

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/07/2020 3:51:32 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

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|----------------------------|--|
| Document Lodged: | Interlocutory Application - Form 35 - Rule 17.01(1)(a) |
| 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 |
| Reason for Listing: | Interlocutory Hearing |
| Time and date for hearing: | 15/07/2020, 9:30 AM |
| Place: | Court No. 1 Level 5, Roma Mitchell Commonwealth Law Courts Building Level 5, 3 Angas Street, Adelaide; By Web Conference, Roma Mitchell Commonwealth Law Courts Building Level 5, 3 Angas Street, Adelaide |



Sia Lagos

Dated: 9/07/2020 2:55:42 PM AEST

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

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



Form 35
Rule 17.01(1)

INTERLOCUTORY APPLICATION

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

NO NSD 1485 OF 2018
NSD 1486 OF 2018
NSD 1487 OF 2018

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

To: the Applicant and the Respondents

The Commonwealth of Australia applies for the interlocutory orders set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

TIME AND DATE FOR HEARING:

PLACE:

Federal Court of Australia
Level 17, Law Courts Building
184 Phillip Street
Queens Square, SYDNEY NSW 2000

Date:

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

Filed on behalf of the Commonwealth of Australia
Prepared by: Kristy Alexander
AGS lawyer within the meaning of s 55I of the *Judiciary Act*
1903
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INTERLOCUTORY ORDERS SOUGHT

1. Pursuant to ss 38A and 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, the Court make orders to give effect to the s 38B arrangement agreed to between the Commonwealth and the parties and annexed to this application.
2. That within a period fixed by the Court after the parties are provided with copies of the documents produced by the Secretary of the Department of Defence pursuant to the subpoena issued on 5 March 2020, the parties are to notify the Commonwealth of which Sensitive Documents they propose to tender or refer to at the trial.
3. That within 4 weeks after receiving notifications from the parties under Order 2, the Commonwealth is to provide the parties with proposed amendments to the s 38B orders concerning the closed court regime for the trial.
4. That within 2 weeks after receiving the Commonwealth's proposed amendments under Order 3, the parties are to provide the Commonwealth with their responses to the proposed amendments.
5. Such further order or orders as the Court thinks fit.

SERVICE ON THE APPLICANT AND THE RESPONDENTS

It is intended to serve this application on the Applicant and the Respondents

Date: 8 July 2020

A handwritten signature in blue ink, appearing to read 'Kristy Alexander', is written over a dotted line.

Kristy Alexander
AGS Lawyer
for and on behalf of the Australian Government Solicitor
Lawyer for the Commonwealth of Australia



ORDERS FOR THE PROTECTION OF NATIONAL SECURITY INFORMATION

THE COURT NOTES:

- A. These Orders are made by consent and without admissions under ss 19(3A) and 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the **NSI Act**).
- B. To the extent that a disclosure of national security information is to be made in the Proceedings (including to any person for the purposes of the Proceedings) in accordance with these Orders, the disclosure may be undertaken without notice to the Attorney-General of the Commonwealth under ss 38D or 38E of the NSI Act (as the case may be).
- C. To the extent that a disclosure of national security information is to be made in the Proceedings (including to any person for the purposes of the Proceedings) other than in accordance with these Orders:
 - i) notice of the disclosure is to be given to the Attorney-General of the Commonwealth under ss 38D or 38E of the NSI Act (as the case may be); and
 - ii) disclosure will thereafter be subject to any non-disclosure certificate given by the Attorney-General of the Commonwealth until a Court makes a determination under s 38L of the NSI Act.
- D. These Orders do not regulate the conduct of the Commonwealth (including by its agencies, officers, officials, employees, agents and representatives) outside the context of the Proceedings and, in particular, do not prevent the Commonwealth from communicating information, or dealing with documents, as it sees fit.

PART A: DEFINITIONS AND OTHER PRELIMINARY MATTERS

- 1. In these Orders:

AGS means the Australian Government Solicitor.

Applicant means the applicant in the Proceedings, Ben Roberts-Smith.

Applicant Representative means:

- a) a solicitor or barrister engaged by the Applicant to represent him in the Proceedings who is listed in Schedule A to these Orders (such person having been approved before being listed in Schedule A); and
- b) any person who is approved as an Applicant Representative in accordance with the process described in Part J of these Orders.



approved briefcase means a briefcase, or other container designed for carrying/transporting things, provided by the Commonwealth for the purposes of the Proceedings.

approved courier means a courier approved in writing by the Commonwealth for the purposes of the Proceedings.

approved electronic device means an electronic device provided by the Commonwealth for the purposes of the Proceedings.

approved printer means a printer provided by the Commonwealth for the purposes of the Proceedings.

approved single-use bag means a single-use bag provided by the Commonwealth for the purposes of the Proceedings.

Authorised Advisor means a person:

- a) who an Authorised Person proposes to communicate with in order for the person to advise or assist a Party for the purposes of the Proceedings;
- b) who deployed to Afghanistan as a member or officer of the Special Air Service Regiment on any of Special Operations Task Group Operation Slipper rotations III, IX, XII or XVIII; and
- c) whose identity has been notified to the Commonwealth a reasonable period prior to the communication occurring.

Authorised Person means:

- a) a Party;
- b) a Party Representative;
- c) the Commonwealth;
- d) a Commonwealth Representative;
- e) the associate to the presiding Judge;
- f) the Principal Registrar and the Deputy Principal Registrar;
- g) a Court official undertaking duties for the purposes of the Proceedings who holds a security clearance (if any) at the level which the Commonwealth notifies the Principal Registrar and/or Deputy Principal Registrar in writing is appropriate for the purposes of the Proceedings;
- h) a person officially engaged to provide recording and transcription services for the purposes of the Proceedings who holds a security clearance (if any) at the level which the Commonwealth notifies the Principal Registrar and/or Deputy

Principal Registrar in writing is appropriate for the purposes of the Proceedings;

- i) any person approved in writing by the Commonwealth for the purposes of the Proceedings.

