

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/05/2021 2:55:14 PM 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



Sia Lagos

Dated: 6/05/2021 2:54:23 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 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 59
Rule 29.02(1)

Affidavit

No: .NSD 1485 of 2018

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

BEN ROBERTS-SMITH

Applicant

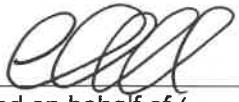
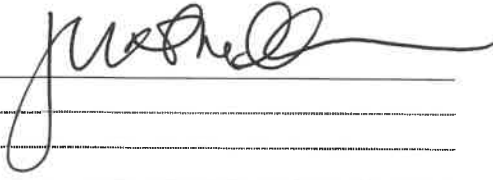
FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

Affidavit of: Justine Munsie
Address: Level 12, 60 Carrington Street, Sydney NSW 2000
Occupation: Solicitor
Date: 30 April 2021

I Justine Munsie of Level 12, 60 Carrington Street Sydney New South Wales, Solicitor, say on oath:

1. I am the solicitor for the person known in these proceedings as Person 35 and I am authorised to make this affidavit on their behalf.
2. The matters set out in my affidavit are true based on my knowledge, or where indicated, are based on inquiries of relevant persons who I identify.
3. On 1 April 2021, on instructions from Person 35, I accepted service of a subpoena (**Subpoena**) that had been issued by the respondents on that day.
4. Annexed and marked **JMM1** is a copy of an email sent to me on 29 April 2021 by Ms Stacey Hahn, solicitor for the Commonwealth, attaching a copy of Ms Hahn's letter to the

Filed on behalf of (name & role of party)		Person 35 (third party)
Prepared by (name of person/lawyer)		Justine Munsie
Law firm (if applicable)	Addisons	
Tel	02 8915 1011	Fax 02 8916 2000
Email	justine.munsie@addisons.com	
Address for service	Level 12, 60 Carrington Street Sydney NSW 2000	

parties dated 28 April 2021 regarding the Commonwealth's claim of public interest immunity in respect of the Subpoena, amongst other matters.

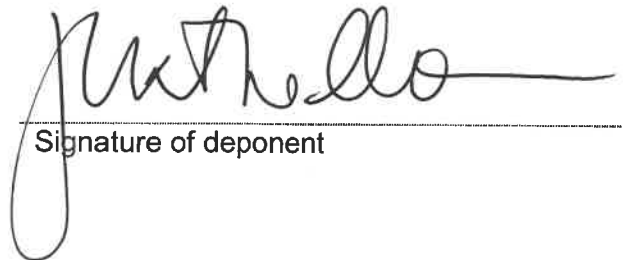
- 5. Annexed and marked **JMM2** is a copy of an email sent to me on 29 April 2021 by Mr Jeremy Forbes, of Minter Ellison, the solicitors for the respondents, attaching his email to Ms Hahn of the same date.
- 6. Person 35 wishes to make submissions in support of their application to set aside the Subpoena.
- 7. Exhibited and marked **Confidential JMM3** is a copy of the document in the possession of Person 35 which answers the Subpoena and from which I have redacted and de-identified content in accordance with the proposal made in Ms Hahn's letter contained in Annexure JMM1 and the agreement of Mr Forbes set out in Annexure JMM2.
- 8. Person 35 is presently the subject of a direction made under section 21(1) of the *Inspector General Australia Defence Force Regulations 2016* which prevents Person 35 from disclosing the content of the redacted parts of Confidential Exhibit JMM3 and other matters relating to that content and relevant to the unredacted content, including for the purpose of legal argument.

Sworn
at Sydney
in New South Wales
on 30 April 2021
Before me:



Signature of witness
Solicitor

)
)
)
)
)
Signature of deponent



And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for more than 12 months.



