

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 31/08/2020 11:38:11 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
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, reading "Sia Lagos".

Dated: 31/08/2020 11:38:46 AM 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 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.



Affidavit

No. NSD. 1485 of 2018

Federal Court of Australia

District Registry: New South Wales

Division: General

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

Affidavit of: **Paul Victor Svilans**

Address: Level 19, 68 Pitt Street, New South Wales, 2000

Occupation: Solicitor

Date: 31 August 2020

Contents

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1.	Affidavit of Paul Victor Svilans sworn on 31 August 2020 in relation to the IGADF's claim for public interest immunity	1-	1-3
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A handwritten signature in black ink, appearing to read "Paul Victor Svilans".

A handwritten signature in black ink, appearing to read "Ben Roberts-Smith".

I Paul Victor Svilans, solicitor of level 19, 68 Pitt Street, Sydney in the State of New South Wales, say on oath:

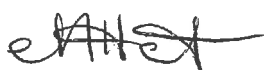
1. I am a Partner with the firm Mark O'Brien Legal (**MOBL**), the solicitors for the Applicant in this proceeding and, with Mark O'Brien, I have the day to day conduct of this matter on behalf of the Applicant.
2. Unless otherwise stated, the facts in this affidavit are matters within my own knowledge.
3. Nothing in this affidavit is intended to waive any client legal or legal professional privilege.
4. On 2 August 2019, the Court made orders for the parties to give discovery. Pursuant to those orders, on 25 October 2019, the parties gave verified discovery and produced copies of the discovered documents.
5. Since 6 November 2019, the Respondents have requested that the Applicant serve an updated List of Documents so as to include any correspondence or material which may be in his possession concerning the Inspector-General of the Australian Defence Force's Afghanistan Inquiry (**IGADF Inquiry**).
6. Annexed hereto and marked "**PVS-1**" is a bundle of correspondence between MOBL and Minter Ellison (solicitors for the Respondents) between 6 November 2019 and 19 November 2019 concerning the Respondents' requests as described in paragraph 5 above.
7. On 2 April 2020, the Respondents issued a Notice to Produce (the **Notice**) to the Applicant seeking, amongst other things, production of:

[1] All correspondence between the Applicant and Inspector General of the Australian Defence Force (IGADF) insofar as it is caught by one or more of the agreed categories of documents for discovery by the Applicant.

[2] All documents concerning the IGADF insofar as they are caught by one or more of the agreed categories of documents for discovery by the Applicant.

A copy of that Notice to Produce is annexed hereto and marked "**PVS-2**".

8. By letter dated 8 May 2020, the Respondents (through their solicitors) indicated that they would not call upon the Notice as they had been informed by the IGADF that the IGADF would claim public interest immunity in respect of the documents responsive to paragraphs 1 and 2 of the Notice.
9. By letter dated 15 May 2020, the Respondents requested that the Applicant provide an updated Verified List of Documents, including discovery of documents received by the Applicant from the Australian Federal Police (**AFP**) or the IGADF. A copy of the letters dated




2


8 May and 15 May 2020, together with further correspondence between MOBL and Minter Ellison is annexed and marked "**PVS-3**".

10. Following extensive correspondence, two Notices to Produce and a Subpoena to Produce issued to the AFP by the Respondents, on 13 July 2020, the Applicant served an Amended List of Documents which included, among other things, two new categories of documents in Part 2 of the List (being items 67 and 68 in the Amended List of Documents filed in Federal Court proceedings no. 1485 of 2018). A copy of the Applicant's Amended List of Documents is in the Respondents' Tender Bundle.
11. By letter dated 15 July 2020, the Respondents required the Applicant to provide a further updated discovery list itemising the documents captured by items 67 and 68. A copy of that letter together with the response is annexed and marked "**PVS-4**".

Sworn by the deponent
at Sydney
in New South Wales
on 31 August 2020
Before me:

)
)
)
)
)



Signature of deponent

Signature of witness
Monica Helen Allen
Level 19, 68 Pitt Street
Sydney New South Wales 2000
An Australian Legal Practitioner within the
meaning of the Legal Profession Uniform Law

Certificate Identifying Annexure
"PVS-1"

No. NSD\ 1485 of 2018

Federal Court of Australia

District Registry: New South Wales

Division: General

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd and others

Respondents

This is the annexure marked "PVS-1" now produced and shown to PAUL VICTOR SVILANS at the time of swearing his affidavit on 31 August 2020.

Before me:



Signature of person taking affidavit

Monica Helen Allen

Level 19, 68 Pitt Street

Sydney New South Wales 2000

An Australian Legal Practitioner within the
meaning of the Legal Profession Uniform Law

Filed on behalf of	Ben Roberts-Smith VC MG
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
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Fax	-
Email	paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales 2000

[Version 2 form approved 09/05/2013]

MinterEllison

6 November 2019

By email: Paul.Svilans@markobrienlegal.com.au

Paul Svilans
Principal
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Mr Svilans

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court proceeding numbers NSD 1486, 1486 and 1487 of 2018

We refer to your letter of 30 October 2019 and the parties' respective List of Documents and discovered material.

