

## Notice to produce

No. NSD1487 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 before the Registrar on 3 February 2021.

1. All photographs taken by the Applicant in the hotel room at the Hotel Realm Canberra on or around 28 March 2018, including those referred to in paragraph 201 of the Applicant's Outline of Evidence in Reply filed on 12 July 2019, with such documents to be produced in native electronic format.
2. Any video or videos taken of Person 17 on or around 6 March 2018, with such videos to be produced in native electronic format.

Date: 15 December 2020



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.

FEDERAL COURT OF AUSTRALIA

NSD 1485, 1486, 1487 of 2018

Date: 25 June 2021

Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors

Exhibit No: R74

MFI No: \_\_\_\_\_

Assoc: Alice O'Connell

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.

**From:** Jeremy Forbes  
**Sent:** Friday 12 February 2021 10:37 AM  
**To:** 'Monica Allen' <Monica.Allen@markobrienlegal.com.au>  
**Cc:** Mark O'Brien <Mark.O'Brien@markobrienlegal.com.au>; Paul Svilans <Paul.Svilans@markobrienlegal.com.au>; Peter Bartlett <Peter.Bartlett@minterellison.com>; Dean Levitan <Dean.Levitan@minterellison.com>; Dougal Hurley <Dougal.Hurley@minterellison.com>  
**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4106433]

Dear Monica,

Please find **attached** our letter of today's date.

Kind regards

—  
**Jeremy Forbes**

Lawyer

T +61 2 9921 4620

[jeremy.forbes@minterellison.com](mailto:jeremy.forbes@minterellison.com)

**MinterEllison** Governor Macquarie Tower 1 Farrer Place Sydney NSW 2000

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---

**From:** Monica Allen <[Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)>  
**Sent:** Thursday 11 February 2021 11:53 AM  
**To:** Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>; Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>; Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>  
**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans <[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>

**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4589145]

Dear Colleagues

We refer to our email below and to the Notice to Produce issued by the Respondents dated 15 December 2020.

**Attached** are further copies of the images held by the Applicant which respond to the Notice to Produce. We are instructed that these images (which as previously noted are screenshots of deleted images, not the original images taken on or about 28 March 2018). The images have been exported from an Apple Laptop. When viewed on our client's Apple Laptop, we are instructed that the following meta data is displayed for each image:

1. IMG\_0088.JPG dated 13 June 2019 10:58:59am. 220 x 172. 21 KB
2. IMG\_0091.JPG dated 13 June 2019 10:59:31am. 547 x 200. 30 KB

This is the only material held by our client in response to the Notice to Produce.

Our client deleted the original images when the relationship with Person 17 ended in or about April 2018. Our client had no reason to retain images of Person 17 after that time, as he had reconciled with his then wife and he had no knowledge or expectation that Person 17 would subsequently make a false allegation of domestic violence. In this regard, we note that our client had no knowledge at all of Person 17's allegation, her meeting with or draft statement given to members of the Australian Federal Police's Counter Terrorism Taskforce in Melbourne on 30 May 2018 concerning her allegation of domestic violence, until he was contacted by the Respondents for comment in August 2018 concerning publication of Person 17's allegation on 10 August 2018.

We trust this concludes the matter.

Kind regards

**Monica Allen**

Senior Associate | Mark O'Brien Legal

**MARK  
O'BRIEN  
LEGAL**

ABN 86 002 421 123

Level 19, 68 Pitt Street, Sydney NSW 2000 Australia

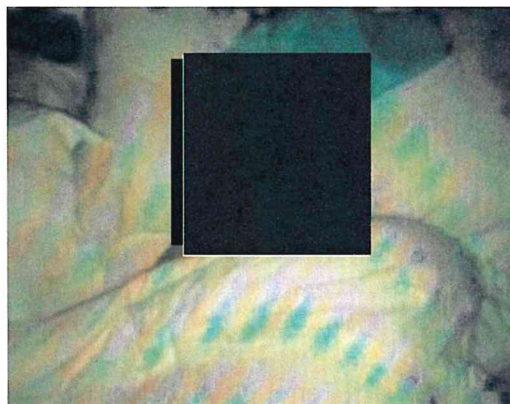
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**From:** Monica Allen

**Sent:** Friday, 5 February 2021 1:32 PM

**To:** Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>; Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>

**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans <[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>; Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>

**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4589145]



Dear Dougal

Just to confirm that our client is making inquiries as to how to export the screenshots with the meta data you require. Each time the images are exported to us electronically by our client, the format they are received in is the format in which they have been produced to you.

We will provide further copies of the images as soon as they are available and respond to your letter in due course.