Commonwealth includes a Minister of the Commonwealth and the Inspector-General of the Australian Defence Force.

Commonwealth Representative means a Commonwealth officer, AGS lawyer or barrister representing the Commonwealth in the Proceedings or assisting in the protection of the Commonwealth's interests in the Proceedings (including a Commonwealth officer responsible for giving instructions on behalf of the Commonwealth or a Commonwealth officer responsible for managing Sensitive Documents or approved electronic devices on which Sensitive Documents are stored).

communicate, in relation to Sensitive Information or information which identifies or tends to identify a Special Operations Command member, means to communicate the information to another person in any way, including (without limitation) by disclosing, revealing, divulging, publishing, making available or permitting access to the information.

deal with, in relation to a Sensitive Document or an approved electronic device on which a Sensitive Document is stored, means to deal with the Sensitive Document or approved electronic device in any way, including (without limitation) by accessing, using, handling, carrying, transporting, transmitting, sending, copying, printing, storing or destroying the Sensitive Document or approved electronic device (as the case may be).

Deputy Principal Registrar means the Deputy Principal Registrar of the Federal Court of Australia, NSW Registry.

Document/Device Register means a register which records details about the movement etc of a Sensitive Document or an approved electronic device on which a Sensitive Document is stored.

disclose has the same meaning as provided for in s 7 of the NSI Act.

discrete area means a room within the court building to which access may be controlled.

electronic device means any electronic device capable of recording or transmitting information, including (without limitation) a mobile phone, a laptop or notebook computer, a tablet, a portable storage device or a smartwatch.

national security has the same meaning as provided for in s 8 of the NSI Act.

national security information has the same meaning as provided for in s 7 of the NSI Act.

New Sensitive Document has the meaning given by Order 28.

Party means:

- a) the Applicant; and
- b) the Respondents.

Party Representative means:

- a) an Applicant Representative; and
- b) a Respondent Representative.

Principal Registrar means the Principal Registrar of the Federal Court of Australia.

Respondents means:

- a) Fairfax Media Publications Pty Ltd acting by an officer or employee who is listed in Schedule B to these Orders;
- b) The Age Company Pty Ltd acting by an officer or employee who is listed in Schedule B to these Orders;
- c) The Federal Capital Press of Australia Pty Ltd acting by an officer or employee who is listed in Schedule B to these Orders;
- d) Nick McKenzie;
- e) Chris Masters; and
- f) David Wroe.

Respondent Representative means:

- a) a solicitor or barrister engaged by the Respondents to represent them in the Proceedings who is listed in Schedule A to these Orders (such person having been approved before being listed in Schedule A); and
- b) any person who is approved as a Respondent Representative in accordance with the process described in Part J of these Orders.

security classification means any of the following markings:

- a) "RESTRICTED";
- b) "PROTECTED";
- c) "CONFIDENTIAL";
- d) "HIGHLY PROTECTED";

- e) "SECRET"; or
- f) "TOP SECRET";
whether or not the marking appears on its own or with any other caveat, including the following:
- g) a codeword (sensitive compartmented information);
- h) a foreign government marking;
- i) a special handling instruction (for example, "CABINET" or "EXCLUSIVE FOR [named person]"); or
- j) a releasability caveat (for example, "AUSTEO", "AGAO" or "REL").

Security Cleared Premises of a Party Representative means a premises (or a part of a premises) of a Party Representative which has been assessed and approved in writing by the Commonwealth for the purposes of the Proceedings.

Sensitive Court Document has the meaning given by Order 68.

Sensitive Court File has the meaning given by Order 69.

Sensitive Document means:

- a) a document (whether in hard copy or electronic form) produced by the Secretary of the Department of Defence, on behalf of the Commonwealth, in answer to the subpoena to produce documents issued by the Court on 5 March 2020 (excluding the documents produced and marked "Packet S5"), and any copy made of such a document;
- b) a document (whether in hard copy or electronic form) which is marked with a security classification that is disclosed, or to be disclosed, in the Proceedings, and any copy made of such a document; or
- c) a document (whether in hard copy or electronic form) which the Commonwealth notifies the Parties and the Court in writing is a Sensitive Document (whether the notification is provided before or after the document is first received by an Authorised Person) that is disclosed, or to be disclosed, in the Proceedings, and any copy made of such a document;

but does not mean:

- d) a New Sensitive Document;
- e) a document or a copy of a document (whether in hard copy or electronic form) which the Commonwealth notifies the Parties and the Court in writing is not a Sensitive Document (whether the notification is provided before or after the document is first received by an Authorised Person); or

- f) a document or a copy of a document (whether in hard copy or electronic form) which, following the process described in Orders 25-27, is ruled by the Court not to be a Sensitive Document.

Sensitive Information means any information contained in a Sensitive Document.

Sensitive Outline of Evidence means an outline of evidence that is listed in Schedule C to these Orders.

Sensitive Witness means:

- a) a Special Operations Command member who a Party proposes to call as a witness in the Proceedings; and
- b) a person who the Commonwealth notifies the Parties and the Court in writing is a Sensitive Witness.

Special Operations Command means the Special Operations Command of the Australian Defence Force.