Confidential Sources and the Journalist Privilege

Consistently with section 126K of the *Evidence Act*, the Respondents will not provide to you any documents or evidence that may tend to disclose the identity of confidential sources.

The suggestion that serving Outlines of Evidence for witnesses somehow waives the privilege that may have otherwise protected the identity of those individuals, is misguided. Such a suggestion erroneously assumes that the individuals for whom Outlines of Evidence have been served were the sources for the articles prior to publication and prior to institution of these proceedings. Respectfully, your letter conflates anticipated witnesses with confidential sources/informants.

You have also demanded that the Respondents separately describe each document over which a claim for journalist privilege is made. Even if the *Federal Court Rules* required parties to do so (which we dispute), the description of such documents, including in some cases disclosure of the fact of the document being in the Respondents' possession, would tend to disclose the identity of a confidential source. On that basis, we reject your demand to do so.

Each of the documents specifically identified in your letter as being allegedly in the Respondents' possession, including "records of conversations" and "official reports", are documents over which the journalist privilege is claimed.

Respondents' List of Documents

Our clients will provide a List of Documents, which will include separate affidavits for each Respondent.

Applicant's list of documents and discovered material

Your client has discovered 63 documents / categories of documents, of which 31 are either articles already in the possession of the Respondents (being documents published by them) and/or documents relating to your client's claimed loss of earnings.

Army records

At a minimum, for example, your client must have in his possession or control (including have access to),

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his Defence Service and Personnel Records, including service reports, personal documents, training records and health documents. In addition, we understand that all military personnel have access to PMKeys (Personnel Management Key Solution), an online database that stores the details of defence personnel, including career history, honours/recognitions, qualifications, historical promotions. We also understand that when a soldier discharges from the army, they receive a 'read-out' of this material and have permanent access to their personnel file.

Correspondence

Your client's discovered material also fails disclose a single piece of correspondence relating to these proceedings and its related matters. It is plainly absurd to suggest, for example, that your client does not have in his possession any correspondence with individuals upon whose behalf he filed Outlines of Evidence in this proceeding relating to the matters referred to in those Outlines. In the event that he has deleted such correspondence, that ought to have been disclosed in his verified List of Documents, with appropriate particularity, identifying each document or communication which he no longer has in his possession, unless there is a proper reason not to do so.

In addition, it is a matter of public record that your client is a subject of the inquiry by the IGADF (**Inquiry**) and has been called to give evidence to the Inquiry. Is it being seriously suggested that your client has had no correspondence with any of the representatives or delegates of the Inquiry and/or has been furnished with no material by the Inquiry in relation to the matters also the subject of these proceedings?

In addition to the matters set out above, your client is quoted directly in the following (non-exhaustive list of) articles, which are available online:

1. "*Victoria Cross recipient Ben Roberts-Smith hits out at new SAS book No Front Line*", published on thewest.com.au by Nick Butterly and Sarah Martin on 21 October 2017;
2. "*You think I'm brave? You should meet my mates*", published in *The Australian* by Brendan Nicholson on 23 April 2011;
3. "*War hero lashes his accusers*", published in *The Australian* by Paul Maley on 11 August 2018; and
4. "*Ben Roberts-Smith VC: a wartime hero in the cross hairs*", published in *The Australian* by Paul Maley on 15 August 2018.

Despite those articles directly pertaining to the matters in dispute in these proceedings, including matters falling within the agreed categories of discovery, and your client clearly having had direct communication with the authors and/or editors of those articles, your client has not discovered a single document evidencing such communications.

Further, your client has engaged Sue Cato and Ross Coulthart to assist him with the public relations in respect of these proceedings and its related matters. Documents, including correspondence with them, insofar as they relate to the events the subject of these proceedings, are also discoverable.

In due course, we intend to subpoena *The Australian*, its authors and editors, Sue Cato and Ross Coulthart for documents relating to the matters in these proceedings, but that does not relieve your client from his obligation to discover his communications with those individuals, which are plainly relevant to these proceedings.

We invite your client to attend to his discovery obligations as soon as possible and look forward to your response as to what is proposed to remedy its present deficiency.

Yours faithfully
MinterEllison



Contact: Dean Levitan T: +61 3 8608 2152
F: +61 3 8608 1088 peter.bartlett@minterellison.com
Partner: Peter Bartlett T: +61 3 8608 2677
OUR REF: PLB 1183220

MARK O'BRIEN LEGAL

ABN 8600 2421 123

Level 19, 68 Pitt Street
Sydney NSW 2000
Australia

Our Ref: MOBL:283
Your Ref: PLB 1183220

11 November 2019

Mr. Peter Bartlett
Minter Ellison
Rialto Towers 525 Collins Street
MELBOURNE VIC 3000

By Email: Peter.Bartlett@minterellison.com

Dear Mr Bartlett

Ben Roberts-Smith VC MG v Fairfax Media Publications & Ors
Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 of 2018

We refer to your letter dated 6 November 2019 and to your assertions that our client has failed to discover material in his possession or control which falls within the agreed categories for discovery (as set out in your letter dated 24 September 2019).

