

## NOTICE OF FILING

### Details of Filing

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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



*Sia Lagos*

Registrar

### Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.



Form 59  
Rule 29.02(1)

## Affidavit

No. NSD689, 690 and 691 of 2023

Federal Court of Australia

District Registry: New South Wales Registry

Division: General

**BEN ROBERTS-SMITH**

Appellant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) and others**

Respondent

Affidavit of: Natale Ilardo

Address: Level 19, 123 Pitt Street, Sydney NSW 2000

Occupation: Solicitor

Date: 23 April 2025

### Contents

Document number	Details	Paragraph	Page
1	Affidavit of Natale Ilardo in support of interlocutory application seeking to set aside subpoena to attend to give evidence, sworn on 23 April 2025	1 - 7	1 - 2
2	Annexure "NI1", being copy of the Appellant's Request for Leave to Issue the Subpoena	4	3 - 12
3	Annexure "NI2", being copy of the email exchange between Jonathon Turner and Monica Allen, on 22 April 2025	7	13 - 22


Two handwritten signatures are visible at the bottom of the page. The signature on the left is a stylized 'N' followed by a horizontal line. The signature on the right is a more complex, cursive signature.


I, Natale Ilardo, of Level 19, 123 Pitt Street, Sydney, New South Wales, say on oath:

1. I am a Special Counsel in the employment of Lander & Rogers, the solicitors for Dean Levitan (**Mr Levitan**), and I am authorised to make this affidavit on Mr Levitan's behalf.
2. I make this affidavit in support of the interlocutory application to be filed on behalf of Mr Levitan seeking an order setting aside the subpoena to Mr Levitan to attend to give evidence in these proceedings on 1 May 2025 (**Subpoena**).
3. I make this affidavit on the basis of my own knowledge except where otherwise indicated. Where I depose to matters on information and belief, I believe them to be true.
4. A copy of the Request for Leave to Issue the Subpoena executed by Monica Allen of BlackBay Lawyers is annexed to this affidavit and marked **Annexure "N11"**.
5. On 22 April 2025, at 8:24PM, Jonathon Turner (Partner at Lander & Rogers with care and conduct of this matter) sent an email to Ms Allen.
6. On 22 April 2025, at 8:29PM, Ms Allen responded to Mr Turner's email and attached by way of service on Mr Levitan a sealed copy of the Subpoena.
7. A copy of Mr Turner's email exchange with Ms Allen on 22 April 2025 is annexed to this affidavit and marked **Annexure "N12"**.

Sworn by the deponent  
at 123 Pitt Street, Sydney NSW 2000  
in New South Wales  
on 23 April 2025  
Before me:

)  
)  
)  
)  
)

  
Signature of deponent

  
Signature of witness

Jonathon Turner

**Annexure Certificate**

**NI1**

No. NSD689, 690 and 691 of 2023

Federal Court of Australia

District Registry: New South Wales Registry

Division: General

**BEN ROBERTS-SMITH**

Appellant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) and others**

Respondent

This is annexure marked "NI1" referred to in the affidavit of NATALE ILARDO  
sworn on 23 April 2025 before me



Signature of witness

Jonathon Turner

Partner

Lander & Rogers

Level 19, 123 Pitt Street, Sydney NSW 2000



# Request for Leave to Issue Subpoena (Form NCF7)

Federal Court Rules 2011 – Rule 24.13

Subpoenas and Notices to Produce Practice Note (GPN-SUBP)

- Cross boxes where applicable
- Clearly print or type all answers
- Please prepare one Request for Leave to Issue Subpoena for each addressee
- Attach an extra page if you need more space for any of the details requested

## 1. Details of the proceeding

1.1 Title of proceeding: Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors

1.2 Proceeding number: NSD689 of 2023

## 2. Details of person making the Request

2.1 I am: ☐ a party to the above proceeding:

☒ the Lawyer for:

The Appellant

2.2 Contact details of person making the Request:

(a) Name & Position  
*[if applicable]* Monica Allen

(b) Organisation/Firm: BlackBay Lawyers

(c) Telephone: 61 2 8005 3077 Mobile :

(d) Email: monica.allen@blackbaylawyers.com

(e) Address: Level 17, 20 Martin Place, Sydney, NSW 2000

(f) Signature:  
*[an electronic signature can be used, provided this is done by or at the direction of the person completing this Request]*

Date: 16 April 2025

## 3. Request for leave ("Request")

3.1 (a) Is the Request urgent? ☐ No ☒ Yes

OR (b) Is an abridged period of service sought on the addressee (short service)? ☒ No ☐ Yes

If "yes" to either 3.1 (a) or (b), briefly explain the urgency and/or basis for short service being requested:

Hearing commences on 1 May 2025.

