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Details of Filing

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

No NSD 1485 of 2018
NSD 1486 of 2018
NSD 1487 of 2018

BEN ROBERTS-SMITH
Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others
Respondents

SUBMISSIONS OF THE INSPECTOR-GENERAL OF THE AUSTRALIAN DEFENCE FORCE AND THE COMMONWEALTH:
CLAIMS OF PUBLIC INTEREST IMMUNITY

INTRODUCTION

1. The Inspector-General of the Australian Defence Force (**IGADF**) claims public interest immunity over documents (or parts of documents) sought by:

    a. A subpoena issued at the request of the Applicant on 2 March 2021, and reissued on 15 March 2021 (**IGADF Subpoena**).

    b. A subpoena issued at the request of the Applicant on 18 December 2020 to a person known in these proceedings by the pseudonym Person 18 (**Person 18 Subpoena**)

2. In addition, the Commonwealth as represented by the Department of Defence (**Defence**) claims public interest immunity over documents sought by a subpoena issued at the request of the Applicant on 18 December 2020 to a person known in these proceedings by the pseudonym Person 4 (**Person 4 Subpoena**).

3. These submissions are structured as follows:

    a. **Part 1** provides a summary of the general principles relevant to determination of a claim of public interest immunity.

    b. **Part 2** provides a brief overview of the evidence on which the IGADF and Defence rely in support of the claims of public interest immunity.

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c. **Part 3** addresses the reasons why the IGADF's claims of public interest immunity should be upheld. Briefly stated these reasons relate to avoiding significant prejudice to:

(i) the personal safety of persons in Afghanistan who cooperated with the IGADF's inquiry into rumours and allegations of breaches of the Law of Armed Conflict by elements of the ADF's Special Forces in Afghanistan (the **Afghanistan Inquiry**); and

(ii) the IGADF's ability to fulfil his statutory functions in the future.

d. **Part 4** addresses the reasons why Defence's claims of public interest immunity should be upheld.

e. **Part 5** addresses the reasons why the public interest cannot be adequately protected by orders under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**).

PART I PUBLIC INTEREST IMMUNITY: GENERAL PRINCIPLES

THE COMMON LAW APPLIES

4. The *Evidence Act 1995* (Cth) (**Evidence Act**) applies to the adducing of evidence during the trial process in the Federal Court: s 4 of the Evidence Act. Certain States have, through amendments to their Evidence Act, extended the operation of s 130 (which concerns the exclusion of evidence of 'matters of state') to certain pre-trial processes: see, for example, s 131A of the *Evidence Act 1995* (NSW) and s 131A of the *Evidence Act 2008* (Vic). However, the Commonwealth has not. Accordingly, the determination of claims of public interest immunity which arise during pre-trial processes, such as those referred to in [1]-[2] above, are still determined under the common law: *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341.

THE NATURE OF PUBLIC INTEREST IMMUNITY

5. Public interest immunity is an immunity from the production of documents or disclosure of information, where such production or disclosure would be contrary to the public interest.[1] There are recognised categories of documents that are prima facie immune from compulsory production, such as documents concerning national security, documents revealing the identity of informers, and documents obtained in the course of criminal or analogous investigations. However, the circumstances in which production of documents may be contrary to the public interest are not closed: *Finch v Grieve and Others* (1991) 22 NSWLR 578 at 591 (Wood J); *Australian National Airlines Commission v Commonwealth of Australia and Canadian Pacific Airlines Ltd* (1975) 132 CLR 582 at 591 (Mason J).

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[1] While a claim of public interest immunity may take the form of an objection either to the production of documents or the disclosure of information (eg, information in the form of a witness' answer to a question), the balance of these submissions will refer simply to an objection to documents, as this is the context in which the IGADF's claims of public interest immunity fall to be determined.

6. Public interest immunity is not just a 'rule of evidence'. It is a doctrine of substantive law that represents a fundamental immunity: *Jacobsen v Rogers* (1995) 182 CLR 572 at 589; *R v Baladjam [No 31]* [2008] NSWSC 1453; *R v Richard Lipton* [2011] NSWCA 247; *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62.

STANDING TO MAKE A CLAIM OF PUBLIC INTEREST IMMUNITY

7. A claim of public interest immunity can be made by an entity which is not a party to the proceedings: *Young v Quin* (1985) 4 FCR 483 at 485 (Bowen CJ), *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 (***Stuart***) at 690C (Smart J). Claims of public interest immunity are 'often' made by an 'arm of the executive' that is 'not a party to the litigation': *HT v The Queen* [2019] HCA 40; 374 ALR 216 (***HT v The Queen***) at [70] (Gordon J).