In relation to the matters identified in your letter of 6 November 2019, we are instructed as follows:

1. **Army service record.** Our client does not hold and has no recollection of ever being given a copy of his Australian Army service record or any other documents identified in category 5 of the agreed categories for discovery. As to the PMKeys database referred to in your letter of 6 November 2019, we are instructed that our client does not have access to the PMKeys database.
2. **Correspondence between the Applicant and individuals upon whose behalf he filed Outlines of Evidence in this proceeding relating to the matters referred to in those Outlines.** As noted in our client's initial Outline of Evidence dated 5 April 2019, our client does not retain messages sent or received by him. However, to avoid any unnecessary argument, our client will serve a Supplementary List of Documents noting that to the extent he received or sent any communications relevant to an agreed category for discovery to any of the individuals upon whose behalf Outlines of Evidence have been filed, those communications are no longer in his possession and have been deleted in the usual course.
3. **IGADF.** As the Inquiry is being conducted in private pursuant to the direction issued by the Inspector-General ADF to the Assistant Inspector-General ADF dated 17 January 2017 and pursuant to section 19 of the *Inspector-General of the Australian Defence Force Regulation 2016*, we have informed the IGADF of your discovery request. In doing so, we are not stating that any documents exist or do not exist in relation to your discovery request as we do not wish to undermine the investigation process by disclosing any details. We will provide you with a substantive response when we have been informed of the IGADF's position.

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4. **Correspondence with Journalists.** We are instructed that our client does not hold any documents or communications with journalists relevant to an agreed category for discovery in these proceedings.
5. **Correspondence with Cato & Clegg.** We are instructed that our client does not hold any documents or communications with Sue Cato and/or Ross Coulthart relevant to an agreed category for discovery in these proceedings.

Yours faithfully



Paul Sivilans

Principal

T +61 2 9216 9830

M +61 410 687 900

E paul.sivilans@markobrienlegal.com.au

MinterEllison

11 November 2019

By email: Paul.Svilans@markobrienlegal.com.au

Paul Svilans
Principal
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Mr Svilans

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court proceeding numbers NSD 1486, 1486 and 1487 of 2018

We refer to your letter of 11 November 2019 and the explanations provided by you with respect to the your client's deficient discovery.

1. Correspondence between the Applicant and individuals upon whose behalf he filed Outlines of Evidence in this proceeding relating to the matters which are issues in dispute in these proceedings

We consider the explanation provided in this respect to be wholly inadequate. In circumstances where your client has initiated this litigation and communicated with other individuals with respect to matters relevant to these proceedings, he clearly knew, or ought to have known, that such material was directly related to the issues in dispute and would be required to be produced pursuant to his discovery obligations. Accordingly, it is entirely inappropriate that such correspondence has been deleted by him in the "usual course".

We request that upon serving a Supplementary List of Documents, your client set out the various individuals with whom he corresponded in relation to the factual matters relevant in these proceedings (including the factual matters in the Defence and the parties' Outlines of Evidence), the nature of such correspondence, the date(s) the communications were deleted and the reason for the deletion of such material.

Should your client fail to serve a Supplementary List of Documents by 4pm on Tuesday 19 November rectifying the abovementioned issues, we intend to seek orders to, amongst other things, appoint a digital forensic expert to assess your client's historical email and phone records for this purpose.

2. IGADF

While your client may need to consider his obligations arising out of the *Inspector-General of the Australian Defence Force Regulation 2016 (the Regulations)*, should he wish to object to the discovery of such material in these proceedings on the basis that he may otherwise be in breach of the Regulations, he must do so pursuant to a properly asserted and available privilege. As such, we anticipate that your client's Supplementary List of Documents will either provide discovery of this material, or set out the basis upon which he claims any such privilege.

Our clients' rights are otherwise reserved in this respect.

Yours faithfully

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MinterEllison

A handwritten signature in black ink, appearing to read 'Bartlett', with a long horizontal flourish extending to the right.

Contact: Peter Bartlett T: +61 3 8608 2677
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Partner: Peter Bartlett T: +61 3 8608 2677
OUR REF: PLB 1183220

MARK O'BRIEN LEGAL

ABN 8600 2421 123

Level 19, 68 Pitt Street
Sydney NSW 2000
Australia

Our Ref: MOBL:283
Your Ref: PLB 1183220

19 November 2019

Mr. Peter Bartlett
Minter Ellison
Rialto Towers 525 Collins Street
MELBOURNE VIC 3000

By Email: Peter.Bartlett@minterellison.com

Dear Mr Bartlett

**Ben Roberts-Smith VC MG v Fairfax Media Publications & Ors
Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 of 2018**

We refer to your letter dated 11 November 2019 regarding the Applicant's verified List of Documents.

Correspondence between the Applicant and individuals upon whose behalf he filed Outlines of Evidence

We are instructed that since at least January 2017, when the Inspector-General of the Australian Defence Force (IGADF) commenced his Inquiry, our client has had no written communications relevant to an agreed category for discovery in these proceedings (with the exception of agreed category 1, which has been dealt with in Part 3 of our client's List of Documents).

