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

NSD 1485 OF 2018
NSD 1486 OF 2018
NSD 1487 OF 2018

BEN ROBERTS-SMITH
Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) AND OTHERS
Respondents

WRITTEN SUBMISSIONS OF THE COMMISSIONER OF THE AUSTRALIAN FEDERAL POLICE IN RELATION TO PUBLIC INTEREST IMMUNITY

INTRODUCTION

1. The **Commissioner** of the Australian Federal Police Force (**AFP**) claims public interest immunity (**PII**) in relation to the following documents:

   (a) documents called for pursuant to a subpoena addressed to him and issued by the Applicant in these proceedings on 12 December 2020 (**the Third AFP Subpoena**);

   (b) documents that are responsive to eight subpoenas addressed to individual witnesses in the proceedings and issued by the Applicant in these proceedings on 18 December 2020

   (together, the **Relevant Documents**).

2. The Commissioner's claim is made to protect the integrity of ongoing criminal investigations by the AFP into allegations of war crimes committed by members of the Australian Defence Force (**ADF**), including the applicant, in Afghanistan.

3. Given the nature of the AFP's PII claims, and the sensitivity of the Relevant Documents themselves, these submissions are necessarily general. Nevertheless, even expressed at this necessarily general level, the public interest in protecting the integrity of the AFP's

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ongoing investigations significantly outweighs the public interest (if any) in the disclosure of the documents to the parties in these proceedings, given:

(a) the seriousness, and significance, of the allegations the subject of the AFP's investigations, and;

(b) the nature of these proceedings.

4. The Commissioner's PII claim should be upheld.

EVIDENCE IN SUPPORT OF THE COMMISSIONER'S CLAIM

5. In support of his claim, the Commissioner relies on the following evidence:

(a) an open affidavit of Assistant Commissioner Scott Lee, the AFP's Assistant Commissioner, Counter Terrorism and Special Investigations Command, sworn on 3 May 2021 (the **Open Lee Affidavit**); and

(b) a confidential affidavit of Assistant Commissioner Lee also sworn on 3 May 2021 (the **Confidential Lee Affidavit**).

6. The Open Lee Affidavit has been served on the parties.

7. The Confidential Lee Affidavit has been prepared for the Court alone, and has not been served on the parties. In this respect, it is well-established that courts may receive confidential affidavits in support of PII claims (and like applications to protect the disclosure of information).[1] This reflects the Court's obligation to hear and determine such claims and applications in a way that does not defeat the very protection they seek to invoke.

8. The Court should afford considerable weight to views expressed by Assistant Commissioner Lee in his affidavits.[2] He is the responsible for the investigations of

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1 *Kamasee v Commonwealth* [2016] VSC 492 at [38]; *Parkin v O'Sullivan* (2009) 260 ALR 503 at [8] and [23]-[30] (and cases cited there); *Young v Quinn* at 488-489; *Arthur Stanley Smith* (1996) 86 A Crim R 308 at 310; *A-G for NSW v Stuart* (1994) 34 NSWLR 667 at 681; *Commonwealth v Northern Land Council and Another* (1993) 176 CLR 604 (***NLC***) at 620; *Regina v Bebic* (Unreported, 27 May 1982, NSWCA, Samuels JA, Nagle CJ at CL and Cantor J) at 4-5; *Jackson v Wells* (1985) 5 FCR 296 at 307; *R v Fandakis* [2002] NSWCCA 5 at [28] and [48]; *R v Francis* (2004) 145 A Crim R 233 at [12], [14], [21] and [26]; *SBEG v Secretary, Department of Immigration* (2012) 291 ALR 281 at [11]; *Attorney-General (NSW) v Lipton* (2012) 224 A Crim R 177 at [14]-[15]; *BUSB v The Queen* (2011) 80 NSWLR 170) at [15] and [59]; *R v Baladjam & Ors [No 29]* [2008] NSWSC 1452 at [3] and [58]; *Polley v Johnson* [2013] NSWSC 543; *Gypsy Jokers Inc v Commissioner of Police (WA)* (2008) 234 CLR 532 at 595 [180]; *Attorney-General for NSW v Nationwide News Pty Ltd* (2007) 73 NSWLR 635 at [11] and [42]-[43]; *P v D1* (2010) 202 A Crim R 40 at [24].