THE PROCESS FOR DETERMINING A CLAIM OF PUBLIC INTEREST IMMUNITY AND THE CONSEQUENCES OF UPHOLDING A CLAIM

8. The overriding common law principle is that a court ought not order the production of information or a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it.

9. Accordingly, as explained in *Alister v The Queen* (1984) 154 CLR 404 (***Alister***) at 412 (Gibbs CJ), whether a claim of public interest immunity ought to be upheld requires the Court to consider two conflicting aspects of the public interest:

    a. First, whether harm would be done by the disclosure of matters of state.

    b. Second, whether the proper administration of justice would be frustrated or impaired if the documents were withheld.

10. The final step – the balancing exercise – can only be undertaken when it appears that both aspects of the public interest require consideration; that is, when it appears on the one hand that damage would be done to the public interest by producing the documents and, on the other hand, that there are or are likely to be documents which contain material evidence: *Alister* at 412, 414 and 438; *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 675-676 (Hunt CJ at CL); *Burmah Oil Co Ltd v Governor and Company of the Bank of England* [1980] AC 1090 at 1113-1114. The Court can then consider the nature of the injury likely to be suffered by disclosure and the evidentiary value and importance of the documents in the particular litigation.

11. The consequences of a successful claim of public interest immunity are: (i) the information in question need not be produced for inspection by any party to the proceedings; (ii) the information in question cannot be adduced in evidence by any party; and (iii) the substantive proceedings continue, in effect, without regard to the existence of the information over which public interest immunity has been successfully asserted: *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61 (Mason J); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 (***Gypsy Jokers***) at [24] (Gummow, Hayne, Heydon and Kiefel JJ); *Condon v Pompano* (2013) 252 CLR 38 at [148] (Hayne, Crennan, Kiefel and Bell JJ); *HT v The Queen* at [29] and [32] (Kiefel CJ, Bell and Keane JJ) and [71]-[72] (Gordon J).

INSPECTION OF DOCUMENTS SUBJECT TO A CLAIM OF PUBLIC INTEREST IMMUNITY

12. In most cases where a claim of public interest immunity is made, the claim may be determined without the Court inspecting the documents over which the claim is made. However, the Court possesses the power to inspect the documents 'privately' if this is considered necessary to determine the claim of public interest immunity: see, for example, *Sankey v Whitlam* (1978) 142 CLR 1 at 46 (Gibbs ACJ); see also *Stuart* at 672 (Hunt CJ at CL), citing *Conway v Rimmer* [1968] AC 910 at 971, 979 and 995. Where this occurs, the documents are 'treated as confidential' and are inspected 'only for the purpose of determining the objection to disclosure': *HT v The Queen* at [33] (Kiefel CJ, Bell and Keane JJ); see also [71] (Gordon J). To avoid any suggestion of bias, it is often 'preferable' for an inspection of this kind, and the ensuing resolution of the claim of public interest immunity, to be 'by decision of a judicial officer other than the trial judge', as has occurred in the present matter: *Gypsy Jokers* at [24] (Gummow, Hayne, Heydon and Kiefel JJ).

CONFIDENTIAL EVIDENCE CAN BE UTILISED TO SUPPORT A PUBLIC INTEREST IMMUNITY CLAIM

13. In determining a claim of public interest immunity, it is permissible for a Court to consider confidential evidence, such as a confidential affidavit: see, for example, *Young v Quin* at 489 (Sheppard J); *National Crime Authority v Gould* (1989) 23 FCR 191 (***Gould***) at 198-199 (Foster J); *R v Meissner* (1994) 76 A Crim R 81 at 84-85 (Carruthers J; Smart and Grove JJ agreeing); *R v Smith* (1996) 86 A Crim R 308 at 310 (the Court); *R v Fandakis* [2002] NSWCCA 5 at [28] and [48] (Barr J; Ipp AJA and Hidden J agreeing); *Gypsy Jokers* at [180] (Crennan J); *Parkin v O'Sullivan* (2009) 260 ALR 503 at [8] and [23]-[30] (Sundberg J); *SBEG v Secretary, Department of Immigration* (2012) 291 ALR 281 at [10] (Besanko J). The Court undertakes that consideration on the same basis that it inspects documents over which a claim of public interest immunity is made, that is, privately or confidentially and only for the purpose of determining the claim: see, for example, *Gould* at 198-199 (Sheppard J), citing *Regina v Bebic* (unreported, 27 May 1982, NSW Court of Appeal). Consistently with this principle, some submissions below that refer to the IGADF's or Defence's confidential evidence have been redacted in the version of these submissions that has been filed and served, but are not redacted in the submissions provided to Abraham J.