To the extent that over an 11 year period from June 2006 (being the date of the first allegation relevant to these proceedings) to in or about January 2017 (being the commencement of the Inquiry referred to above), there may have been communications to or from our client that may have fallen within an agreed category for discovery, our client cannot comply with your request to *"set out the various individuals with whom he corresponded in relation to the factual matters relevant in these proceeding, the nature of that correspondence, the date(s) the communications were deleted and the reason for the deletion of such material"*. Given the time elapsed our client obviously cannot recall those details and the exercise would be oppressive. Our client will nonetheless amend Part 3 of his List of Documents to include a reference to any such documents.

Further, we observe that each of the Respondents' List of Documents served in the proceedings contains the following entry in Part 3:

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Description of document	Date of document	What became of document
<i>Various encrypted messages periodically deleted</i>	<i>N/A</i>	<i>Deleted</i>

As is apparent from the Respondents' approach to their discovery, there is nothing exceptional or inappropriate about the periodic deletion of communications.

Inspector General of the Australian Defence Force

We note the comments in your letter. We can only again state that as the Inquiry is being conducted in private pursuant to the direction issued by the IGADF to the Assistant Inspector-General ADF dated 17 January 2017 and pursuant to section 19 of the *Inspector-General of the Australian Defence Force Regulation 2016*, we have informed the IGADF of your discovery request. We will provide you with a further response when we have been informed of the IGADF's position.

As we are still awaiting a response from the IGADF, our client is not able to verify his Supplementary List of Documents. However, please find **enclosed** a draft Supplementary List of Documents dealing with the communications referred to above.

Yours faithfully



Paul Svillans

Principal

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Certificate Identifying Annexure
"PVS-2"

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd

Respondents

This is the annexure marked "PVS-2" now produced and shown to PAUL VICTOR SVILANS at the time of swearing his affidavit on 31 August 2020.

Before me:



.....
Signature of person taking affidavit
Monica Helen Allen
Level 19, 68 Pitt Street
Sydney New South Wales 2000
An Australian Legal Practitioner within the
meaning of the Legal Profession Uniform Law

Filed on behalf of	Ben Roberts-Smith VC MG
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9815
Fax	-
Email	paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales 2000

[Version 2 form approved 09/05/2013]

Notice to produce

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Ltd & Ors

Respondents

To the Applicant

The Respondents require you to produce the following documents at the next case management hearing at 10:00am on Thursday 9 April:

1. All correspondence between the Applicant and Inspector General of the Australian Defence Force (**IGADF**) insofar as it is caught by one or more of the agreed categories of documents for discovery by the Applicant;
2. All documents concerning the IGADF insofar as they are caught by one or more of the agreed categories of documents for discovery by the Applicant;
3. One copy of item 66 in the Applicant's Verified List of Documents;
4. All correspondence between the Applicant and the Australian Federal Police (**AFP**) relating to the AFP's investigation(s) into the Applicant;
5. A copy of any statement(s) provided by the Applicant to the AFP in relation to the AFP's investigation(s) into the Applicant; and
6. A copy of any transcript of interview provided by the Applicant to the AFP in relation to the AFP's investigation(s) into the Applicant.

Filed on behalf of (name & role of party)

Prepared by (name of person/lawyer)

Law firm (if applicable)

Tel 03 8608 2152

Email

Address for service
(include state and postcode)

Fairfax Media Publications Pty Ltd, Nick McKenzie, Chris Master and
David Wroe, the Respondents

Dean Levitan, Lawyer for the Respondents

MinterEllison

Fax -

dean.levitan@minterellison.com

Level 19, 525 Collins St Melbourne, VIC 3000

Date: 2 April 2020

A handwritten signature in black ink, appearing to read 'Peter Bartlett', written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondent

Note

If this notice specifies a date for production, and is served 5 days or more before that date, you must produce the documents or things described in the notice, without the need for a subpoena for production.

If you fail to produce the documents or things, the party serving the notice may lead secondary evidence of the contents or nature of the document or thing and you may be liable to pay any costs incurred because of the failure.

Certificate Identifying Annexure
"PVS-3"

No. NSD. 1485 of 2018

Federal Court of Australia

District Registry: New South Wales

Division: General

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd and others

Respondents

This is the annexure marked "PVS-3" now produced and shown to PAUL VICTOR SVILANS at the time of swearing his affidavit on 31 August 2020.

Before me:



Signature of person taking affidavit

Monica Helen Allen

Level 19, 68 Pitt Street

Sydney New South Wales 2000

An Australian Legal Practitioner within the
meaning of the Legal Profession Uniform Law

Filed on behalf of	Ben Roberts-Smith VC MG
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9815
Fax	-
Email	paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales 2000

[Version 2 form approved 09/05/2013]

Our Ref: MOBL:283
Your Ref: PLB 1183220

7 April 2020

Mr. Peter Bartlett
Minter Ellison
Rialto Towers 525 Collins Street
MELBOURNE VIC 3000

By Email: Peter.Bartlett@minterellison.com

Dear Sir

Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors
Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 and 1826 of 2018

We refer to your letter dated 2 April 2020 and the Notices to Produce of the same date (the **Notices**).