3.2 Are the other parties to the proceeding aware of this Request? ☒ No ☐ Yes

3.3 Has the Request (or a similar request) previously been raised with or addressed by the Court? ☒ No ☐ Yes

If "yes" to 3.3, provide details:

3.4 Is it intended that the subpoena will be issued for service outside Australia [ie. Outside of the jurisdiction]? ☒ No ☐ Yes

If "yes" to 3.2, set out where, outside Australia the subpoena is to be served:

3.5 Name of person to be subpoenaed ("Addressee"): Dean Levitan

3.6 I request leave of the Court to issue a subpoena requiring the Addressees to:

- ☒ Attend at Court to give evidence (Form 43A, r 24.13(1)(a) of the *Federal Court Rules*); or  
☐ Produce a document or thing (Form 43B, r 24.13(1)(b) of the *Federal Court Rules*); or  
☐ Attend at Court to give evidence and produce a document or thing (Form 43C, r 24.13(1)(c) of the *Federal Court Rules*),

I request leave for the following reasons:

The Appellant seeks leave to issue subpoenas to give evidence to:

- a. Mr Dean Levitan; and
- b. Mr Peter Bartlett,

in connection with matters arising from the affidavit of Mr McKenzie affirmed on 14 April 2025. That affidavit contains numerous assertions regarding documents allegedly provided to him by Ms Danielle Scott, and related discussions involving the Respondents' solicitors, Messrs Levitan and Bartlett.

Mr McKenzie deposes that he received materials and information from Ms Scott and Ms Roberts, some of which were privileged to the Appellant. While Mr McKenzie claims to have believed that the material was not privileged, he does not identify the specific documents to which that belief applied, nor is there any evidence that the belief was informed by legal advice or verified with the Respondents' solicitors. His belief is vague, unsubstantiated, and unsupported by any reasonable steps of inquiry.

Mr McKenzie further gives evidence about meetings and discussions he had with Messrs Levitan and Bartlett, including a meeting on 14 March 2021 at the home of Ms Roberts, which both solicitors attended. He also deposes to attending a subsequent dinner in Sydney on an unspecified date with Ms Roberts, Ms Scott, and Mr Levitan. Although Mr McKenzie asserts that the dinner was not for the purpose of sharing information or material relevant to the case, and that he does not recall any such disclosures being made (see [61]), the fact of the meeting and its participants is not in dispute.

The importance of their evidence has been reinforced by recent disclosures from the Respondents' solicitors, MinterEllison. In correspondence dated 15 April 2025 (**annexed**), MinterEllison confirmed the existence of a contemporaneous file note authored by Mr Levitan, said to have been prepared for the dominant purpose of providing legal services in this litigation. That note records the 14 March 2021 meeting at the home of Ms Roberts, attended by Mr Levitan, Mr McKenzie, Ms Roberts, and Ms Scott.

The Respondents now claim privilege over that document, which is directly relevant to the key issues of waiver and the use of privileged information. Significantly, the document was not produced in response to a Notice to Produce issued on 15 February 2022, which was pressed in Court the following day. No documents were produced at that time. Its existence has only now been disclosed – more than three years later – in response to the Appellant's current application. That delay raises serious questions as to the conduct of the Respondents and reinforces the necessity of oral evidence from Messrs Levitan and Bartlett to determine what occurred, what was said, and what was understood at the meeting, particularly in relation to the handling of privileged material.

The proposed subpoenas are limited to oral testimony only. The request is urgent due to the imminent hearing date (1 May 2025), and it is not practicable to obtain the relevant information by other means (e.g. document production or interrogatories), given the importance of testing Mr McKenzie's evidence under cross-examination. The communications and interactions at issue were either oral, conducted via encrypted messaging platforms (e.g. Signal), or involved matters of knowledge and understanding (such as legal privilege), which are not amenable to production notices or non-party discovery. The evidence goes directly to key factual issues and satisfies the requirement for a legitimate forensic purpose.

In the circumstances, there is a clear and legitimate forensic purpose for seeking to compel the attendance of these witnesses to give evidence, and the application satisfies the requirements for leave under *GPN-SUBP*.

The Appellant is also prepared, if the Court considers it appropriate, to serve, in advance of the hearing, outlines of evidence identifying the anticipated subject matter of each witness's evidence.