No: NSD 1485 of 2018

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

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

This is the Annexure marked **JMM1** referred to in the affidavit of Justine Munsie sworn on 30 April 2021 before me



Filed on behalf of (name & role of party) Person 35 (third party)
Prepared by (name of person/lawyer) Justine Munsie
Law firm (if applicable) Addisons
Tel 02 8915 1011 Fax 02 8916 2000
Email justine.munsie@addisons.com
Address for service Level 12, 60 Carrington Street Sydney NSW 2000

JMM 1

Justine Munsie

From: Hahn, Stacey <Stacey.Hahn@ags.gov.au>
Sent: Thursday, 29 April 2021 12:02 PM
To: Justine Munsie
Cc: Alexander, Kristy; Bell, Emily
Subject: Ben Roberts-Smith v Fairfax & Ors - Subpoena to Person 35
[SEC=OFFICIAL:Sensitive] [AGSDMS-DMS.FID3637016]
Attachments: 20210428 Letter to parties - SOCOMD Subpeonas.PDF
FilingDate: 29/04/2021 12:16:00 PM

[Caution: Please confirm the source of this email before opening any attachment or link]

OFFICIAL: Sensitive

Dear Justine

As discussed on the phone yesterday, **attached** is a copy of our letter to the parties sent last night.

Regards
Stacey

Stacey Hahn
Senior Lawyer
Australian Government Solicitor
T 02 9581 7594
stacey.hahn@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

Important: This message may contain confidential or legally privileged information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS.

OFFICIAL: Sensitive

If you have received this transmission in error please notify us immediately by return e-mail and delete all copies. If this e-mail or any attachments have been sent to you in error, that error does not constitute waiver of any confidentiality, privilege or copyright in respect of information in the e-mail or attachments.

CONFIDENTIAL



Our ref. 18007526

28 April 2021

Mr Peter Bartlett
MinterEllison

By email: peter.bartlett@minterellison.com
dean.levitan@minterellison.com
jeremy.forbes@minterellison.com

Australian Government Solicitor
Level 42, MLC Centre
19 Martin Place Sydney NSW 2000
GPO Box 2727 Sydney NSW 2001
T 02 9581 7777 F 02 9581 7778 DX 444 Sydney
www.ags.gov.au

Canberra
Sydney
Melbourne
Brisbane
Perth
Adelaide
Hobart
Darwin

Mr Mark O'Brien
Mark O'Brien Legal

By email: mark.obrien@markobrienlegal.com.au
monica.allen@markobrienlegal.com.au
paul.svilans@markobrienlegal.com.au

Dear Colleagues

Ben Roberts-Smith v Fairfax Media Publication & Ors and related proceedings (NSD1485/2018, NSD1486/2018 and NSD 1487/2018) – SOCOMD Subpoenas

1. We refer to the orders made by her Honour Justice Abraham on 22 April 2021 (**22 April orders**), in particular, orders 14 and 19.
2. We also refer to our letter to the parties dated 24 March 2021 (copy **enclosed** for ease of reference).

Respondents' SOCOMD Subpoenas

Subpoena to Person 35

3. In accordance with order 18 of the 22 April orders, we have been informed that Person 35 holds one document which is responsive to the subpoena to produce issued to him dated 1 April 2021 (the **Person 35 Document**).
4. We are instructed that the Person 35 Document contains information over which the Commonwealth claims public interest immunity (**PII**). The basis of such claim is the same as outlined in paragraphs 9 to 13 of our letter of 24 March 2021. We note that in response to that letter, by letter dated 26 March 2021, the Respondents confirmed they would withdraw the Second IGADF Subpoena.
5. We are instructed that the Person 35 Document also contains identifying information as defined in the orders made by his Honour Justice Besanko on 15 July 2020 (as amended on 17 December 2020 and 5 March 2021) pursuant to section 38B of the

National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (NSI Act) (s 38B orders).

6. We are instructed to propose that:
- a. those parts of the Person 35 Document over which the Commonwealth claims public interest immunity be redacted; and
 - b. pseudonyms or redactions (as appropriate) be applied to identifying information contained in the Person 35 Document.

If the Respondents agree to this approach, we are instructed that it will not be necessary for the Commonwealth to press its PII claim in respect of the Person 35 Document on 7 May 2021.

7. Could the Respondents indicate **by COB on 29 April 2021** whether the course proposed in [6] above is agreed. Additionally, if the Applicant has any concerns regarding such an approach, please let us know. In the event it is not agreed, the Commonwealth notifies the parties of its intention to make a PII claim in respect of information contained in the Person 35 Document.