We write this letter on the basis of not confirming or denying the existence of any of these documents or whether they are in our custody or control.

Category 1: Our client objects to production under this category as:

1. the documents sought go beyond any legitimate forensic purpose;
2. it would be contrary to the obligations placed upon him pursuant to s 21 of the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth); and
3. we anticipate that the documents will be protected from production by public interest immunity as their disclosure may prejudice the ongoing investigations of the Inquiry.

We have written to the IGADF to inform him of the Notices and to invite the IGADF, if it so wishes, an opportunity to be heard in relation to Category 1 of the Notices.

Category 2: Our client objects to production under this category for the same reasons as outlined in relation to category 1, as well as the broad nature of the category.

Category 3: As your firm will be aware following its Subpoena to Produce to the Department of Defence dated 5 March 2020 seeking a copy of the AAR, this is a classified document and subject to the provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**). It is improper for the Respondents to attempt to circumvent the provisions of the NSI Act by again trying to compel our client to produce classified material.

We have written to the Department of Defence to inform them of the Notice and to invite the Department of Defence and the Attorney General, if they so wish, an opportunity to be heard in relation to Category 3 of the Notice.

Category 4: Our client objects to production under this category as:

1. the documents sought go beyond any legitimate forensic purpose; and
2. we anticipate that the documents will be protected from production by public interest immunity as their disclosure may prejudice the ongoing investigation.

We note that the Respondents' request is disingenuous. As the Respondents would well be aware, Mr Bachelard of The Age approached this firm on 23 March 2020 with a request in the following terms:

"I would like to seek Ben Roberts-Smith's response to a story that we're intending to run tomorrow which says he has been called in to be questioned by the Australian Federal Police over the incident in Darwin."

Can you or your client confirm that he has been called in for questioning under caution, and that he has indeed been interviewed by the AFP."

In response to this request, our client issued a statement to The Australian which was reported in that newspaper on 23 March 2020 in the article entitled "Police question Ben Roberts-Smith over Afghanistan killing."

The use of a notice to produce to seek correspondence passing between our client and the AFP in these circumstances is an abuse of process. It is improper for the Respondents to rely upon an inquiry from a journalist employed by the Respondents to manufacture a right to obtain the documents sought pursuant to this category.

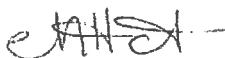
We have written to the AFP to inform it of the Notice and to invite the AFP, if it so wishes, an opportunity to be heard in relation to Category 4 of the Notices.

Category 5: Our client objects to production under this category for the same reasons as outlined in relation to category 4. In any event, our client has nothing to produce.

Category 6. Our client objects to production under this category for the same reasons as outlined in relation to category 4. In any event, our client has nothing to produce.

We invite the Respondents to withdraw the Notices by 12pm on Wednesday 8 April 2020. In the event that the Respondents do not withdraw them, we will seek directions on 9 April 2020 for the filing of an interlocutory application to deal with this issue.

Yours faithfully



Monica Allen

Senior Associate

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E monica.allen@markobrienlegal.com.au

MinterEllison

8 April 2020

By email: Monica.Allen@markobrienlegal.com.au

Monica Allen
Senior Associate
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Ms Allen

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court proceeding numbers NSD 1486, 1486 and 1487 of 2018

We refer to your letter of 7 April 2020 and the Notices to Produce dated 2 April 2020 (**Notices**).

1. Category 1 and 2

- 1.1 We do not agree that the documents sought go beyond the legitimate forensic purpose of these proceedings.
- 1.2 We refer to the Applicant's written submissions on the discovery application dated 9 December 2019 (**Applicant's written submissions**) in which you made plain that you share the view that documents recording prior accounts of witnesses have a legitimate forensic purpose.
- 1.3 Specifically, we refer to the following paragraphs in the Applicant's written submissions:
 - (a) *"It is submitted that it is obvious that the Applicant would seek documents which, for example, might comprise earlier versions or accounts from the Respondents' witnesses, or documents those witnesses might have supplied to the Respondents to support their accounts, or which might otherwise impact upon the credit of the witnesses" [paragraph 33];*
 - (b) *"The public interest in a fair trial requires the Applicant gaining access to the initial accounts provided by those sources" [paragraph 36(a)]; and*
 - (c) *"...It is a reasonable supposition that access to such documents would be of real assistance to the Applicant in preparing to meet the evidence of Person 7" [paragraph 48].*
- 1.4 We also refer to the oral submissions made by the Applicant's Senior Counsel, Mr McClintock SC, during the hearing on the discovery application on 11 December 2019. At that hearing, Mr McClintock SC said the following in respect of Person 4's alleged correspondence with the Respondents: *"...And we are to be prevented from knowing whether he gave an inconsistent version on an earlier occasion? It would be a serious injustice if that were the case."*
- 1.5 It is extraordinary that the Applicant is now purporting to diminish the importance of credit in this case and the forensic value of prior statements. On any view, the Applicant's credit is a central feature of these proceedings and the Respondents ought not to be deprived of material recording the Applicant's earlier accounts provided to the IGADF, and the opportunity to interrogate the Applicant on those earlier accounts.