2 ***Sankey v Whitlam*** (1978) 142 CLR 1 at 43-44, 59-60; ***Alister*** *v R* (1983-84) 154 CLR 404 at 435.9, 455.5; *Church of Scientology v Woodward* (1982) 154 CLR 25 at 59.9; *A v Hayden* (1984) 156 CLR 532 at 560.2, 576.7; ***Young v Quinn*** (1985) 4 FCR 483 at 489-490; *R v Lodhi* (2006) 163 A Crim R 508 at [31]-[32]; *Commonwealth v Northern Land Council* (1991) 30 FCR 1 at 38; *State of NSW v Ryan* (1998) 101 LGERA 246 at 252; *Plaintiff B60/2012 v Minister for Foreign Affairs* [2013] FCA 1303 at [11]-[12] (citing *Parkin v O'Sullivan* (2009) 260 ALR 503 at [30] and *Leghaei v Director-General of Security* (2007) 241 ALR 141 at [56]-[58]).

domestic and international terrorist activity, espionage and foreign interference, and special investigations, which includes, relevantly, the investigation of alleged war crimes.[3]

9. When weighing the strength and persuasiveness of Assistant Commissioner Lee's affidavits, the Court should take into account the following factors:

   (a) the need to give due weight and proper respect to the deponent's reasons for claiming PII;[4]

   (b) the seniority and standing of the deponent;[5]

   (c) the importance of the public interests sought to be protected by the claim;[6]

   (d) whether those issues are wholly within the competence of a court to evaluate;[7]

   (e) whether the call for production takes place in criminal or civil proceedings; and

   (f) the importance of the subject documents to the issues in the proceedings.

10. Those factors lend significant support to the Commissioner's PII claims.

11. A party is not ordinarily entitled to cross-examine the deponent in an affidavit in support of a claim of PII. An application for leave to conduct such a cross-examination should be refused or, alternatively, should only be allowed in very rare or exceptional cases.[8] The Commissioner's PII claims in the present proceedings are not rare or exceptional.

RELEVANT PRINCIPLES

a. The legal regime under which to decide the PII claims

12. The Commissioner's PII claims are a *separate lis* from the substantive proceedings.[9]

13. The usual starting point is to consider whether the claim for immunity falls to be determined by reference to:

   (a) the *Evidence Act 1995* (Cth) (the **Commonwealth Evidence Act**); or

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3 Open Lee Affidavit, [7].

4 *Sankey v Whitlam* at 45-46.

5 *Young v Quin* at 489.

6 *NLC* at 618-619.

7 *Alister v R* at 435.9, 455.5. See also *Church of Scientology v Woodward* (1982) 154 CLR 25 at 38; *R v Lodhi* [2006] NSWSC 596 at [32], [51], [58-59].

8 See eg, *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 681; *Young v Quin* at 485, 488-489 and 495; *Kamasee v Commonwealth* [2016] VSC 438 at [23].

9 *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62 at [79], citing *Young v Quin* at 485-486.

(b) the common law: *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 (***PTTC***) at [24].

14. Unlike s 131A of the *Evidence Act 1995* (NSW), which operates to extend the operation of s 130 of that Act to pre-trial 'disclosure requirements' such as subpoenas, the Commonwealth Evidence Act does not extend the operation of s 130 in the same way. Accordingly, the common law applies to the claim.