CROSS-EXAMINATION OF THE DEPONENTS SHOULD NOT BE PERMITTED

14. A party is not ordinarily entitled to cross-examine the deponent of an affidavit in support of a claim of public interest immunity and an application for leave to conduct such a cross-examination should be allowed only in exceptional circumstances. As Hunt CJ at CL said in *Stuart* at 681 (emphasis in the original):

> There is, of course, no *right* to cross-examine such a deponent upon his affidavit, and leave to permit such a cross-examination is granted only very rarely; more usually, the party claiming immunity will be requested by the judge instead to produce further evidence which overcomes any defect in the claim which may be apparent on the face of evidence already produced.

15. In *Young v* Quin, Sheppard J observed that the reluctance of the courts to permit cross-examination of a deponent is 'principally because it will be impossible for any cross-examination to take place without the matters in respect of which the claim is made

becoming the subject of it and thus being revealed' (at 489; see also at 486 (Bowen CJ) and 495 (Beaumont J)).

PUBLIC INTEREST IMMUNITY IS DESIGNED TO PROTECT AGAINST A RISK OF HARM

16. The applicable test is whether harm to the public interest could arise from disclosure as a matter of real possibility, as opposed to a matter of probability. This is because 'the incurring of the identified risk [of harm] is itself injurious to the public interest': *The Australian Statistician v Leighton Contractors Pty Ltd* (2008) 36 WAR 83 at [46] (Steytler P, McLure JA and Newnes AJA).[2]

CIVIL AND CRIMINAL PROCEEDINGS

17. It is well recognised that, in determining a claim of public interest immunity, the balance between competing public interests 'may be struck differently in civil and criminal proceedings': *HT v The Queen* at [33] (Kiefel CJ, Bell and Keane JJ). The public interest in favour of disclosure is generally stronger in criminal proceedings, where the ultimate issue is the guilt or innocence of a particular individual: see, for example, *Alister* at 414 (Gibbs CJ) and 456 (Brennan J). By contrast, in civil proceedings the 'interests of a litigant seeking to vindicate private rights' will rarely prevail over an important public interest such as the protection of Cabinet confidentiality or national security: see, for example, *Commonwealth v Northern Land Council* (1992) 176 CLR 604 at 618 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ). This is so notwithstanding that the consequence of upholding the claim of public interest immunity may be that a party is 'handicapped' in the conduct of his or her case, or even that the case is doomed to fail: see, for example, *Gypsy Jokers* at [5] (Gleeson CJ) and [24] (Gummow, Hayne, Heydon and Kiefel JJ).

PART II EVIDENCE

INTRODUCTION

18. The courts have long recognised that 'full respect' and 'great weight' should be given to the evidence of the deponent who makes an affidavit in support of a claim of public interest immunity, particularly where: (i) the deponent is a person of seniority and standing within the executive arm of government; (ii) the affidavit has been prepared with obvious care; and (iii) the matters in respect of which the evidence is given are not or not wholly within the competence of the Court to evaluate for itself: see, for example, *Sankey v Whitlam* at 43-44, 46 (Gibbs ACJ) and 59-60 (Stephen J).

AFFIDAVIT IN SUPPORT OF IGADF'S PUBLIC INTEREST IMMUNITY CLAIMS

19. The IGADF is a full-time statutory office-holder appointed pursuant to s 110E(1) of the *Defence Act 1903* (Cth) (***Defence Act***). The office of the IGADF is established by s 110B of

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[2] See also *Conway v Rimmer* [1968] AC 910 at 940, referred to with approval by Gibbs ACJ in *Sankey v Whitlam* at 39.2; *Rogers v Home Secretary* [1973] AC 388 at 410E-F (Lord Reid); *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 *Defence Act*, and the functions of the IGADF are set out in s 110C. The current IGADF is Mr James Morgan Gaynor.

20. In support of his claims of public interest immunity, the IGADF relies on an open affidavit of James Morgan Gaynor sworn on 3 May 2021 (**Gaynor Affidavit**) and a confidential affidavit of James Morgan Gaynor sworn on 3 May 2021 (**Confidential Gaynor Affidavit**).