Special Operations Command member means:

- a) a current or former member, officer or employee of Special Operations Command (other than the Applicant or a person who the Commonwealth has publicly acknowledged is or was a member, officer or employee of Special Operations Command); and
- b) a person who has served with or alongside Special Operations Command, including (without limitation) a member of a partner military force, a contracted civilian interpreter or a government official.

the Proceedings means:

- a) proceeding NSD 1485/2018 between Ben Roberts-Smith (applicant) and Fairfax Media Publications Pty Ltd, Nick McKenzie, Chris Masters and David Wroe (respondents);
- b) proceeding NSD 1486/2018 between Ben Roberts-Smith (applicant) and The Age Company Pty Ltd, Nick McKenzie, Chris Masters and David Wroe (respondents); and
- c) proceeding NSD 1487/2018 between Ben Roberts-Smith (applicant) and The Federal Capital Press of Australia Pty Ltd, Nick McKenzie, Chris Masters and David Wroe (respondents).

PART B: GENERAL PROHIBITIONS

General prohibition on communication of Sensitive Information and information which identifies Special Operations Command members

2. A person must not communicate Sensitive Information, except in accordance with these Orders (see, in particular, Part C and Part F).
3. A person must not communicate any information which identifies, or tends to identify, a Special Operations Command member, except in accordance with these Orders (see, in particular, Part C and Part F; see also Part G), including (without limitation):
 - a) the name of the Special Operations Command member;
 - b) a photograph or other visual representation of the Special Operations Command member;
 - c) a physical description of the Special Operations Command member; or
 - d) any identifying information other than the relevant pseudonym for the Special Operations Command member listed in a Confidential Schedule to be prepared for the purposes of these Orders.

General prohibition on dealings with Sensitive Documents or approved electronic devices on which Sensitive Documents are stored

4. A person must not deal with a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, except in accordance with these Orders (see Part D and Part F; see also Part H).

General prohibition on creating or preparing documents which contain Sensitive Information

5. A person must not create or prepare a document of any kind which contains Sensitive Information, except in accordance with these Orders (see, in particular, Part E and Part F).

PART C: COMMUNICATION OF SENSITIVE INFORMATION AND INFORMATION WHICH IDENTIFIES SPECIAL OPERATIONS COMMAND MEMBERS

Communication of Sensitive Information

6. An Authorised Person or a Sensitive Witness may communicate Sensitive Information if the following requirements are satisfied:
 - a) the communication is necessary for the purposes of the Proceedings; and
 - b) the communication occurs in one of the following circumstances:

- i. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor at the Security Cleared Premises of a Party Representative, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
- ii. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor at AGS or Commonwealth premises, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
- iii. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor in a discrete area, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor; or
- iv. the communication occurs in closed court in accordance with Part F of these Orders.

Communication of information which identifies Special Operations Command members

7. An Authorised Person or a Sensitive Witness may communicate information which identifies, or tends to identify, a Special Operations Command member if the following requirements are satisfied:
- a) the communication is necessary for the purposes of the Proceedings; and
 - b) the communication occurs in one of the following circumstances:
 - i. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor at the Security Cleared Premises of a Party Representative, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
 - ii. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor at AGS or Commonwealth premises, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
 - iii. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor in a discrete area, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
 - iv. the communication is to an Authorised Person, a Sensitive Witness or an Authorised Advisor by telephone, in the absence, on either side of

the telephone call, of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;

- v. the communication comprises a subpoena to a Sensitive Witness requiring him to attend to give evidence; or
- vi. the communication occurs in closed court in accordance with Part F of these Orders.

PART D: DEALINGS WITH SENSITIVE DOCUMENTS AND APPROVED ELECTRONIC DEVICES ON WHICH SENSITIVE DOCUMENTS ARE STORED

Application of Part D

- 8. Part D of these Orders does not apply to a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, which is held by the Court (as to which, see Part H).

Storage of Sensitive Documents or approved electronic devices on which Sensitive Documents are stored

- 9. Whenever a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, is not in use in accordance with Part D of these Orders (see, in particular, Orders 13, 14 and 15), the Sensitive Document, or the approved electronic device, must be stored in a Class B security container.
- 10. The Class B security container must:
 - a) have a combination that is not known by any person other than:
 - i. an Authorised Person; or
 - ii. a Commonwealth Representative whose duties include duties relating to the Class B security container;
 - b) be locked at all times when an Authorised Person is not present;
 - c) be kept in a room or area within the Security Cleared Premises of a Party Representative that has been assessed and approved in writing by the Commonwealth for the purposes of the Proceedings.

Document/Device Register

Recording of information about removals

- 11. Whenever an Authorised Person removes a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, from the Class B security container in which it is stored when not in use in accordance with Part D of these Orders, the Authorised Person must record the following information in the Document/Device Register:

- a) the Authorised Person's full name;
- b) the following information in relation to the Sensitive Document or approved electronic device:
 - i. in relation to a Sensitive Document — information sufficient to identify the Sensitive Document (for example, its unique reference number or its title); or
 - ii. in relation to an approved electronic device — its unique reference number;
- c) the date and time that the Sensitive Document or approved electronic device was removed; and
- d) the purpose for which the Sensitive Document or approved electronic device was removed, including:
 - i. if the Sensitive Document or approved electronic device was removed for the purpose of carriage/transportation under Order 14 — the place to which the Sensitive Document or approved electronic device is carried/transported; and
 - ii. if the Sensitive Document or approved electronic device was removed for the purpose of giving it to another Authorised Person or an approved courier under these Orders — the person to whom the Sensitive Document or approved electronic device is given.