Subpoena to Persons 29

8. The Commonwealth claims PII over parts of one document which the Commonwealth understands is responsive to the subpoena (the **Person 29 Document**). The basis of such claim is the same as outlined in paragraphs 9 to 13 of our letter of 24 March 2021. The Person 29 Document also contains identifying information as defined in the s 38B orders.
9. The Commonwealth also proposes the same course be adopted in respect of the Person 29 Document as outlined in [6] above, subject to Person 29 agreeing to such course. Could the Respondents indicate **by COB on 29 April 2021** whether the course proposed in [6] above is agreed in respect of the Person 29 Document. Additionally, if the Applicant has any concerns regarding such an approach, please let us know.
10. In the event it is not agreed, the Commonwealth notifies the parties of its intention to make a PII claim in respect of information contained in the Person 29 Document.

Subpoena to Person 32

11. The Commonwealth has not received a list of documents responsive to the subpoena to produce issued to Person 32.
12. While the Commonwealth is not in a position to precisely formulate any PII claim in respect of documents held by Person 32 without understanding what those documents are, given the terms of the subpoenas, it is anticipated that Person 32 may hold documents of a similar kind to the Person 35 Document and the Person 29 Document.
13. If that is the case, the Commonwealth claims PII in respect of information likely to be contained in such document on the same basis as outlined in paragraphs 9 to 13 of

our letter of 24 March 2021. The Commonwealth also proposes the same course be adopted in respect of such document as outlined in [6] above.

Applicant's SOCOMD Subpoenas

14. We refer to our letters dated 16 and 18 March and 22 April 2021 and confirm for completeness that the Commonwealth makes PII claims in respect of documents responsive to the Applicant's SOCOMD Subpoenas, insofar as those subpoenas seek production of materials pertaining to the AFP's ongoing criminal investigations. An outline of the basis of those claims appears in our letter dated 16 March 2021.
15. In addition, we are instructed that the Commonwealth makes PII claims over the following material responsive to the Applicant's SOCOMD Subpoenas:
 - a. Parts of one document responsive to the subpoena issued to Person 4 (the **Person 4 Document**). The basis of such claim is the same as outlined in paragraphs 9 to 13 of our letter of 24 March 2021. The Person 4 Document also contains identifying information as defined in the s 38B orders. In respect of this document, the Commonwealth repeats its proposal at [6] above. Could the Applicant please advise **by COB on 29 April 2021** whether he is agreeable to this proposed course.
 - b. Documents responsive to the subpoena issued to Person 18, the disclosure of which has the potential to prejudice the integrity and efficacy of the IGADF's information gathering function and compromise the conduct of future inquiries. Could the Applicant please advise **by COB on 29 April 2021** whether the Commonwealth's PII claim in this regard is opposed.
16. The Commonwealth reserves its rights to make a PII claim or other objection over any further material that may be notified by the recipients of the Respondents' SOCOMD Subpoenas or the Applicant's SOCOMD Subpoenas as being responsive to those subpoenas, about which the Commonwealth is not presently aware.
17. We note that we intend to provide a copy of this letter to Persons 4, 18, 29, 32 and 35 (or their legal representatives).

Yours sincerely



Kristy Alexander
Senior Executive Lawyer
T 02 9581 7640 F 02 9581 7732
Kristy.Alexander@ags.gov.au

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

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

This is the Annexure marked **JMM2** referred to in the affidavit of Justine Munsie sworn on 30 April 2021 before me



JMM 2

Justine Munsie

From: Jeremy Forbes <Jeremy.Forbes@minterellison.com>
Sent: Thursday, 29 April 2021 4:11 PM
To: Justine Munsie
Cc: Peter Bartlett; Dean Levitan; Dougal Hurley; Dylan Dexter
Subject: FW: Ben Roberts-Smith v Fairfax & Ors - SOCOMD Subpoenas [SEC=OFFICIAL:Sensitive] [AGSDMS-DMS.FID3637016] [ME-ME.FID4106433]

[Caution: Please confirm the source of this email before opening any attachment or link]

Dear Ms Munsie,

Please see below the email issued by the Respondents to the Commonwealth.