21. Mr Gaynor was appointed with effect from 1 December 2016, after over 28 years' experience as a legal practitioner and Army officer: Gaynor Affidavit, [2], [4]. Prior to his appointment as the IGADF, Mr Gaynor served as the Deputy IGADF from February 2013 to December 2015 and, thereafter, was Acting IGADF until November 2016: Gaynor Affidavit, [3]. On 12 May 2016, Mr Gaynor (in his capacity as Acting IGADF) appointed Major-General the Honourable Paul Brereton AM RFD as an Assistant IGADF and directed him to conduct the Afghanistan Inquiry: Gaynor Affidavit, [16].

22. The experience of Mr Gaynor, most particularly over the course of the Afghanistan Inquiry, places him in a special position to assess the damage to the public interest that would arise if the information in question was released. Particular aspects of Mr Gaynor's evidence will be highlighted below.

AFFIDAVIT IN SUPPORT OF DEFENCE'S PUBLIC INTEREST IMMUNITY CLAIMS

23. In support of its claims of public interest immunity, Defence relies on an open affidavit of Brigadier Jane Maree Spalding sworn on 4 May 2021 (**Spalding Affidavit**) and a confidential affidavit of Brigadier Jane Maree Spalding sworn on 4 May 2021 (**Confidential Spalding Affidavit**).

24. Brigadier Spalding holds the position of Director General Sensitive Issues Management – Army: Spalding Affidavit at [6]. In this role, she is responsible for managing on behalf of Chief of Army, issues and matters relevant to Army which pertain to the IGADF's Afghanistan Inquiry; in essence, the 'fall out' from the Inquiry: Spalding Affidavit at [6].

PART III REASONS WHY IGADF'S CLAIMS OF PUBLIC INTEREST IMMUNITY SHOULD BE UPHELD

INTRODUCTION

25. The documents over which the IGADF claims public interest immunity are all documents relating to the Afghanistan Inquiry. The specific bases on which the public interest immunity claims are advanced, in respect of each subpoena, are set out in more detail below. However, to understand the context for those claims it is useful to begin with an overview of the very particular circumstances in which the Afghanistan Inquiry was conducted.

26. The IGADF deposes to the purpose of the Afghanistan Inquiry, and the circumstances in which it was conducted, in [16] to [27] of the Gaynor Affidavit. The Acting IGADF was on 20 March 2016 requested by the Chief of Army to commence an inquiry into the rumours and allegations of breaches of the Law of Armed Conflict by elements of the Special Forces of the Australian Defence Force in Afghanistan: [17]. Major-General Brereton, a judge of the

Court of Appeal of the Supreme Court of New South Wales, was tasked with conducting the inquiry and appointed to the role of Assistant IGADF for that purpose: [18].

27. On 29 October 2020, Major-General Brereton reported his findings to the IGADF by way of a confidential report setting out his findings and recommendations: Gaynor Affidavit, [22]. A heavily redacted version of the report was released to the public on 19 November 2020: [24]. The public release version of the report did not disclose the identities of any persons who had given evidence to the inquiry, whether voluntarily or under compulsion, or any persons in respect of whom findings or recommendations were made.

28. At the same time as the public version of the report was released, Major-General Brereton issued the following direction pursuant to s 21 of the IGADF Regulation (see pages 12-13 of the public release version, reproduced at Gaynor Affidavit, Annexure JMG-2):

> I direct that there is to be no public disclosure of the names of, or anything which would tend to identify:
>
> a. any person who has given evidence or information to the Inquiry who is referred to in Parts 2 or 3 of Reference C;
>
> b. any person mentioned in any finding or recommendation contained in the Report.

29. The Afghanistan Inquiry was conducted in circumstances of strict confidentiality: Gaynor Affidavit, [25].

30. The extensive measures taken to preserve the confidentiality of the Afghanistan Inquiry are detailed in [28] of the Gaynor Affidavit. Those measures included:

    a) a direction pursuant the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) (**IGADF Regulation**) that the Afghanistan Inquiry be conducted in private;

    b) the disclosure of information, even within the team of persons assisting the IGADF, only on a 'need to know' basis and only among a small group of persons;

    c) the conduct of interviews under circumstances of strict confidence and discretion;

    d) the issuance of directions to witnesses, pursuant to s 21 of the IGADF Regulation, restricting the disclosure of evidence given in the inquiry or any document received during the course of the inquiry;

    e) the issuance of similar non-disclosure directions, pursuant to s 21 of the IGADF Regulation, to any persons who received a Potentially Affected Person Notice (**PAP Notice**), being a notice that set out (for reasons of procedural fairness) the findings the inquiry was at that stage proposing to make;

    f) that information was tightly held, and was not shared with the Australian Defence Force chain of command, the Secretary of the Department of Defence or the Defence Minister; and

    g) a deliberate policy of not providing comments to the media.