- 1.6 The Respondents are properly entitled to have access to such documents and the Applicant is required, pursuant to his ongoing obligations of discovery, to produce those documents to the Respondents.
- 1.7 We note your client's objection to production of these documents on the basis that you "anticipate" that the documents will be protected from production by public interest immunity. That is not an objection available to the Applicant. Any objection on the grounds of a public interest immunity claim must be taken by the IGADF. As far as we are aware, the IGADF have not indicated their intention to be heard in relation to the Category 1 and Category 2 documents at the Case Management Hearing tomorrow, notwithstanding your invitation to them.
- 1.8 Accordingly, the Respondents press for production of the Category 1 and Category 2 documents and intend to call for them during the Case Management Hearing.
- 2. Category 3**
- 2.1 The NSI Act was invoked in relation to these proceedings on 31 March 2020. The Applicant has been under an obligation to discover all relevant documents since 25 October 2019.
- 2.2 In any event, as articulated in our letter of 1 April 2020, the objection on the basis of the NSI Act is not an objection available to your client to take. Should your client believe that documents contain 'national security information' as defined by the NSI Act, your client should engage with the NSI Act's disclosure regime. The fact that the documents may contain national security information does not set aside your client's ongoing discovery obligations.
- 2.3 In the circumstances, we press for production of the AAR referred to in Category 3 of the Notice and intend to call for it during the Case Management Hearing. Should your client maintain that the AAR contains national security information, your client should inform the Court of the steps your client has taken to ensure compliance with his continuing discovery obligations.
- 3. Category 4, 5 and 6**
- 3.1 We repeat our points in paragraphs 1.1 – 1.5 of this letter in relation to the relevance of the documents sought in Category 4 of the Notice.
- 3.2 Again, the Applicant is not in a position to refuse production of these documents on the basis of some anticipated claim by a third party on the grounds of public interest immunity. In the absence of a claim by the IGADF, we expect the Applicant to produce documents captured by Category 4 of the Notice.
- 3.3 The suggestion in your letter that the Respondents orchestrated their request for comment in relation to an article in order to manufacture a right to obtain documents from the Applicant is absurd. Your client voluntarily submitted a statement to *The Australian* in which he confirmed the existence of documents and/or correspondence, which happen to be relevant to these proceedings and are properly captured by Category 4 of the Notice.

We confirm that the Respondents do not withdraw the Notices. If the Applicant makes an application to set aside the Notices, we will oppose that application and will rely on this letter on the question of costs.

Yours faithfully
MinterEllison



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OUR REF: PLB 1183220

MinterEllison

28 April 2020

By email: Monica.Allen@markobrienlegal.com.au

Monica Allen
Senior Associate
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Ms Allen

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court Proceeding numbers NSD 1485, 1486 and 1487 of 2018 (Proceedings)

We refer to the Notices to Produce dated 2 April 2020 (**Notices**). We also refer to the direction by His Honour Justice Besanko that the parties exchange orders relating to the Notices (at T25.5, 9 April 2020 Case Management Hearing).

We write to inform you that we have written to the Inspector-General of the Australian Defence Force, the Department of Defence and the Attorney-General seeking written confirmation of their respective positions with respect to the Notices. We received a response to our letter today at 10:52am.

Our client will need further time to consider the response and to provide us with instructions. However, we anticipate being in a position to provide you with our proposed orders, including with respect to the Notices, in the next few days. We would be grateful if you could indicate when the Respondents can expect to receive the Applicant's proposed orders in relation to the case management hearing on 14 May 2020.

As you are aware, paragraph 3 of the Notices seeks production of a copy of the After Action Report from June 2006, which was item 66 of the Applicant's Verified List of documents. We have been informed by the Australian Government Solicitor that the Applicant has provided his copies of this After Action Report to the Australian Government Solicitor. We would request that you provide us with information concerning the circumstances of the After Action Report being provided to the Australian Government Solicitor, including the date on which it was provided to them.

We have also made enquiries with the Attorney-General regarding the status of orders proposed to be made pursuant to s 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). We have been advised that a draft of these orders have not been finalised.

Yours faithfully
MinterEllison



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MinterEllison

8 May 2020

By email: Monica.Allen@markobrienlegal.com.au

Monica Allen
Senior Associate
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Ms Allen

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court Proceeding numbers NSD 1485, 1486 and 1487 of 2018 (Proceedings)

We refer to the Notices to Produce dated 2 April 2020 (**Notices**). We also refer to our letter of 28 April 2020.

We have been informed by the Inspector-General of the Australian Defence Force (IGADF) that the IGADF would seek to make a public interest immunity (PII) claim in respect of documents responsive to paragraphs 1 and 2 of the Notices. We also understand that the Applicant no longer has in his possession or custody the document called for at paragraph 3 of the Notices.

In these circumstances, the Respondents to the Proceedings will not, at this time, call upon the Notices. As you will have seen, the Respondent has issued a subpoena to the Australian Federal Police (AFP). Moreover, the Respondents may issue a subpoena to the IGADF. Issues relating to PII can be considered by the Court on the application of the AFP or IGADF if those addressees object to the issuance of subpoenas.

