

NOTICE OF FILING

Details of Filing

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



A handwritten signature in blue ink, reading "Sia Lagos".

Registrar

Important Information

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

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ROBERTS-SMITH VC MG

v

FAIRFAX MEDIA PUBLICATIONS PTY LTD & ORS

**APPELLANT’S OUTLINE OF SUBMISSIONS IN REPLY IN RELATION TO WAIVER
OF PRIVILEGE OVER 14 MARCH 2021 LEVITAN FILE NOTE**

- 1.1 This outline of submissions is in reply to the Respondents’ written submissions filed on 30 April 2025 (**RS**) in relation to the issue of waiver of privilege over the 14 March 2021 File Note prepared by Mr Dean Levitan (the **File Note**).
- 1.2 The Respondents contend (at RS [19]) that Mr McKenzie has not put in issue what was said at the meeting on 14 March 2021, but rather “cannot recall” whether Ms Roberts said anything that made him think she was sharing privileged material. In other words, the Respondents accept that Mr McKenzie does not say Ms Roberts *did not* share privileged information at the meeting, only that he *cannot recall* her saying anything that made him think it *might* have been privileged.
- 1.3 It is no answer to say that a witness gives purportedly exculpatory evidence about his perception of what was or was not said at the meeting. The Appellant is entitled to test that assertion. The contemporaneous record of what occurred at the meeting – namely, the File Note – is the best evidence of what was said and by whom.
- 1.4 The proposition that Mr McKenzie does not “deny” that privileged information may have been shared at the meeting (RS [19]), but simply “does not recall” receiving it, is precisely what makes it necessary and fair for the Appellant to inspect the File Note. It would be unjust to permit a party to answer an allegation of forensic misconduct by reference to their own memory of a meeting, while simultaneously shielding a contemporaneous record of that same meeting from scrutiny.
- 1.5 In short, the Respondents cannot deny that the meeting is a central factual event, allow Mr McKenzie to give self-serving evidence about his subjective recollections of that meeting, and yet withhold a contemporaneous note of what was actually said. That conduct is inconsistent with the maintenance of confidentiality and gives rise to the necessary inconsistency identified in *Mann v Carnell*, thereby effecting a waiver of privilege over the File Note.

Arthur Moses SC

Nicholas Olson

Thomas Scott

Counsel for the Appellant

30 April 2025