Recording of information about returns and receipts

12. Whenever an Authorised Person:
- a) returns a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, to the Class B security container in which it is stored when not in use in accordance with Part D of these Orders; or
 - b) receives a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, from another Authorised Person or an approved courier;

the Authorised Person must record the following information in the Document/Device Register:

- c) the information in Orders 11(a) and (b);
- d) the date and time that the Sensitive Document or approved electronic device was returned or received; and

- e) if the Sensitive Document, or an approved electronic device on which a Sensitive Document is stored was received from another Authorised Person or an approved courier — the person from whom the Sensitive Document or approved electronic device was received.

Access, use or handling of Sensitive Documents or approved electronic devices on which Sensitive Documents are stored

- 13. An Authorised Person or a Sensitive Witness may access, use or handle a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, if the following requirements are satisfied:
 - a) the access, use or handling is necessary for the purposes of the Proceedings; and
 - b) the access, use or handling occurs in one of the following circumstances:
 - i. the access, use or handling occurs at the Security Cleared Premises of a Party Representative, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
 - ii. the access, use or handling occurs at AGS or Commonwealth premises, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor;
 - iii. the access, use or handling occurs in a discrete area, in the absence of any person who is not an Authorised Person, a Sensitive Witness or an Authorised Advisor; or
 - iv. the access, use or handling occurs in closed court in accordance with Part F of these Orders.

Carrying/transporting Sensitive Documents or approved electronic devices on which Sensitive Documents are stored

- 14. An Authorised Person may carry/transport a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, if the following requirements are satisfied:
 - a) the carrying/transportation is necessary for the purposes of the Proceedings;
 - b) the carrying/transportation is from the Security Cleared Premises of a Party Representative to one of the following places (or vice versa):
 - i. other Security Cleared Premises of a Party Representative;
 - ii. AGS or Commonwealth premises; and
 - iii. the Court; and

- c) the following requirements are satisfied:
 - i. the Sensitive Document, or the approved electronic device on which the Sensitive Document is stored, is placed in an approved briefcase;
 - ii. the approved briefcase is locked;
 - iii. the keys for the approved briefcase are removed from the approved briefcase; and
 - iv. both the approved briefcase, and the keys for the approved briefcase, remain in the possession and control of the Authorised Person at all times during the carrying/transportation.
- 15. An Authorised Person may give a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, to another person for the purpose of carrying/transporting it if the following requirements are satisfied:
 - a) the carrying/transportation is necessary for the purposes of the Proceedings;
 - b) the carrying/transportation is from the Security Cleared Premises of a Party Representative to one of the following places (or vice versa):
 - i. other Security Cleared Premises of a Party Representative;
 - ii. AGS or Commonwealth premises; and
 - iii. the Court;
 - c) the other person is:
 - i. an Authorised Person; or
 - ii. an approved courier; and
 - d) the following requirements are satisfied:
 - i. if the other person is an Authorised Person — that Authorised Person complies with the requirements in Order 14(c); or
 - ii. if the other person is an approved courier — the Sensitive Document, or the approved electronic device on which the Sensitive Document is stored, is placed inside two approved single-use bags before being given to the approved courier.

Copying and printing of Sensitive Documents

- 16. An Authorised Person (other than the Commonwealth or a Commonwealth Representative) must not:

- a) copy a Sensitive Document (or any part of a Sensitive Document) that is in hard copy form; or
 - b) print a Sensitive Document (or any part of a Sensitive Document) that is in electronic form.
17. If an Authorised Person (other than the Commonwealth or a Commonwealth Representative) requires a copy of a Sensitive Document (or any part of a Sensitive Document) that is in hard copy form, or a copy of a Sensitive Document (or any part of a Sensitive Document) that is in electronic form, the Authorised Person may make a request to the Commonwealth for a copy.
18. A request under Order 17 must meet the following requirements:
- a) the request must be provided to AGS;
 - b) the request must be in writing;
 - c) the request must state:
 - i. the name of the Authorised Person making the request;
 - ii. the number of copies required; and
 - iii. the reason(s) why the copies are required, including the name of each other Authorised Person who is to be given a copy.
19. The Commonwealth must comply with any reasonable request made under Order 18 within a reasonable time of receipt of the request, subject to any concern relating to national security.

Protection of approved electronic devices on which Sensitive Documents are stored

20. Whenever an approved electronic device on which a Sensitive Document is stored is not in use in accordance with Part D of these Orders, the approved electronic device must be protected or secured by a password that is not known by any person other than:
- a) an Authorised Person; or
 - b) a Commonwealth Representative whose duties include duties relating to the approved electronic device.

Return and destruction/sanitation of Sensitive Documents and approved electronic devices on which Sensitive Documents are stored

21. An Authorised Person must return all Sensitive Documents, and all approved electronic devices on which Sensitive Documents are stored, to a Commonwealth representative whose duties include duties relating to Sensitive Documents and

approved electronic devices, within 28 days after either of the following (whichever occurs first):

- a) the conclusion of the Proceedings (including any and all appeals); or
 - b) the Authorised Person ceasing to be an Authorised Person (for example, because he or she ceases to be a Party Representative).
22. Upon the return of any Sensitive Documents or any approved electronic devices on which Sensitive Documents are stored under Order 21, the Sensitive Documents and the approved electronic devices are to be destroyed and/or sanitised in accordance with Commonwealth requirements (unless an arrangement is made for the Commonwealth to retain the Sensitive Documents and approved electronic devices on behalf of the Authorised Person who returned them).
23. For the avoidance of doubt, the return of any Sensitive Documents or any approved electronic devices on which Sensitive Documents are stored under Order 21 does not amount to a waiver by an Authorised Person of legal professional privilege or client legal privilege.