Nevertheless, we request that you respond to our letter of 28 April 2020 and provide to the Respondents details of the circumstances in which the Applicant handed over copies of the After Action Report from June 2006 (which was called for by paragraph 3 of the Notices and was item 66 of the Applicant's Verified List of Documents).

As the Applicant's Verified List of Documents is no longer accurate, the Respondents require the Applicant to provide an updated list of documents so that the Applicant remains in compliance with his continuing obligation to give discovery (as per r 20.20 of the *Federal Court Rules 2011* (Cth) (**Rules**)). For the avoidance of doubt, this list should be prepared in accordance with r 20.17 of the Rules.

Yours faithfully
MinterEllison



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MinterEllison

15 May 2020

By email: Monica.Allen@markobrienlegal.com.au

Monica Allen
Senior Associate
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Ms Allen

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court Proceeding numbers NSD 1485, 1486 and 1487 of 2018 (Proceedings)

We refer to the Notices to Produce dated 2 April 2020 (**Notices**) and to our letter of 8 May 2020, to which we have not received a response. We also refer to our letter of 24 September 2019, which contained the agreed list of categories of documents to be discovered by the Applicant (**Agreed List of Categories**).

As set out in our letter of 8 May 2020, we again request that you provide to the Respondents details of the circumstances in which the Applicant handed over to the Australian Government Solicitor copies of the June 2006 After Action Report (which was called for by paragraph 3 of the Notices and was item 66 of the Applicant's Verified List of Documents).

Moreover, as set out in our letter of 8 May 2020, we also request that you provide the Respondents with an updated Verified List of Documents. On 2 August 2019, the Court made an order that "*the parties give verified discovery in respect of agreed categories and produce copies of discovery documents by 4 October 2019*" (Order 8). The Respondents letter of 24 September 2019 contained the Agreed List of Categories. As a "*party who has been ordered to give discovery*", the Applicant "*is under a continuing obligation to discover*" (see rule 20.20(1) of the *Federal Court Rules 2011* (Cth) (**Rules**)). As such, the Applicant must continue to discover documents that are responsive to the Agreed List of Categories. This obligation includes discovering documents received by the Applicant from the Australian Federal Police or Inspector-General of the Australian Defence Force.

We request a response to this letter (including an updated Verified List of Documents) by **5pm, Friday 22 May 2020**. Should the Applicant fail to respond to this letter, the Respondents will, at the Case Management Hearing on 27 May 2020, seek orders requiring the Applicant to provide a response to this letter and an updated Verified List of Documents.

Yours faithfully
MinterEllison



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Our Ref: MOBL:283
Your Ref: PLB 1183220

22 May 2020

Mr. Peter Bartlett
Minter Ellison
Rialto Towers 525 Collins Street
MELBOURNE VIC 3000

By Email: Peter.Bartlett@minterellison.com

Dear Sir

**Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors
Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 and 1826 of 2018**

We refer to your letter dated 15 May 2020 concerning the Notice to Produce issued to our client and our client's discovery.

After Action Report

During the discovery process, our client sought advice from the Australian Government Solicitor as to whether he was permitted to discover a copy of the After Action Report (as we understood that it may remain classified). As a result of those discussions, we were informed by Mr Hutchins of the AGS that the Department of Defence's position was as follows:

1. Our client was not permitted to discover the AAR as it comprised material that was subject to the *National Security Information (Criminal and Civil Proceedings) Act* (as noted in our client's List of Documents); and
2. Given the document was classified, the Department of Defence required our client and his legal representatives to surrender all copies of the AAR to the Department.

Accordingly, Mr Hutchins collected all copies of the AAR held by our client and/or by our office on 16 December 2019.

List of Documents

We are in the process of preparing an updated List of Documents on behalf of our client. We will serve

the updated List of Documents shortly.

Yours faithfully

A handwritten signature in black ink, appearing to read 'eMISA -', is positioned above the printed name.

Monica Allen

Senior Associate

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MinterEllison

15 June 2020

By email: Monica.Allen@markobrienlegal.com.au

Monica Allen
Senior Associate
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Ms Allen

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court Proceeding numbers NSD 1485, 1486 and 1487 of 2018 (Proceedings)

We refer to the previous correspondence regarding your client's compliance with his obligations of continuing discovery, and in particular our letter of 15 May 2020 and your response of 22 May 2020.

In your letter of 22 May 2020 you indicated that you were in the process of preparing an updated List of Documents and would serve that list "shortly".

On 2 June 2020 our clients sought an order requiring your client to serve a supplementary list of documents by 9 June 2020. We understood that your client did not oppose that order. Whilst that order has not yet been made (given his Honour has reserved his decision on the primary applications before the Court), there remains an obligation on your client to comply with his obligations of continuing discovery independently of an order of the Court.

Please serve the list as soon as possible and without any further delay.