Kind regards

Jeremy

Jeremy Forbes

Lawyer

T +61 2 9921 4620

jeremy.forbes@minterellison.com

MinterEllison Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000

minterellison.com Follow us on **LinkedIn** and **Twitter**

From: Jeremy Forbes

Sent: Thursday 29 April 2021 04:09 PM

To: 'Hahn, Stacey' <Stacey.Hahn@ags.gov.au>; Monica Allen <Monica.Allen@markobrienlegal.com.au>

Cc: Peter Bartlett <Peter.Bartlett@minterellison.com>; Dean Levitan <Dean.Levitan@minterellison.com>; Dougal Hurley <Dougal.Hurley@minterellison.com>; Dylan Dexter <Dylan.Dexter@minterellison.com>

Subject: RE: Ben Roberts-Smith v Fairfax & Ors - SOCOMD Subpoenas [SEC=OFFICIAL:Sensitive] [AGSDMS-DMS.FID3637016] [ME-ME.FID4106433]

Dear Colleagues,

We refer to your letter of 29 April 2021.

The Respondents confirm that they are content with the Commonwealth's proposal at paragraph [6] (in relation to the Person 35 Document) and paragraph [9] (in relation to the Person 29 Document) of your letter.

We will provide a copy of this email to the legal representative for Person 35. Could you please kindly provide us the details of the legal representative for Person 29, so that we can also provide them with a copy of this correspondence?

Kind regards

Jeremy

Jeremy Forbes

Lawyer

T +61 2 9921 4620

jeremy.forbes@minterellison.com

From: Hahn, Stacey <Stacey.Hahn@ags.gov.au>
Sent: Wednesday 28 April 2021 08:38 PM
To: Monica Allen <Monica.Allen@markobrienlegal.com.au>; Jeremy Forbes <Jeremy.Forbes@minterellison.com>
Cc: Paul Svilans <Paul.Svilans@markobrienlegal.com.au>; Mark O'Brien <Mark.O'Brien@markobrienlegal.com.au>; Peter Bartlett <Peter.Bartlett@minterellison.com>; Dean Levitan <Dean.Levitan@minterellison.com>; Dougal Hurley <Dougal.Hurley@minterellison.com>; Alexander, Kristy <Kristy.Alexander@ags.gov.au>; Bell, Emily <Emily.Bell@ags.gov.au>
Subject: Ben Roberts-Smith v Fairfax & Ors - SOCOMD Subpoenas [SEC=OFFICIAL:Sensitive] [AGSDMS-DMS.FID3637016]

OFFICIAL: Sensitive

Dear colleagues

Our letter of today is **attached**.

Regards
Stacey

Stacey Hahn
Senior Lawyer
Australian Government Solicitor
T 02 9581 7594
stacey.hahn@ags.gov.au

Find out more about AGS at <http://www.ags.gov.au>

Important: This message may contain confidential or legally privileged information. If you think it was sent to you by mistake, please delete all copies and advise the sender. For the purposes of the *Spam Act 2003*, this email is authorised by AGS.

OFFICIAL: Sensitive

If you have received this transmission in error please notify us immediately by return e-mail and delete all copies. If this e-mail or any attachments have been sent to you in error, that error does not constitute waiver of any confidentiality, privilege or copyright in respect of information in the e-mail or attachments.

MinterEllison has a 24-hour chatbot helpline offering guidance on a range of COVID-19 related topics and a COVID-19 Hub on our website.

IMPORTANT INFORMATION, PLEASE READ

This email, including any attachments, is confidential and may be legally privileged (and neither is waived or lost by mistaken delivery). Please notify us if you have received this email in error and promptly delete it from your system. Any unauthorised use of this email is expressly prohibited. Our liability in connection with this email (including due to viruses in any attachments) is limited to re-supplying this email and its attachments. We collect personal information to provide and market our services and for other purposes - please refer to our privacy policy for more information on how we collect and handle personal information.

Official:Sensitive