15. Of course, in any event, there is now little practical difference between the common law and s 130 of the Evidence Act.[10]

b. The Court's task when deciding the claim

16. When a claim for PII is made, the Court must embark upon a three stage process.[11] It must:

(a) determine whether there is a public interest in the non-disclosure of the information in question;

(b) determine whether there is a public interest in the disclosure of the information in question; and

(c) balance, or weigh, the public interest in disclosure against the public interest in non-disclosure, in order to decide whether or not the information should be admitted into evidence (**the Balancing Exercise**).[12]

The balancing exercise

17. The Balancing Exercise can only be taken when it appears that both aspects of the public interest require consideration by the Court. The High Court explained this approach to the balancing exercise in *Alister v R* (1983-84) 154 CLR 404 at 412:

> [T]he balancing exercise … can only be taken when it appears that both aspects of the public interest do require consideration - i.e., when it appears, on the one hand, that damage would be done to the public interest by producing the documents sought or documents of that class, and, on the other hand, that there are or are likely to be documents which contain material evidence. The court can then consider the nature of the injury which the nation or the public service would be likely to suffer, and the evidentiary value and importance of the documents in the particular litigation.[13]

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10 *PTTC* at [42]; *Ryan v Victoria* [2015] VSCA 353 at [58]; *Eastman v The Queen* (1997) 76 FCR 9 at 65.

11 On occasion, the first two of three stages are combined: see, eg, *PTTC* at [42].

12 *Sankey v Whitlam* at 38-39; *Alister* at 412 and 434; *NLC* at 616-617.

13 *Alister* at 412. See also ***Tatts Group*** *Limited v State of Victoria* [2013] VSC 301 at [33]; *Carol Ann* ***Matthews v SPI*** *Electricity Pty Ltd* [2014] VSC 65 at [24(k)].

18. While a balancing exercise is required in the third stage, that does not mean the scales begin evenly balanced. On the contrary, it is clear that in respect of many kinds of documents the scales begin heavily tilted in favour of non-disclosure.[14] This is one such case.

19. When considering the documents in the context of the particular litigation, relevance to the proceedings is of itself insufficient. The documents must have an important bearing upon the ultimate decision on the relevant questions.[15]

20. In adjudicating PII claims, courts have long-recognised that a fair trial does not mean a perfect trial.[16] Rather, the legal right to a fair trial, truly stated, 'is a right to a trial as fair as the courts can make it'.[17] As noted by Gibbs CJ, Wilson, Brennan and Dawson JJ in *Alister* at 469:

> The disposal of any point in litigation, without the fullest argument on behalf of the parties, is a course to which every court reacts adversely, however untenable the point in issue may first appear, and however unlikely it is that argument will assist it. The present case evokes the same reaction. But it is the inevitable result when privilege is rightly claimed …

21. The 'fairness of trial' principle involves fairness not only to the parties to proceedings but also to other persons whose interests may be materially affected.[18] It is only if a 'strong case has been made out for the production of the documents, and the court concludes that the disclosure would not really be detrimental to the public interest, an order for production will be made'.[19] A Court will be slow to order production of documents the disclosure of which would be injurious to the public interest in litigation 'seeking to vindicate private rights'.[20]

22. It is not necessary to establish that harm to the public interest will arise from disclosure, as a matter of probability. Rather, the proper test is whether harm to the public interest

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14 *NLC* at 618, noting that 'where it is established that a document belongs to a class which attracts immunity, a court will lean initially against ordering disclosure'.

15 *Tatts Group* at [33], *Matthews v SPI* at [24(k)]; *Krew v Federal Commissioner of Taxation* (1971) 2 ATR 230 at 232.

16 *R v Ngo* [2003] NSWCCA 82 at [99], citing *Jarvie*, and the High Court cases of *Jago* v *District Court of NSW* (1989) 168 CLR 23 and *Dietrich v The Queen* (1992) 177 CLR 292.

17 *Jago v District Court* (1989) 168 CLR 23 at 49.

18 *R v Ngo* [2003] NSWCCA 82 at [78].

19 *Sankey v Whitlam* at 43.