We have set out in previous correspondence our clients' expectation that the supplementary list of documents will describe any documents received by your client from the Inspector General of the Australian Defence Force and the Australian Federal Police which fall within the agreed categories of documents. For the avoidance of doubt such documents would include any notice received from the IGADF that your client is a potentially affected person. The fact that such notices have been sent by the IGADF is a matter of public record: see, for example, article published in *The Australian* on 22 May 2020 entitled "*Australian Defence Force may pay soldiers' war crimes bills*". Accordingly, the mere fact that such a notice to your client exists could not be the subject of any claim for public interest immunity. Any objection to production or inspection (including any claim by the IGADF or the AFP for PII) can be dealt with separately, upon notice to the entity asserting the claim.

Yours faithfully
MinterEllison



Peter Bartlett
Partner

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Certificate Identifying Annexure
"PVS-4"

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd

Respondents

This is the annexure marked "PVS-4" now produced and shown to PAUL VICTOR SVILANS at the time of swearing his affidavit on 31 August 2020.

Before me:



.....
Signature of person taking affidavit
Monica Helen Allen
Level 19, 68 Pitt Street
Sydney New South Wales 2000
An Australian Legal Practitioner within the
meaning of the Legal Profession Uniform Law

Filed on behalf of	<u>Ben Roberts-Smith VC MG</u>
Prepared by (name of person/lawyer)	<u>Monica Allen</u>
Law firm (if applicable)	<u>Mark O'Brien Legal</u>
Tel	<u>+61 2 9216 9815</u>
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Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales 2000</u>

[Version 2 form approved 09/05/2013]

MinterEllison

15 July 2020

By email: Monica.Allen@markobrienlegal.com.au

Monica Allen
Senior Associate
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Ms Allen

Ben Roberts-Smith v Fairfax Media Publications & Ors
Federal Court proceeding numbers NSD 1486, 1486 and 1487 of 2018

We refer to your client's updated discovery list dated 13 July 2020 (**Updated List**), and in particular, item 68 in the Updated List, which your client claims "privilege" against production under s 130 of the Evidence Act 1995 (Cth). The claim is identified as a "privilege from production" in paragraph 5(c) of your client's verifying affidavit dated 13 July 20120.

The claim to "privilege from production" under s 130 of the Evidence Act is misconceived. Section 130 of the Commonwealth Evidence Act applies to the "adducing of evidence", not to the pre-trial stages of proceedings such as discovery. Unlike in other uniform law jurisdictions, s 131A of the Commonwealth Evidence Act does not extend the operation of s 130 to pre-trial stages. Instead, the common law principles of public interest immunity apply. You have not informed us, and we are not otherwise aware, of any Commonwealth entity, agency or other relevant person having asserted a claim to public interest immunity over the material described in item 68.

We therefore request that your client produce the material identified in item 68 of his Updated List without further delay, and in any event, within 7 days.

Further, we request that your client, within 7 days, provides a further updated discovery list, which properly describes the individual documents covered by item 67 and 68 in the Updated List.

Our clients reserve all of their rights, including the right to bring an application for further and better discovery.

We look forward to hearing from you.

Yours faithfully
MinterEllison



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MARK O'BRIEN LEGAL

ABN 86 002 421 123

Level 19, 68 Pitt Street
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Australia

Our Ref: MOBL283
Your Ref: PLB 1183220

24 July 2020

Mr. Peter Bartlett
Minter Ellison
Rialto Towers 525 Collins Street
MELBOURNE VIC 3000

By Email: Peter.Bartlett@minterellison.com

Dear Sir

**Ben Roberts-Smith VC MG v Fairfax Media Publications Pty Ltd & Ors
Federal Court of Australia Proceedings No. NSD 1485, 1486, 1487 of 2018**

We refer to your letter dated 15 July 2020.

In relation to Item 68 in the List of Documents, we observe that your clients have previously sought to obtain these documents pursuant to a Notice to Produce dated 2 April 2020. By way of letter dated 8 May 2020 your clients abandoned that Notice, and instead issued a subpoena to the AFP. In that letter you stated:

"As you will have seen, the Respondent has issued a subpoena to the AFP. Moreover the Respondents may issue a subpoena to the IGADF. Issues relating to PII can be considered by the Court on the application of the AFP or IGADF if those addressees object to the issuance of subpoenas."

We respectfully agree with your proposal as foreshadowed in that letter. The correct way for the public interest immunity issue to be ventilated is via a subpoena to the AFP and not discovery. This will avoid the (costly and time consuming) need for the Applicant's representatives to refer every step in the process to the AGS. We do not know yet of the extent of any public interest immunity application by the AFP in relation to these documents, but it is plainly under contemplation.

As to your request for an Itemised list, you will be aware from the 14 July 2020 letter from the AGS, that the IGADF considered any form of response whatsoever (including a nil return) to the 3 July 2020 Notice to Produce would infringe the immunity being claimed. In those circumstances a request for an

itemised list should not have been made as on its face it seeks to render otiose at least part of the IGADF's immunity claim before it has been determined by the Court.

We have referred this correspondence to the AGS.

Yours faithfully

A handwritten signature in black ink, appearing to read 'M. Allen', with a stylized flourish extending to the right.

Monica Allen

Senior Associate

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