3.7 I request that the subpoena be made returnable:

☐ Before the hearing - preferred return date:

☒ At the hearing of the matter *[if known]* on:

1 May 2025

3.8 ☒ **Attached** is the draft subpoena (*Form 43A, Form 43B or Form 43C, r 24.13 of the Federal Court Rules 2011*)

**For Court Use only**

**Considered/Issued by:**

*(Judge)*

*(Signature)*

**Comments:**

☐ Accept

☐ Reject

☐ Other:



Form 43A  
Rule 24.13(1)(a)

## Subpoena to Give Evidence

No. NSD 689 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

### Ben Roberts-Smith VC MG

Appellant

**Fairfax Media Publications Pty Limited** and others named in the schedule  
Respondents

To: Dean Levitan  
c/- MinterEllison  
Collins Arch , 447 Collins Street  
MELBOURNE VIC 3000

**You are ordered to attend to give evidence.** See next page for details.

**Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.**

Please read Notes 1 to 8 at the end of this subpoena.

The last date for service of this subpoena is [date]. (See Note 1)

Date:

Signed by an officer acting with the authority  
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Appellant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	BlackBay Lawyers
Tel	+ 61 2 8005 3077
Fax	-
Email	monica.allen@blackbaylawyers.com
<b>Address for service</b> (include state and postcode)	Level 17, 20 Martin Place, Sydney, New South Wales, 2000

Issued at the request of the Appellant, whose address for service is:

Place: Level 17, 20 Martin Place, Sydney, NSW 2000

Email: [monica.allen@blackbaylawyers.com](mailto:monica.allen@blackbaylawyers.com)

**Details of subpoena**

Date, time and place at which you must attend to give evidence, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date: 1 May 2025

Time: 10.15 am

Place: Law Courts Building, 184 Phillip St, Queens Square, Sydney NSW 2000

You must continue to attend from day to day unless excused by the Court or the person authorised to take evidence in this proceeding or until the hearing of the matter is completed.

**Notes****Last day for service**

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

**Informal service**

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

**Addressee a corporation**

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

**Conduct money**

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

**Applications in relation to subpoena**

5. You have the right to apply to the Court:
  - (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
  - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

**Loss or expense of compliance**

6. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

**Contempt of court - arrest**

7. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
8. Note 7 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

No. NSD 689 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Respondent: Nick McKenzie

Third Respondent Chris Masters

Fourth Respondent David Wroe

**Annexure Certificate**

**NI2**

No. NSD689, 690 and 691 of 2023

Federal Court of Australia

District Registry: New South Wales Registry

Division: General

**BEN ROBERTS-SMITH**

Appellant

**FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) and others**

Respondent

This is annexure marked "NI2" referred to in the affidavit of NATALE ILARDO  
sworn on 23 April 2025 before me



Signature of witness

Jonathon Turner

Partner

Lander & Rogers

Level 19, 123 Pitt Street, Sydney NSW 2000

**From:** [Monica Allen](#)  
**To:** [Jonathon Turner](#)  
**Cc:** [Natale Ilardo](#); [Brydie McDonald](#)  
**Subject:** RE: Ben Roberts-Smith VC MG v Fairfax Media Publications Pty Ltd & Ors Federal Court of Australia Proceedings No. NSD 689, 690 and 691 of 2023  
**Date:** Tuesday, 22 April 2025 8:29:55 PM  
**Attachments:** [image001.png](#)  
[Subpoena to Give Evidence - Dean Levitan.pdf](#)

---

Dear Colleagues

Thank you for your email.

Please find **attached** by way of service a sealed copy of the Subpoena to Give Evidence addressed to Mr Levitan.

Kind regards

**Monica Allen**  
Special Counsel



P 02 8005 3077  
M 0432 977 939

[monica.allen@blackbaylawyers.com](mailto:monica.allen@blackbaylawyers.com)  
[www.blackbaylawyers.com.au](http://www.blackbaylawyers.com.au)

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**NOTICE OF FILING AND HEARING****Filing and Hearing Details**

Document Lodged: Subpoena to Give Evidence - Form 43A - Rule 24.13(1)(a)  
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)  
Date of Lodgment: 17/04/2025 6:18:18 PM AEST  
Date Accepted for Filing: 22/04/2025 3:03:43 PM AEST  
File Number: NSD689/2023  
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  
Reason for Listing: Interlocutory Hearing  
Time and date for hearing: 01/05/2025, 10:15 AM  
Place: Please check Daily Court List for details



A handwritten signature in black ink, appearing to read "Sia Lagos".

Registrar

**Important Information**

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The date of the filing of the document is determined pursuant to the Court's Rules.



**Subpoena to Give Evidence**

No. NSD 689 of 2023

Federal Court of Australia  
 District Registry: New South Wales  
 Division: General

**Ben Roberts-Smith VC MG**

Appellant

**Fairfax Media Publications Pty Limited** and others named in the schedule

Respondents

To: Dean Levitan  
 c/- MinterEllison  
 Collins Arch , 447 Collins Street  
 MELBOURNE VIC 3000

**You are ordered to attend to give evidence.** See next page for details.

**Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.**

Please read Notes 1 to 8 at the end of this subpoena.