Sensitive Documents and approved electronic devices on which Sensitive Documents are stored to remain in Australia

24. For the avoidance of doubt, an Authorised Person must not take or send (by any means) a Sensitive Document, or an approved electronic device on which a Sensitive Document is stored, out of Australia without the approval in writing of the Commonwealth.

Hearings in relation to Sensitive Documents

25. A Party may apply to the Court for an order that a Sensitive Document should no longer be classified as a Sensitive Document.
26. An application under Order 25 may be made only on the giving of 5 working days' notice in writing to the Commonwealth.
27. Upon the making of an application under Order 25, the Court must hear the Parties, the Commonwealth and any other interested party to whom the Court considers it appropriate to grant leave on the question whether the Sensitive Document should no longer be classified as a Sensitive Document (such hearing to include an opportunity for all parties concerned to adduce evidence and make submissions, even if this requires the Court to adjourn for a period).



**PART E: CREATION OR PREPARATION OF NEW SENSITIVE DOCUMENTS
(DOCUMENTS WHICH CONTAIN SENSITIVE INFORMATION)**

Circumstances in which New Sensitive Documents may be created or prepared

28. An Authorised Person may create or prepare a document which contains Sensitive Information (including, for example, submissions, affidavits, chronologies, aide-memoires, witness examination notes, notes made in closed court, other notes, etc) (a **New Sensitive Document**) if the following requirements are satisfied:
- a) the creation or preparation is necessary for the purposes of the Proceedings; and
 - b) the creation or preparation occurs in one of the following circumstances:
 - i. the creation or preparation occurs at the Security Cleared Premises of a Party Representative, in the absence of any person who is not an Authorised Person or a Sensitive Witness;
 - ii. the creation or preparation occurs at AGS or Commonwealth premises, in the absence of any person who is not an Authorised Person or a Sensitive Witness;
 - iii. the creation or preparation occurs in a discrete area, in the absence of any person who is not an Authorised Person or a Sensitive Witness; or
 - iv. the creation or preparation occurs in closed court in accordance with Part F of these Orders; and
 - c) the following requirements are satisfied:
 - i. the New Sensitive Document is assigned a security classification that is appropriate given the security classification (if any) of the Sensitive Document from which the Sensitive Information is obtained (or, if the Authorised Person is uncertain as to the appropriate security classification, the security classification "SECRET");
 - ii. the security classification assigned to the New Sensitive Document is clearly recorded at the top and bottom of each page of the New Sensitive Document; and
 - iii. if the New Sensitive Document is created or prepared in electronic form — an approved electronic device is used to create or prepare the New Sensitive Document.

New Sensitive Documents generally subject to Part D of these Orders

29. Subject to Order 30, a New Sensitive Document must be dealt with in the same way as a Sensitive Document in accordance with Part D of these Orders.
30. Notwithstanding Order 16, an Authorised Person may print a New Sensitive Document (or any part of a New Sensitive Document) that is in electronic form if the following requirements are satisfied:
 - a) the printing is necessary for the purposes of the Proceedings; and
 - b) an approved printer is used to print the New Sensitive Document.

Transfer of New Sensitive Documents

31. An Authorised Person (**the first Authorised Person**) may transfer a New Sensitive Document to another Authorised Person (**the second Authorised Person**) if the following requirements are satisfied:
 - a) the transfer is necessary for the purposes of the Proceedings; and
 - b) the transfer occurs in one of the following ways:
 - i. if the New Sensitive Document is in hard copy form:
 - (1) by the first Authorised Person giving the New Sensitive Document to the second Authorised Person — provided that the first Authorised Person, in carrying/transporting the New Sensitive Document to the second Authorised Person, complies with the requirements in Order 14(c); or
 - (2) by the first Authorised Person giving the New Sensitive Document to an approved courier — provided that the New Sensitive Document is placed inside two approved single-use bags before being given to the approved courier; or
 - ii. if the New Sensitive Document is in electronic form:
 - (1) by the first Authorised Person giving an approved electronic device on which the New Sensitive Document is stored to the second Authorised Person — provided that the first Authorised Person, in carrying/transporting the approved electronic device to the second Authorised Person, complies with the requirements in Order 14(c); or
 - (2) by the first Authorised Person giving an approved electronic device on which the New Sensitive Document is stored to an approved courier — provided that the approved electronic

device is placed inside two approved single-use bags before being given to the approved courier.

Filing and service of New Sensitive Documents

32. If a Party or the Commonwealth is required to file a New Sensitive Document with the Court, filing is to be effected in the following way:
- a) the New Sensitive Document is to be printed; and
 - b) the New Sensitive Document is to be delivered to the Court in one of the following ways:
 - i. by being carried/transported to the Court by a Party Representative or Commonwealth Representative and given to the associate to the presiding Judge, the Principal Registrar or the Deputy Principal Registrar — provided that the Party Representative or Commonwealth Representative, in carrying/transporting the New Sensitive Document, complies with the requirements in Order 14(c); or
 - ii. by being given to an approved courier — provided that the New Sensitive Document is placed inside two approved single-use bags before being given to the approved courier.
33. If a Party or the Commonwealth is required to serve a New Sensitive Document on a Party or the Commonwealth, service is to be effected in the following way:
- a) the New Sensitive Document is to be printed; and
 - b) the New Sensitive Document is to be delivered to the Party or the Commonwealth in one of the following ways:
 - i. by being carried/transported to the Security Cleared Premises of a Party Representative or AGS premises by a Party Representative or Commonwealth Representative and given to a Party Representative or Commonwealth Representative — provided that the Party Representative or Commonwealth Representative, in carrying/transporting the New Sensitive Document, complies with the requirements in Order 14(c); or
 - ii. by being given to an approved courier — provided that the New Sensitive Document is placed inside two approved single-use bags before being given to the approved courier.