20 *NLC* at 619.

could arise (as a matter of real possibility). This is because the incurring of a real risk of harm is itself injurious to the public interest.[21]

c. Inspection of documents the subject of an immunity claim

23. When a claim for PII is made, the court may inspect the documents in question if it is necessary to do so in order to rule upon the claims.[22] There remains some controversy in relation to the circumstances in which inspection may take place.[23] Nevertheless, to assist the Court in determining the Commissioner's PII claim, the documents that are the subject of the Commissioner's PII claim with respect to the Third AFP Subpoena have been confidentially annexed at SL-1 to the Confidential Lee Affidavit.

d. Full opportunity to be heard

24. The Court is duty bound to give the Commissioner an opportunity to intervene and be heard fully, including through the provision of affidavit material, before ruling against the Commissioner. This may involve providing further affidavit material if it is necessary to fully explain the Commissioner's PII claims.[24]

25. If the Court is not satisfied that there is a sufficient basis to uphold the Commissioner's PII claim based on the content of the Open Lee Affidavit and the Confidential Lee Affidavit, the Commissioner seeks the opportunity to provide further affidavit evidence to the Court in support of his claim.

THE COMMISSIONER'S PII CLAIM

26. The Commissioner's PII claim is made on the basis that the disclosure of the Relevant Documents would prejudice the AFP's ongoing criminal investigations.

27. Disclosure of the Relevant Documents would be contrary to the public interest because it would disclose information that would:

    (a) prejudice the availability of reliable witness evidence;[25]

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21 See *Conway v Rimmer* [1968] AC 910 at 940, referred to with approval in *Sankey v Whitlam* at 39.2; *Rogers v Home Secretary* [1973] AC 388 at 410E-F; *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (No 2) [1974] AC 405 at 434F; *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1143; *The Australian Statistician v Leighton Contractors Pty Ltd* (2008) 36 WAR 83 at [46].

22 *A-G for NSW v Stuart* (1994) 34 NSWLR 667 at 672; *Alister* at 416 and 453-4.

23 *Lanyon Pty Ltd v Commonwealth* (1974) 129 CLR 650 at 653; *Murrumbidgee Ground-Water Preservation Association v Minister for Natural Resources* [2003] NSWLEC 322 at [19].

24 See also *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 681E.

25 Open Lee Affidavit, [22.1].

(b) reveal details of evidence and lines of enquiry currently being explored during the AFP's investigative proceed;[26] and

(c) risk evidence contamination which cannot be eliminated by the orders currently made in the proceedings pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the **NSI Act**).[27]

28. In addition, Assistant Commissioner Lee has identified additional likely consequences of disclosure in the Confidential Lee Affidavit that would also be contrary to the public interest. For the reasons apparent in that affidavit, those consequences cannot be discussed in any detail in these open submissions.

29. The Commissioner submits the following general principles will assist the Court in adjudicating the claims.

a. The need to protect an important public interest

30. The PII claims are not made to prevent the applicant, or the respondents for that matter, from accessing material. The Commissioner does not make the PII claims lightly. They are made to protect an important public interest; that is, maintaining the effectiveness of ongoing investigations in serious, significant, alleged offences against the laws of the Commonwealth.[28]

31. It is well-recognised that a PII claim cannot be waived.[29] Indeed, public officials and former public officials, including current or former members of the ADF in the present proceedings, cannot conduct themselves so as to preclude a court upholding a soundly-based PII claim.

b. The significance of protecting an ongoing criminal investigation

32. Courts have consistently recognised that a high-premium attaches to the protection of sensitive police methodologies, capabilities, policies and procedures to ensure the ongoing supply of relevant information.[30] The rationale for such protection is to ensure

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26 Open Lee Affidavit, [22.2].

27 Open Lee Affidavit, [22.3].

28 Open Lee Affidavit, [16].

29 *DPP Reference Under Section 693A of the Criminal Code Re Y and Others* (1998) 100 A Crim R 166 at 174.