The last date for service of this subpoena is [date]. (See Note 1)

Date:

Signed by an officer acting with the authority  
 of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Appellant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	BlackBay Lawyers
Tel	+ 61 2 8005 3077
Fax	-
Email	<a href="mailto:monica.allen@blackbaylawyers.com">monica.allen@blackbaylawyers.com</a>
<b>Address for service</b> (include state and postcode)	Level 17, 20 Martin Place, Sydney, New South Wales, 2000



Issued at the request of the Appellant, whose address for service is:

Place: Level 17, 20 Martin Place, Sydney, NSW 2000

Email: [monica.allen@blackbaylawyers.com](mailto:monica.allen@blackbaylawyers.com)

**Details of subpoena**

Date, time and place at which you must attend to give evidence, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date: 1 May 2025

Time: 10.15 am

Place: Law Courts Building, 184 Phillip St, Queens Square, Sydney NSW 2000

You must continue to attend from day to day unless excused by the Court or the person authorised to take evidence in this proceeding or until the hearing of the matter is completed.



## **Notes**

### **Last day for service**

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

### **Informal service**

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

### **Addressee a corporation**

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

### **Conduct money**

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

### **Applications in relation to subpoena**

5. You have the right to apply to the Court:
  - (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
  - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

### **Loss or expense of compliance**

6. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

### **Contempt of court - arrest**

7. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
8. Note 7 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.



No. NSD 689 of 2023

Federal Court of Australia  
District Registry: New South Wales  
Division: General

Second Respondent:	Nick McKenzie
Third Respondent	Chris Masters
Fourth Respondent	David Wroe

**From:** Jonathon Turner <jturner@landers.com.au>  
**Sent:** Tuesday, 22 April 2025 8:24 PM  
**To:** Monica Allen <monica.allen@blackbaylawyers.com>  
**Cc:** Natale Ilardo <nilardo@landers.com.au>; Brydie McDonald <bmcDonald@landers.com.au>  
**Subject:** Ben Roberts-Smith VC MG v Fairfax Media Publications Pty Ltd & Ors Federal Court of Australia Proceedings No. NSD 689, 690 and 691 of 2023

You don't often get email from [jturner@landers.com.au](mailto:jturner@landers.com.au). [Learn why this is important](#)

Dear Colleagues

We have recently been engaged to act on behalf of Mr Dean Levitan in respect of the above proceedings.

We have been provided with a copy of your letter dated 21 April 2025 to Ms Newbold of Minter Ellison (**Letter**), concerning the subpoenas issued to Mr Levitan to produce documents (returnable tomorrow) and to attend to give evidence at the hearing on 1 and 2 May 2025. Please direct all future correspondence regarding those matters concerning Mr Levitan, to our office.

We are presently seeking our client's urgent instructions with respect to each of the subpoena to produce and the subpoena to attend to give evidence (a sealed copy of which has not yet been served). We note that the matter is before the Honourable Justice Perram tomorrow at 9:30am. Mr Nicholas Bender SC has been briefed to appear on behalf of our client. We intend to seek leave to appear tomorrow morning and to notify his Honour of the matters referred to below.

With respect to the foreshadowed subpoena to attend to give evidence (Evidence Subpoena), your Letter states that the "Full Court has granted leave to issue" the Evidence Subpoena to our client. If that is the case, and your client intends to formally serve the subpoena and seek to rely on it, we anticipate receiving instructions to have it set aside on the basis that it is a fishing expedition and has no proper basis. Subject to confirmation of our instructions, we intend to seek, subject to the convenience of the Court, that such application be allocated a hearing date this week.

As to the subpoena to produce documents, we understand that an application has already been filed by the Respondents seeking to set aside a number of subpoenas (including the subpoena to Mr Levitan) and a Notice to Produce issued by your client, and that application will be before Perram J for hearing tomorrow. We will confirm our client's position in respect of this application tomorrow.

Please let us know if your client's position with respect to the subpoenas issued to our client changes in the meantime.

Our client's rights are fully reserved.

Yours faithfully

**Jonathon Turner**  
Partner

**Lander & Rogers**  
Level 19, 123 Pitt Street, Sydney NSW 2000  
D +61 2 8020 7766 M +61 421 513 454  
E [jturner@landers.com.au](mailto:jturner@landers.com.au)

**landers.com.au**

If our bank account details change, we will notify you by letter, phone call or face-to-face, but never by email.

**Lander & Rogers acknowledges the traditional custodians of the land on which we work and pays respects to Elders past and present.**

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