Information about New Sensitive Documents to be recorded in Document/Device Register

34. Without limiting Orders 11-12, if an Authorised Person:

- a) creates or prepares a New Sensitive Document in hard copy form under Order 28;
- b) prints a New Sensitive Document under Order 30;
- c) transfers or receives a New Sensitive Document, or an approved electronic device on which a New Sensitive Document is stored, under Order 31;
- d) files a New Sensitive Document under Order 32; or
- e) serves or receives by way of service a New Sensitive Document under Order 33;

the Authorised Person must record the following information in the Document/Device Register:

- f) the Authorised Person's full name;
- g) the particular action (as mentioned in Orders 34(a)-(e)) taken;
- h) the date and time that the particular action (as mentioned in Orders 34(a)-(e)) was taken; and
- i) information sufficient to identify the New Sensitive Document or approved electronic device (for example, its title or a description).

PART F: CLOSED COURT ARRANGEMENTS

Application of Part F

- 35. Part F of these Orders applies to any interlocutory hearing in the Proceedings, but does not apply to the trial of the Proceedings unless the Court makes a further order to that effect by consent under ss 19(3A) and 38B of the NSI Act.
- 36. For the avoidance of doubt, if the Court does not make orders by consent under ss 19(3A) and 38B of the NSI Act with respect to the closed court arrangements that are to apply to the trial of the Proceedings, then any disclosure (within the meaning of s 7 of the NSI Act) of national security information in the trial of the Proceedings must be made in accordance with the NSI Act (see recital C of these Orders).

Persons permitted to be present when the Court is closed

- 37. Subject to any further order of the Court, a person may be present when the Court is closed only if the person is:
 - a) an Authorised Person; or
 - b) a Sensitive Witness.

Circumstances in which the Court must be closed

Communications of Sensitive Information

38. An Authorised Person must not communicate, or cause or invite a Sensitive Witness or any other person to communicate, Sensitive Information unless the Court is closed.
39. If an Authorised Person believes that it is necessary to communicate, or cause or invite a Sensitive Witness or any other person to communicate, Sensitive Information, the Authorised Person must advise the Court before doing so to enable the Court to be closed.

Communications of information which identifies Special Operations Command members

40. An Authorised Person must not communicate, or cause or invite a Sensitive Witness or any other person to communicate, any information which identifies, or tends to identify, a Special Operations Command member unless the Court is closed.
41. If an Authorised Person believes that it is necessary to communicate, or cause or invite a Sensitive Witness or any other person to communicate, any information which identifies, or tends to identify, a Special Operations Command member, the Authorised Person must advise the Court before doing so to enable the Court to be closed.

Tendering etc of Sensitive Documents

42. A Party Representative or Commonwealth Representative must not tender or otherwise ask the Court to receive a Sensitive Document unless the Court is closed.
43. If a Party Representative or Commonwealth Representative believes that it is necessary to tender or otherwise ask the Court to receive a Sensitive Document, the Party Representative or Commonwealth Representative must:
 - a) advise the Court before doing so to enable the Court to be closed; and
 - b) tender the Sensitive Document as a confidential exhibit or ask the Court to receive the Sensitive Document on a confidential basis.

Communications of national security information (other than Sensitive Information)

44. An Authorised Person must not communicate, or cause or invite a Sensitive Witness or any other person to communicate, national security information (other than Sensitive Information) unless:
 - a) the Court is closed; or
 - b) subsequent to the process described in Orders 45-46, the Court makes a ruling that the Court should not be closed.

45. If an Authorised Person believes that it is necessary to communicate, or cause or invite a Sensitive Witness or any other person to communicate, national security information (other than Sensitive Information), the Authorised Person must advise the Court before doing so.
46. Upon receiving advice under Order 45, the Court must hear the Parties, the Commonwealth and any other interested party to whom the Court considers it appropriate to grant leave on the question whether the Court should be closed (such hearing to include an opportunity for all parties concerned to adduce evidence and make submissions, even if this requires the Court to adjourn for a period).

Tendering etc of documents containing national security information (other than Sensitive Documents)

47. A Party Representative or Commonwealth Representative must not tender or otherwise ask the Court to receive a document (other than a Sensitive Document) that contains national security information unless:
 - a) the Court is closed; or
 - b) subsequent to the process described in Orders 48-49, the Court makes a ruling that the Court should not be closed.
48. If a Party Representative or Commonwealth Representative believes that it is necessary to tender or otherwise ask the Court to receive a document (other than a Sensitive Document) that contains national security information, the Party Representative or Commonwealth Representative must advise the Court before doing so.
49. Upon receiving advice under Order 48, the Court must hear the Parties, the Commonwealth and any other interested party to whom the Court considers it appropriate to grant leave on the question whether the Court should be closed (such hearing to include an opportunity for all parties concerned to adduce evidence and make submissions, even if this requires the Court to adjourn for a period).
50. If the Court decides that the Court should be closed, the Party Representative must tender the relevant document as a confidential exhibit or ask the Court to receive the relevant document on a confidential basis.

Use of electronic devices when the Court is closed

51. During any period in which the Court is closed, a person must not bring an electronic device into the courtroom, or have an electronic device in his or her possession, unless the electronic device is an approved electronic device.
52. An arrangement is to be made, with the concurrence of the Court, for each person permitted to be present when the Court is closed to surrender his or her electronic

devices to a relevant court official for the duration of the period in which the Court is closed.

Notes taken when the Court is closed

53. For the avoidance of doubt, an Authorised Person may take notes during any period in which the Court is closed in accordance with Order 28.