31. The only information that has been publicly disclosed about the Afghanistan Inquiry's activities in Afghanistan is the fact that officers of the inquiry travelled there in 2019: Gaynor Affidavit, [38].

32. It is in that distinctive context that the IGADF's and Defence's public interest immunity claims are advanced.

IGADF SUBPOENA

33. By its subpoena of 2 March 2021 (reissued on 15 March 2021), the Applicant seeks production of documents which, broadly speaking, may be divided into two categories:

    a) documents which identify or disclose communications and information passing between the Afghanistan Inquiry and individuals in Afghanistan who may have assisted the Afghanistan Inquiry (**Afghan Information**); and

    b) documents relating to the identity of four Afghan nationals who are deceased, referred to as having the status of Enemy Killed in Action (**EKIA Information**).

34. The IGADF resists the production of EKIA Information only to the extent that such production would also reveal Afghan Information.

35. Amongst other things, the IGADF Subpoena seeks communications and documents relating to the identity of an 'Afghan agent' retained by the Afghanistan Inquiry to make inquiries in Darwan concerning events on 11 September 2002: see [1]-[3] of the schedule to the subpoena. [redacted]

Prejudice to the proper administration of justice is not established

36. The Applicant bears the onus of establishing the administration of justice would be frustrated or impaired if the documents sought by the subpoena are withheld: see paragraph 10, above.

37. The IGADF accepts that the withholding of information that is directly relevant to the credibility of any Afghan witness who will give evidence in these proceedings would impair, to some extent, the administration of justice. However, in light of the wide terms in which the subpoena is cast it is readily apparent there would be little, if any, frustration or impairment to the administration of justice if many of the documents sought by this subpoena were withheld. In particular:

    a) The Applicant has by correspondence to the Commonwealth dated 12 April 2021 identified the subpoena categories as being relevant to the credit of Afghan witnesses who gave evidence to the Afghanistan inquiry. However, the issue of credit does not arise in relation to 'all witnesses or potential witnesses' (see [3] of

the subpoena's schedule) save to the extent that such persons are giving evidence in these proceedings. [redacted]

b) It is difficult to see how the names, addresses and procedures used to verify the identity of witnesses or potential witnesses interviewed by the Afghanistan Inquiry (see [3] of the subpoena's schedule) could be relevant to any issue in dispute in these proceedings. To the extent the Applicant puts in issue the identity of persons who are to give evidence in these proceedings, that is a matter to be demonstrated in these proceedings rather than by reference to such verification methods as were used by the Afghanistan Inquiry. [redacted]

c) It is also difficult to see how the terms on which any 'Afghan agent' was retained (see [2] of the subpoena's schedule), or any payments were made to Afghan nationals (see [6] of the subpoena's schedule), could be relevant to any issue in dispute in these proceedings. [redacted]. If the hypothesised relevance (not articulated by the Applicant) is that the payment of monies would tend to undermine the reliability of any information given to the Afghanistan Inquiry, such payments would not have (on the hypothesis) been in relation to the evidence to be given by witnesses *in these proceedings*.

d) The subpoena seeks documents concerning the Darwan mission on 11 September 2012, rather than inquiries specifically concerning the matters alleged against the Applicant in the Respondents' Particulars of Truth (see [1], [3] [5] and [7] of the subpoena's schedule). [redacted]

The public interest clearly favours non-disclosure

38. To the extent there would be any impairment to the administration of justice in withholding information sought by the subpoena this is comfortably outweighed by the public interests against disclosure.

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[3] [redacted]

Public interests that favour non-disclosure

39. The public interests against disclosure fall into two principal categories:

    a) Protecting the safety of persons who have participated in the Afghanistan Inquiry, in circumstances where they were given an assurance that their evidence and identities would not be disclosed; and

    b) Preserving the ability of the IGADF to fulfil his statutory functions in the future by ensuring that he is able to honour the assurances given by the IGADF about the confidentiality with which the identities and evidence of witnesses would be treated.

