF, may themselves be the subject of future criminal processes, and information obtained derivatively from the compulsorily acquired information: Reasons [16].
- 6. The Respondents accept that to the extent the Person 35 Document contains any information of an equivalent kind it ought to be redacted prior to production. The Person 35 Document has been redacted so as to avoid disclosure of parts of that document which are subject to the Commonwealth's claim for public interest immunity (see affidavit of Justine Munsie sworn 30 April 2021 at annexure JMM1 and confidential annexure JMM3).
- 7. A document similar to the Person 35 Document has been produced to the Court by Persons 29, and will be produced by Person 32, in redacted form, in response to equivalent subpoenas issued to them.

**C. The Subpoena has a legitimate forensic purpose**

- 8. Sections B and C of the Submissions argue that the Subpoena has no legitimate forensic purpose and the material sought is irrelevant. Those submissions should not be accepted.
- 9. The conduct of Person 35, and his relationship and interaction with the Applicant at key times, is directly at issue in the proceedings. For example, the Respondents' particulars of truth allege that on 12 April 2009, the Applicant was involved in two murders in an Afghan compound known as Whiskey 108. The Respondents also allege that on 11

September 2012, the Applicant kicked a bound Afghan man off a cliff and then engaged in a joint criminal enterprise to shoot him dead.

10. The Applicant has filed and served an Outline of Evidence for Person 35 containing detailed evidence as to the alleged Whiskey 108 murders and the alleged cliff-kick murder. The Outline also contains extensive details as to the Respondent's reputation. Plainly, Person 35 is a key witness in support of the Applicant's case. It follows that his versions of events, and his credibility, will be live issues in the case.
11. The Subpoena seeks Person 35's disciplinary record relating to or connected to the IGADF Inquiry, including any show cause notice issued to Person 35. It is on the cards that the document in question will refer to findings made against Person 35 by the IGADF following the Afghanistan inquiry. The findings almost certainly are adverse to Person 35. In those circumstances, both the fact of the document, and the unredacted portions, are likely to be relevant and capable of providing a legitimate basis for cross-examination on substantive matters, or at the very least credit matters.
12. The relevance of such material was emphasised by Hunter J in *Brand v Digi-Tech (Australia) Ltd* [2001] NSWSC 425 at [36], where his Honour said:

...it is indisputable that, if the subpoenaed documents are by their description, arguably relevant or capable of providing a legitimate basis for cross-examination on credit matters, then an application to set aside a subpoena on the grounds of irrelevance of the documents to the proceedings is misconceived.
13. The Submissions at [14] set out 11 reasons why the document is irrelevant, ranging from criticism of processes of the IGADF Inquiry ([14(b)], confidentiality obligations ([14(c) and (d)], the fact that Person 35 has not been terminated by the ADF ([14(f)], and the purported risk of prejudicing future criminal proceedings ([14(j) and (k)]. The last point is incorrect; the very purpose of the redactions is to remove that risk (see paragraph 19 below). The balance of the reasons are not to the point. They are all reasons why Person 35, and the Applicant, may argue at trial that Person 35's credit is not diminished by the fact or contents of the document at issue. However, none of these reasons render the document irrelevant or incapable of providing a legitimate basis for cross-examination.
14. The Respondents' position on the relevance and legitimate forensic purpose of Person 35's Subpoena is consistent with the approach taken by both parties to the proceeding in respect of such documents. The Applicant and the Respondents have both issued subpoenas to each other's witnesses seeking documents of this nature. It is implicit, in

the issuance of those subpoenas, that both parties accept that such documents are relevant and have a legitimate forensic purpose to the issues in dispute.

**D. Public interest / procedural fairness considerations**

15. The Submissions raise several matters which can broadly be described as public interest or procedural fairness considerations. None of these considerations justify the complete non-disclosure of the Person 35 Document on public interest grounds. Nor do they warrant setting aside the Subpoena on procedural fairness grounds.
16. At the outset, we observe that Person 35 does not identify any error in the Commonwealth's proposed redactions to the Person 35 Document (either at a level of principle or in relation to any specific redaction). The proposed redactions are based on the reasoning of Colvin J. They are directed at preventing the disclosure to the Respondents of any material that might prejudice future criminal proceedings. They will ensure that the Respondents only receive material that is not unfairly prejudicial to Person 35. In circumstances where no error of principle or application has been identified, there is no reason for the Commonwealth, or the Court, to reconsider whether a broader public interest immunity claim ought to be upheld over the whole Person 35 Document.
17. None of the submissions advanced on behalf of Person 35 alter this position.
18. *First*, the submissions at Section A (Submissions [11]-[12]) are contrary to authority. In *Roberts-Smith v Fairfax Media Publications (No 6)* [2020] FCA 1285, Colvin J considered the very same submission (at [63]) and rejected it at [67]. The submission at Submission [12] is similarly not to the point. A letter recording the findings of the IGADF Inquiry does not have "speculative benefit". Nor would a redaction regime consistent with that ordered by Colvin J render the material so innocuous as to deprive it of any forensic purpose.
19. *Secondly*, the submission at Section D (Submissions [18]-[23]) is addressed by implementing the same redaction regime ordered by Colvin J. That regime was crafted to mitigate the very risk complained of at Submissions [18]-[23]. Accordingly, the "significant and grave risk" referred to at Submissions [18] will not arise.
20. Privacy and confidentiality concerns are similarly not matters warranting setting the Subpoena aside. Person 35's identity in this proceeding is protected. His name, image and other identifying information can never be made public. At worst, the public will know that a special forces soldier known as "Person 35" received a document referring to adverse findings made by the IGADF. In any event, any concerns as to privacy, mental

health and welfare raised by using this document are matters that can all be dealt with at trial. They are not reasons to deny production in the first place.

21. *Thirdly*, the submissions at Sections E and G (Submissions [24]-[26] and [30]-[32]) are similarly not matters that warrant setting the subpoena aside. The fact that neither party presently has the requested documents is not a basis to deny production. The quote from *HT v the Queen* [2019] HCA 40 at [32], cited at Submissions [25], related to the particular circumstances where one party already had the documents and the other did not. It is not authority for the proposition that if neither party presently has the documents, there is no unfairness in denying access to both. Nor is the fact that disclosure might result in further subpoenas a basis to deny production. In short, if relevant material exists which bears directly on the credit of Person 35, the Respondents submit they are entitled to it.
22. *Fourthly*, the submission at Section F (Submissions [27]-[29]) should not be accepted. The Respondents do not dispute that Person 35 is subject to a direction by the IGADF not to discuss certain matters. However, Person 35 does not need to address the substance of specific findings to engage with the gravamen of this application, namely, whether a document notifying adverse findings by the IGADF in and of itself is capable of providing a legitimate basis for cross-examination on credit matters. For the reasons identified above, that the document (even in redacted form) is manifestly capable of doing so.

**F Conclusion**

23. For the reasons, the Respondents submit that the Court should dismiss the application with costs. The document should be produced as soon as possible.

Nicholas Owens                      Lyndelle Barnett                      Christopher Mitchell

Counsel for the Respondents

6 May 2021