Closed Court Transcript

Recording and transcription of hearings when the Court is closed

54. There is to be no recording or transcription of any hearing in the Proceedings that takes place when the Court is closed, except on equipment approved in writing by the Commonwealth for the purposes of these Orders.
55. The transcript of any hearing in the Proceedings that takes place when the Court is closed (the **Closed Court Transcript**):
- a) must be assigned a security classification that is appropriate given the security classification (if any) of the Sensitive Information communicated or the Sensitive Documents dealt with while the Court is closed (or, if the person engaged by the Court to provide recording and transcription services for the purposes of the Proceedings is uncertain as to the appropriate security classification, the security classification "SECRET"); and
 - b) the security classification assigned to the Closed Court Transcript must be clearly recorded at the top and bottom of each page of the Closed Court Transcript.
56. The Closed Court Transcript must be dealt with in the same way as a Sensitive Document in accordance with Part D of these Orders (see also Part H).

Provision, redaction and release of Closed Court Transcript

57. As soon as it is available, the Closed Court Transcript is to be provided by secure means to the Parties, the Commonwealth and the Court.
58. Within 5 working days after receiving a copy of the Closed Court Transcript under Order 57, or within such further time as the Court allows, the Commonwealth must notify the Parties and the Court in writing of any redactions to the Closed Court Transcript that the Commonwealth considers necessary to enable the Closed Court Transcript to be produced in an unclassified form suitable for release to the public.
59. Within 5 working days after receiving notification from the Commonwealth under Order 58, or within such further time as the Court allows, each Party is to notify the other Party, the Commonwealth and the Court in writing whether the Party considers

that the redactions to the Closed Court Transcript notified by the Commonwealth should be varied.

60. If no Party notifies the other Party, the Commonwealth and the Court that the Party considers that the redactions to the Closed Court Transcript notified by the Commonwealth should be varied, the Court is to order that the redactions be made, provided that the Court is satisfied that the redactions are appropriate.
61. If a Party notifies the other Party, the Commonwealth and the Court that the Party considers that the redactions to the Closed Court Transcript notified by the Commonwealth should be varied, or if the Court is not satisfied, under Order 60, that the redactions are appropriate, the Court must:
 - a) hear the Parties and the Commonwealth on the question whether the redactions should be made (such hearing to include an opportunity for all parties concerned to adduce evidence and make submissions); and
 - b) make a ruling as soon as practicable on the question whether the redactions should be made.
62. Within 2 working days after the making of the Court's ruling under Order 61, or within such further time as the Court allows, the Parties and the Commonwealth are to notify each other and the Court in writing whether they seek a stay of the ruling pending an appeal (in which case the Court is not to release the Closed Court Transcript to the public until all appeals are determined).
63. If the Parties and the Commonwealth do not seek a stay of the Court's ruling under Order 61, the Court may release so much of the Closed Court Transcript (if any) to the public as can be released in accordance with the ruling.
64. If the Court considers it appropriate to do so, the Court may grant leave to any other interested party to be heard on the question whether the redactions to the Closed Court Transcript notified by the Commonwealth (or any other redactions) should be made, whether before or after the redactions are made.

PART G: PROTECTION OF THE IDENTITIES OF SPECIAL OPERATIONS COMMAND MEMBERS AND SENSITIVE WITNESSES

Use of pseudonyms for Special Operations Command members

65. When the Court is open, each Special Operations Command member must be referred to by the relevant pseudonym listed in a Confidential Schedule to be prepared for the purposes of these Orders.

Giving of evidence by Sensitive Witnesses

66. Subject to any further order of the Court, each Sensitive Witness must give evidence in such a way that:
- a) the Sensitive Witness may be heard and seen by each person who is an Authorised Person or a Sensitive Witness who is present in the courtroom; but
 - b) the Sensitive Witness may be heard but not seen by any person who is not an Authorised Person or a Sensitive Witness.
67. A Sensitive Witness is permitted to enter and leave the courtroom and the court building by a means that enables the Sensitive Witness to avoid being identified as a person connected with Special Operations Command by any person other than an Authorised Person or a Sensitive Witness.

PART H: SENSITIVE DOCUMENTS HELD BY THE COURT

Application of Part H

68. Part H of these Orders applies to a Sensitive Document (including a New Sensitive Document and the Closed Court Transcript) which is held by the Court for any reason (a **Sensitive Court Document**), including (without limitation) because it has been produced in answer to a subpoena, filed, tendered or otherwise provided or received.

Sensitive Court File

69. The associate to the presiding Judge, the Principal Registrar or the Deputy Principal Registrar must place all Sensitive Court Documents on a special file (or special files) created for the purposes of the Proceedings (the **Sensitive Court File**).
70. Other than when the Sensitive Court File is in use for the purposes of the Proceedings, it must be:
- a) placed in a sealed envelope (or sealed envelopes) marked with the words "SENSITIVE COURT FILE IN PROCEEDINGS NO. [INSERT] — TO BE OPENED ONLY BY OR WITH THE AUTHORITY OF THE PRESIDING JUDGE";
 - b) securely stored:
 - i. in the court building in a Class B security container which is accessible only by the presiding Judge, the associate to the presiding Judge, the Principal Registrar, the Deputy Principal Registrar and a Commonwealth Representative whose duties include duties relating to the Class B security container; or

- ii. if directed by the Court — by the Commonwealth on behalf of the Court, on the condition that the sealed envelope (or sealed envelopes) is (or are) not to be opened or interfered with and is (or are) to be delivered to the Court as directed by the presiding Judge from time to time.
71. At the conclusion of the Proceedings, an arrangement is to be made, with the concurrence of the Court, for the Sensitive Court File to be stored securely by the Commonwealth on behalf of the Court, on the condition that the sealed envelope (or sealed envelopes) containing the Sensitive Court File is (or are) not to be opened or interfered with and is (or are) to be delivered to the Court as directed by the presiding Judge or the Chief Justice of the Federal Court of Australia.