40. The concerns for the personal safety of such persons who may have participated in the Afghanistan Inquiry are deposed to in the Gaynor Affidavit, [40]-[43]. The Applicant has previously accepted that concerns about the safety of Afghan witnesses could not be excluded.[4] Further, the Applicant also relied on issues relating to the safety of Afghan witnesses in opposing the Respondents' application for the evidence of Afghan witnesses to be heard via audio-visual link: *Roberts-Smith v Fairfax Media Publications Pty Limited (No 10)* [2021] FCA 317 at [58].

41. [redacted]

42. There is an inherent public interest in preventing disclosure where disclosure would put a person's safety at risk. So much has been recognised in the relevantly analogous context of police informants. In that context, it has been observed that, quite apart from the public interest in encouraging people to provide useful information to authorities (considered below), there is an independent public interest in protecting the persons involved: *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 233-234 (Kirby P).

43. Further, and in any event, the public interest favours non-disclosure because the production of documents that tend to reveal Afghan Information would undermine the IGADF's ability to perform his statutory functions in the future. That is because the disclosure of information, in circumstances where assurances were given as to its confidentiality, would tend to erode a person's confidence that their contributions to inquiries of a similar nature would be kept confidential.

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[4] Transcript 05.03.21, p. 43, ln 21.

44. Disclosure of the witnesses' identities and the substance of their evidence is likely to discourage persons who have information regarding matters the subject of IGADF inquiries (including members of the ADF's Special Forces as well as members of foreign armed forces) from communicating freely with the IGADF. [redacted]

45. Disclosure of the identities of persons who have given evidence to the Afghanistan Inquiry would be directly contrary to the purpose of the direction issued under s 21 of the IGADF Regulation on 29 October 2020, referred to in paragraph 28 above. Section 21 of the IGADF Regulation empowers the IGADF (or a person authorised by him under sub-s (2)) to give a direction restricting the disclosure of, relevantly: '(a) information contained in oral evidence given during the inquiry, whether in public or in private' and/or '(b) all or part of any document received during the course of the inquiry'. Permitting private litigants to use compulsory processes to circumvent the effect of such directions undermines the effectiveness of those directions and, in turn, erodes the degree of assurance that persons cooperating with IGADF inquiries derive from the existence of the direction-giving power.

46. Many of the persons who have provided information to the Inquiry have acted, in essence, as informers. There is a well-recognised and strong public interest in favour of protecting informers and encouraging future informers: see *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227and the cases discussed therein. The rationale behind the protection given to informers is clear: if such protection were not given, 'sources of information would dry up and the prevention and detection of crime would be hindered': *R v Smith* (1996) A Crim R 308 at 311 (Gleeson CJ, Clarke and Sheller JJA); see also *R v Lodhi* (2006) 199 FLR 270 at [37] (Whealy J) (referring to the importance of securing the 'free flow of information to intelligence or enforcement agencies'). The courts have also recognised that if proper protection is not provided to informers, especially informers who have provided information about those who are suspected of having committed offences of violence or other serious offences, their personal safety and that of their family may be put at risk: *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84 at 88 (Brooking J). In the present circumstances, if persons who have acted, or are considering acting, as informers to assist the work of the IGADF perceive that there is a risk that the IGADF cannot keep their identities and/or information secret, the IGADF's sources of information may be diminished.

47. In *Goldberg v Ng* (1994) 33 NSWLR 639 at 645, Kirby P noted that 'clearly an assurance of confidentiality is a factor to be taken into account' in determining a claim of public interest immunity (in that case, the assurance was given by the Law Society in the course of one of its investigations, although the claim was not ultimately upheld). Kirby P cited *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405 at 433; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 239; *Borg v Barnes* (1987) 10 NSWLR 734 at 738; *Neilson v Laugharne* [1981] QB 736 at 740; *Kanthal Australia Pty Ltd v Minister for Industry, Technology and Commerce* (1987) 14 FCR 90 at 94-95; 71 ALR 109 at 113-114. A further illustration of the judicial recognition of the public interest in honouring confidentiality so as to encourage freedom and candour is

Gallop J's comments in *Ninness v Graham* (1986) 86 FLR 138 at 144 concerning the importance of confidentiality in police internal investigations.