30 *A-G (NSW) v Stuart* (1994) 34 NSWLR 667 at 675, 680-681. See also, *Ryan v Victoria* [2015] VSCA 353 at [56]; *Collard v Western Australia (No 3)* [2013] WASC 70 at [13]; *Commissioner of Police New South Wales v Nationwide News Pty Ltd* (2007) 70 NSWLR 643 at 648 [35]; *Western Australia v Christie* (2005) 30 WAR 514 at 522-523; *Marsden v Amalgamated Television Services Pty Limited* [1999] NSWSC 212 at [160]; *Seymour v Price* [1998] FCA 1224; *Eastman v The Queen* (1997) (1997) 76 FCR 9 at 65; *Beneficial Finance Corporation Ltd v Commissioner of the Australian Federal Police* (1991) 31 FCR 523 at 527-528; *Conway v Rimmer* [1968] AC 910 at 953-954.

that crime can be effectively investigated and prosecuted. Unless protection is provided the administration of justice will be compromised.[31]

33. As Hunt CJ at CL observed in *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 675:

> As another part of that broader public interest, it is essential that nothing used by police in their pursuit of criminals should be disclosed which may give any useful information concerning continuing inquiries to those who organise criminal activities: *Conway v Rimmer* (at 953-954); or which may impede or frustrate the police in that pursuit: *ibid* (at 972); or which may reveal matters to the prejudice of future police activities: *Young v Quin* (1985) 4 FCR 483 at 492; 59 ALR 225 at 234; *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 52 A Crim R 423 at 436-437; and on appeal (1991) 31 FCR 523 at 527-528; 103 ALR 167 at 172; 58 A Crim R 1 at 5.

34. In this respect, Courts have also repeatedly emphasised the special importance which attaches to protection of confidential sources of information to law enforcement.[32] That expression, 'confidential sources of information to law enforcement', can include, obviously, a variety of sources such as technological capabilities, liaison relationships with foreign law enforcement agencies, and human sources.

35. In the context of human sources, or informers, in *Attorney-General (NSW) v Lipton* [2012] NSWCCA 156 at [38], Basten JA stated:

> In practice, informers fall into different categories, as do the threats attendant upon disclosure. Each case must depend, to a certain extent, upon its own facts, although the importance of maintaining trust in the ability of a police force to offer protection to informers is a consideration of general application.

36. When assessing the risk of harm to the safety of persons who are informers, courts apply a 'calculus of risk approach'. Adamson J described this approach in *R v Khayat (No 2)* [2019] NSWSC 1315 at [20], as follows:

> The calculus of risk approach requires the court to consider the nature, imminence and degree of likelihood of harm occurring to the relevant person or persons. If the prospective harm is very severe, as in the present case, it may more readily be concluded that the order is necessary even if the risk does not rise beyond a mere possibility. The calculus of risk approach has been endorsed in *AB (A Pseudonym) v CD (A Pseudonym)* [2019] HCA 6 at [14] (Nettle J); *AB (A Pseudonym) v R (No 3)*

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31 *O'Shane v Burwood Local Court (NSW)* [2007] NSWSC 1300 at [42].

32 See eg, *Jarvie v The Magistrates Court of Victoria* [1995] 1 VR 84 at 88, *Arthur Stanley Smith* (1996) 86 A Crim R 308 at 311, *Savvas* (1989) 43 A Crim R 331 at 336-7, *Attorney-General (NSW) v Lipton* [2012] NSWCCA 156 at [38].

[2019] NSWCCA 46 at [56]- [58] (Hoeben CJ at CL, Price and Adamson JJ); *Hamzy v R* [2013] NSWCCA 156 at [60] (Harrison J) and *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36 at [16]- [17] (Besanko J).

The ongoing criminal investigation that is subject to the Commissioner's PII claim

37. The Confidential Lee Affidavit outlines, with considerable specificity, the considerations which may impede or frustrate the AFP's ongoing investigations into war crimes allegedly committed by ADF members in Afghanistan. It should not, necessarily, be assumed that it is only the Applicant's alleged conduct which is, or is to be, the subject of investigation, particularly having regard to the creation of the Office of the Special Investigator.