Access to Sensitive Court Documents

72. If a person (other than an Authorised Person) wishes to access a Sensitive Court Document, the person may make a request in writing to the Principal Registrar or the Deputy Principal Registrar which specifies the Sensitive Court Document to which access is sought and the reason(s) why access is sought.
73. Where a person makes a request to access a Sensitive Court Document under Order 72 and, but for these Orders, the person would have been given access to the Sensitive Court Document, the following steps are to be taken:
- a) the Court must notify the Parties and the Commonwealth in writing and provide them with a copy of the request;
 - b) within 5 working days after receiving a copy of the request from the Court, or within such further time as the Court allows, the Parties and the Commonwealth must notify each other and the Court in writing whether any objection to access is made, and if so, on what basis; and
 - c) if a Party or the Commonwealth makes an objection to access, the Court must make arrangements with the Parties, the Commonwealth and the person seeking access to the Sensitive Court Document for a hearing on the question whether the person should be given access to the Sensitive Court Document (such hearing to include an opportunity for all parties concerned to adduce evidence and make submissions).

PART I: SENSITIVE OUTLINES OF EVIDENCE

74. If a person (other than an Authorised Person) wishes to access a Sensitive Outline of Evidence, the person may make a request in writing to the Principal Registrar or the Deputy Principal Registrar which specifies the Sensitive Outline of Evidence to which access is sought and the reason(s) why access is sought.

75. Where a person makes a request to access a Sensitive Outline of Evidence under Order 74 and, but for these Orders, the person would have been given access to the Sensitive Outline of Evidence, the process described in Order 73 is to be undertaken.

PART J: APPROVAL OF PARTY REPRESENTATIVES

76. Where a Party wishes to engage a person who is not already a Party Representative to represent the Party for the purposes of the Proceedings, the Party may make a request to the Commonwealth that the person be approved as a Party Representative.
77. A request under Order 76 must meet the following requirements:
- a) the request must be provided to AGS;
 - b) the request must be in writing;
 - c) the request must state:
 - i. the person's full name and any previous names;
 - ii. the person's date of birth; and
 - iii. the person's city and country of birth; and
 - d) the request must be accompanied by:
 - ii. either:
 - (1) a colour copy of the person's valid and current Australian passport; or
 - (2) a colour copy of the person's birth certificate and a colour copy of valid and current photographic identification of the person (such as an Australian driver licence);
 - iii. if the person was born in Australia after 20 August 1986 or the person was not born in Australia, proof of Australian citizenship; and
 - iv. if the person has had any previous name(s), proof of the person's previous name(s).
78. Within 10 working days of a request that meets the requirements in Order 77 being provided to AGS (or such longer period as is agreed with the Party), the Commonwealth must notify the Party in writing whether the person who is the subject of the request is:
- a) approved; or
 - b) not approved.

79. A person who is seeking to be approved as a Party Representative under Order 78 must not receive Sensitive Information, or deal with Sensitive Documents, prior to being approved under Order 78.

PART K: NOTIFICATION OF BREACH OF THESE ORDERS

80. If an Authorised Person (other than the Commonwealth or a Commonwealth Representative) becomes aware of a possible breach of these Orders or any third party attempt to access Sensitive Information or Sensitive Documents, the Authorised Person must draw the matter to the attention of the Commonwealth immediately by notifying AGS in writing.

PART L: VARIATION AND CONTINUATION OF THESE ORDERS

81. These Orders operate until further order.
82. A Party or the Commonwealth may apply to the Court to vary these Orders.
83. An application to vary these Orders may be made only on the giving of 5 working days' notice in writing (or such shorter time as agreed or as ordered by the Court) to:
- a) in the case of an application made by a Party – the other Party and the Commonwealth; and
 - b) in the case of an application made by the Commonwealth – the Parties.
84. For the avoidance of doubt, these Orders apply to “civil proceedings” (as defined by s 15A of the NSI Act) and continue to apply according to their terms after the conclusion of the Proceedings.

SCHEDULE A: Party Representatives

Applicant Representatives

Solicitors

1. Mark O'Brien
2. Paul Svilans
3. Monica Allen

Barristers

4. Bruce McClintock SC
5. Matthew Richardson
6. Phillip Sharp

Respondent Representatives

Solicitors

1. Peter Bartlett
2. Dean Levitan
3. Dougal Hurley
4. Jeremy Forbes
5. Anna Davyskib

Barristers

6. Alexander (Sandy) Dawson SC
7. Lyndelle Barnett
8. Christopher Mitchell



SCHEDULE B: nominated officers or employees of corporate Respondents

Nominated officers or employees of Fairfax Media Publications Pty Ltd

1. Larina Alick
2. Sam White

Nominated officers or employees of The Age Company Pty Ltd

1. Larina Alick
2. Sam White

Nominated officers or employees of The Federal Capital Press of Australia Pty Ltd

1. Larina Alick
2. Sam White



SCHEDULE C: Sensitive Outlines of Evidence

1. Outline of Evidence of Person 7 dated 7 June 2019
2. Outline of Evidence of Person 21 dated 7 June 2019
3. Outline of Evidence in Reply of the Applicant dated 12 July 2019
4. Outline of Evidence of Person 33 dated 12 July 2019
5. Outline of Evidence of Person 36 dated 12 July 2019
6. Outline of Evidence of Person 37 dated 12 July 2019
7. Outline of Evidence of Person 50 dated 12 July 2019