48. It is necessary to bear in mind in this respect that the IGADF has a range of important statutory functions with respect to the military justice system and the operations of the ADF, many of which depend on confidential communication to/from the IGADF. The authorities recognise that, in order to perform their statutory functions and discharge the responsibilities conferred on them by Parliament, regulators and other administrative bodies depend on members of the regulated community (or the public more broadly) to report allegations, complaints or other concerns: see, for example, *ASIC v P Dawson* at [48]-[50] (which concerned ASIC); *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia SRL* (2011) 283 ALR 137 esp. at [194]-[194] (which concerned the Australian Competition and Consumer Commission); *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 1 ACSR 311 at 312 (which concerned the National Companies and Securities Commission) and *R v Meissner* (1994) 76 A Crim R 81 (which concerned the NSW Crime Commission).

49. In addition, disclosure of the information sought by the subpoena would undermine the directions that the IGADF and the Assistant IGADF have made under the IGADF Regulation to preserve the confidentiality of the Inquiry, and thereby tend to impair the intended operation of the regime for the conduct of inquiries set out in Divisions 4 and 4A of Pt 4 of the IGADF Regulation.

50. Where particular legislation mandates or provides for a regime of confidential communication between a government agency and members of the public, '[t]he common law doctrine of public interest immunity should be applied consistently with the legislative policy manifest' in the regime: *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 at [38] (Heerey, Moore and Tracey JJ). Further, where legislation provides for an 'assurance of confidentiality' in respect of investigations by an administrative body, and gives the administrative body a power to compel disclosure on threat of sanction, that will point in favour of the existence of public interest immunity in respect of any information that the administrative body has obtained compulsorily: *Goldberg v Ng* (1994) 33 NSWLR 639 at 648 (Kirby P).

51. In this respect, it is to be noted that the IGADF Regulation provides for the giving of an 'assurance of confidentiality' (or privacy) in respect of inquiries conducted by the IGADF and authorises the IGADF to compel either members of the ADF or other persons to provide information, produce documents or appear before an inquiry to answer questions (where to fail to do so is a criminal offence): see ss 19, 22, 23 and 29.

PERSON 18 SUBPOENA

52. The IGADF also advances a public immunity claim in respect of the subpoena issued on 18 December 2020 to Person 18, a current or former member of the Special Operations Command (**SOCOMD**): Gaynor Affidavit, [7.2]. The IGADF claims public interest immunity over such documents as are responsive to that subpoena the disclosure of which would prejudice the integrity and efficacy of the IGADF's information-gathering function and compromise the conduct of future inquiries. [redacted]

[redacted]

53. For the same reasons given in paragraphs 43 to 51 above, the IGADF submits that disclosure of the materials referred to in paragraph 52 would interfere with the IGADF's discharge of his statutory functions. [redacted]

PART IV REASONS WHY DEFENCE'S CLAIMS OF PUBLIC INTEREST IMMUNITY SHOULD BE UPHELD

54. As explained in the Open Spalding Affidavit, it is not possible to identify the nature of the documents over which Defence claims public interest immunity (or their contents) without undermining that PII claim: at [6]. It is also not possible to make open submissions as to the reasons why the public interest immunity claim should be upheld.

55. [redacted]

56. [redacted]

57. [redacted]

58. [redacted]

PART V SECTION 38B ORDERS

59. Any suggestion the risks to the public interest identified above can be addressed simply by the production of the subpoena documents pursuant to the orders presently in place under s 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), the most recent version of which was made by the Court on 5 March 2021 (the **s 38B orders**), should be rejected for the following reasons.

60. First, the subpoena documents could not be produced as 'Sensitive IGADF Documents' under the s 38B orders without amendments to the orders being made: see the definition of 'Sensitive IGADF Document' in Order 91. The making of such amendments would require the undertaking of a process of negotiation and agreement between the IGADF, the parties and, ultimately, the Attorney-General on behalf of the Commonwealth. Such a process occurred after the determination by Colvin J of certain other public interest immunity claims made by the IGADF: see *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 6)* [2020] FCA 1285 and *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 8)* 2020 FCA 1630. However, the Court cannot proceed on the assumption that such a process would occur again, bearing in mind the varying interests at stake and the difficulty in securing agreement (especially so close to the trial).

61. Second, and subject to consideration by the Attorney-General of the expected disclosure of national security information further to the notices given under the NSI Act in respect of the subpoenas, while one of the available options is for the subpoena documents to be produced as 'Sensitive Documents' under the s 38B orders without amendments to the orders being made (see the definition of 'Sensitive Document' in Order 1), this would mean the documents would necessarily become liable to 'reclassification' as 'NPO Documents' or 'Non-Sensitive Documents' upon the application of a party and the ruling of the Court: see Orders 29-31. If so reclassified, and especially if reclassified as a 'Non-Sensitive Documents', the subpoena documents could easily be subject to widespread disclosure or

even publication to the world at large. A 'Non-Sensitive Document' is, in essence, equivalent to an ordinary document: it is not subject to any protections under the s 38B orders or otherwise.