38. By corollary, the Commissioner's PII claims ought not to be rejected because of the absence of any open detail about the nature and current status of those investigations, because disclosure of those details would necessarily result in the ventilation of some of the very information for which PII is claimed.[33]

39. There are two reasons why such an approach is necessary in the circumstances of an ongoing police investigation:

    (a) disclosure of details about the nature and current status of the AFP's investigations will create an opportunity of individuals to conduct 'mosaic analysis' cannot be underestimated;[34] and

    (b) the official confirmation or endorsement, or positive denial, of matters which have previously been the subject of speculation or guess work only, may itself be harmful.

c. The defamation proceedings concern the enforcement of private rights

40. It is significant the present proceedings concern private rights. While the enforcement of the Applicant's private rights is of considerable importance to him, in civil cases, it will only be where exceptional circumstances give rise to a significant likelihood that the interest of a litigant seeking to vindicate private rights outweighs the very high public interest, in this case, of the proper functioning of the AFP's in its investigation of serious criminal offences.[35]

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33 *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 681.

34 See *Church of Scientology v Woodward and Others* (1982) 154 CLR 25 at 51.7; *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199 at [23]; *Watson v AWB Ltd (No 2)* (2009) 259 ALR 524 at [32]; *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd (No 5)* [2010] FCA 232 at [11]-[12] and *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2009] FCAFC 183 at [56]-[63].

35 *NLC* at 618-619; *Matthews v SPI* at [24(l)]

41. Of course, the position in criminal proceedings may be different where, for example, the documents sought by a subpoenas concerning a police investigation in a prosecution arising from the investigation. This is not such a case.

d. The importance of the documents in the proceedings

42. When considering a PII claim, in order for the public interest in the administration of justice to arise in the balancing exercise , the Court must consider the importance of the documents in the proceedings, and be satisfied that the documents must contain material evidence. Relevance to the proceedings is of itself insufficient.[36]

43. In practice, this will require the Applicant to explain to the Court the forensic purpose for which the subpoenaed material is sought and the likely significance of the evidence to his case. If the Applicant cannot point to a real or substantial public interest in admitting the information into evidence, then the balancing exercise is likely to be little more than a formality.

e. The risk of harm cannot be ameliorated by other means

44. Assistant Commissioner Lee has considered whether the risk of harm as a consequence of disclosure of the Relevant Documents could be ameliorated by any one of the following alternatives: further orders made under the NSI Act, and non-publication and/or non-disclosure orders.

45. For the reasons identified in the Confidential Lee Affidavit, Assistant Commissioner Lee is of the view that any such order would not sufficiently ameliorate the real risk of harm as a consequence of disclosure of the Relevant Documents.

46. The Commissioner's PII claim cannot be waived (see paragraph 31 above). It is the only mechanism by which the public interest in protecting the AFP's ongoing criminal investigation may be preserved and protected in the present case. Accordingly, the claim should be upheld.

CONCLUSION

47. Assistant Commissioner Lee has identified, with considerable specificity, the harm that would result from disclosure of the PII Information in his confidential affidavit.

48. Assistant Commissioner Lee's evidence is well-reasoned and compelling. The potential for prejudice to the public interest that may result from disclosure of the Relevant Documents is self-evident and significant.

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[36] *Matthews v SPI* at [24(k)]; *Krew v Federal Commissioner of Taxation* (1971) 2 ATR 230 at 232

49. When proper weight is given to the well-recognised importance of protecting ongoing criminal investigations conducted by police, the public interest in non-disclosure of the Relevant Documents outweighs the public interest, if any, in disclosure of those documents in the present proceedings.

50. It is submitted that there is sufficient evidence for this Court to uphold the Commissioner's PII claim on the basis that disclosure of the Relevant Documents will prejudice and the AFP's ongoing criminal investigations, may cause grave harm to the public interest in the proper functioning of the AFP's investigative role, and the administration of justice more generally.

Date: 3 May 2021

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