62. Third, even if the subpoena documents were produced as 'Sensitive Documents' under the s 38B orders and were *not* reclassified, this would not end the risk of disclosure and thus harm to the public interests identified by the IGADF. Of particular concern here is the risk of inadvertent disclosure. The fact that the trial will be conducted against a background of close media scrutiny and high public curiosity, under s 38B orders that contemplate a combination of open and closed court sessions, would create an unavoidable risk of inadvertent disclosure to the public. To be blunt: people can and do make mistakes, including by saying in open court things that are required (under the s 38B orders) to be said only in closed court. Even in a litigation context, where one would expect the utmost care, there are many examples of inadvertent release of information subject to public interest immunity in the course of legal proceedings.[5]

63. In this respect, it is relevant to note that the Court is presently giving consideration to permitting the trial to be live-streamed on the internet (a proposal which the Respondents have already endorsed). This would mean that any inadvertent disclosure could very quickly travel far and wide, including outside Australia and beyond the reach of any non-publication or suppression order made by the Court. It is also relevant to note that, in the context of the IGADF's previous public interest immunity claims, Colvin J specifically took into account the risk of inadvertent disclosure as a factor in favour of upholding the claims in relevant respects: see esp. *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 8)* at [18], where his Honour also noted that sensitive information, 'once known … might be deployed unconsciously or indirectly in the forensic task' of conducting the litigation.

64. Courts rarely, if ever, regard disclosure to parties and legal representatives, combined with undertakings and suppression orders, as adequate protection of the important public interests.

65. As Wilcox J noted in *Jackson v Wells and Others* (1985) 5 FCR 296 (at 307-308) when considering whether to at least grant access to the subject documents to the legal representatives of the parties:

> Without reflecting in any way upon the integrity of any counsel or solicitor, difficulties are likely to arise where counsel appearing in, and advising their clients in respect of, protracted and complex proceedings acquire information which they are not free to use or to pass on to their clients. During the heat of battle an unwitting disclosure may occur. Frank and full advice becomes impossible.

His Honour described as 'merely commonsense' his conclusion that the fewer people who have access to the information, the less is the risk of unauthorised disclosure (at 307-308).

66. The difficulties involved in any order for limited inspection were also adverted to by McLelland CJ (in Eq) in *Telstra Corporation Ltd v Australis Media Holdings Ltd*, Unreported,

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[5] See *Commonwealth v Lyon* (2003) 133 FCR 265 at [2] (Branson, Madgwick and Hely JJ); *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 and *Re Arthur Stanley Smith* (1996) 86 A Crim R 308 at 312-313 (Gleeson CJ, Clarke and Sheller JJA).

NSWSC, 6 December 1996, where his Honour observed that information cannot readily be forgotten, and any breach impossible to detect or prove. In *Traljesic v Attorney-General (Cth)* (2006) 150 FCR 199 Rares J took into account (at [22]-[31]), in refusing any access (even to a legal representative), that there was a risk of inadvertent disclosure which could not properly be guarded against. In *R v Khazaal* [2006] NSWSC 1061 Whealy J similarly observed (at [32] and [34]-[35]) that, despite having absolute confidence in the individual legal representatives, no undertaking can protect against the risk of inadvertent disclosure or the risk that information may be used unconsciously once it becomes known.[6]

CONCLUSION

67. For the foregoing reasons, the IGADF's and Commonwealth's claims of public interest immunity should be upheld.

68. Should the Court not be persuaded to uphold these claims, it has a duty to provide an opportunity to adduce further evidence and, ultimately, seek review of the decision, before permitting the documents to be inspected or copied by any person: *Sankey v Whitlam* at 43; *Alister* at 415.

Date: 4 May 2021

Andrew Berger

Joe Edwards

Christine Ernst

[6] Whealy J referred to the observations of Campbell J in *Carbotech-Australia v Yate*s [2006] NSWSC 269 at [13]. *Khazaal* and *Traljesic* were cited with approval by Sundberg J in *Parkin v O'Sullivan (sued in his capacity as Director-General of Security)* (2009) 260 ALR 503; [2009] FCA 1096 at [29].