Regards

**Monica Allen**

Senior Associate | Mark O'Brien Legal

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**From:** Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>

**Sent:** Thursday, 4 February 2021 3:51 PM

**To:** Monica Allen <[Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)>; Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>

**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans

<[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>; Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>

**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4589145]

Hi Monica

We note that you have produced screenshots of original photographs.

We request that you provide these screenshots in their native format that reveals any metadata (e.g. by attaching the original JPEG, PNG or other file).

To the extent that your client no longer has control of the native file of the screenshot photos produced, we ask in addition to the questions set out in our letter that you also provide information about when and why those files were deleted.

Regards

**Dougal Hurley**

Lawyer

T +61 3 8608 2937

[dougal.hurley@minterellison.com](mailto:dougal.hurley@minterellison.com)

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---

**From:** Monica Allen <[Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)>

**Sent:** Thursday 4 February 2021 03:23 PM

**To:** Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>; Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>

**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans

<[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>; Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>

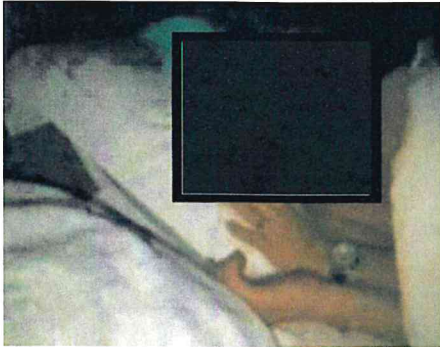
**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4589145]

Dear Dougal

My apologies for not emailing these yesterday.

In response to the Notice to Produce dated 15 December 2020, please find **attached** as agreed, the two screenshots held by the Applicant.

Kind regards



**Monica Allen**

Senior Associate | Mark O'Brien Legal

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**From:** Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>

**Sent:** Thursday, 4 February 2021 3:13 PM

**To:** Monica Allen <[Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)>; Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>

**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans <[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>; Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>

**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4589145]

Hi Monica

We refer to your email below and your agreement to produce any documents responsive to the Notice that are in your client's control.

Please provide that material as a matter of urgency.

In addition, we look forward to receiving your responses to the requests in our letter of 2 February 2021.

Regards

**Dougal Hurley**

Lawyer

T +61 3 8608 2937

[dougal.hurley@minterellison.com](mailto:dougal.hurley@minterellison.com)





---

**From:** Monica Allen <[Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)>  
**Sent:** Tuesday 2 February 2021 04:48 PM  
**To:** Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>  
**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans <[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>; Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>; Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>  
**Subject:** RE: Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4106433]

Dear Jeremy

We are instructed that our client no longer holds the native files of the material requested in the Notice to Produce.

Our client does hold two "screenshots" of the images taken of Person 17 on 28 March 2018 (being electronic versions of the images annexed to his outline of evidence in reply). We are content to produce the screenshots to you via email, on the basis that they are treated in the same manner as if the material was formally produced to the Court.

Kind regards

**Monica Allen**

Senior Associate | Mark O'Brien Legal

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---

**From:** Jeremy Forbes <[Jeremy.Forbes@minterellison.com](mailto:Jeremy.Forbes@minterellison.com)>  
**Sent:** Tuesday, 2 February 2021 3:55 PM  
**To:** Monica Allen <[Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)>  
**Cc:** Mark O'Brien <[Mark.O'Brien@markobrienlegal.com.au](mailto:Mark.O'Brien@markobrienlegal.com.au)>; Paul Svilans <[Paul.Svilans@markobrienlegal.com.au](mailto:Paul.Svilans@markobrienlegal.com.au)>; Peter Bartlett <[Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)>; Dean Levitan <[Dean.Levitan@minterellison.com](mailto:Dean.Levitan@minterellison.com)>; Dougal Hurley <[Dougal.Hurley@minterellison.com](mailto:Dougal.Hurley@minterellison.com)>  
**Subject:** Roberts-Smith v Fairfax - Return of subpoena listing [ME-ME.FID4106433]

Dear Monica,

We refer to the listing of the above proceedings in tomorrow's return of subpoena list.

Please find **attached** proposed consent orders in relation to the various returnable subpoenas. The Commonwealth has agreed to the proposed adjournments, and the legal representative of Persons 5 and 11 has agreed to Orders 4 and 5. Could you please indicate if you consent to these orders being sent to the Registrar to be made in chambers?

Separately, we refer to the notice to produce issued by the Respondents to the Applicant on 15 December 2020. Could you please indicate whether the documents requested in that notice will be produced to the Court, or whether we will need to maintain tomorrow's listing to call on production?

Kind regards

Jeremy

---

**Jeremy Forbes**

Lawyer

T +61 2 9921 4620

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*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](#).*

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Sensitive: Legal



# MinterEllison

12 February 2021

By email: [Monica.Allen@markobrienlegal.com.au](mailto:Monica.Allen@markobrienlegal.com.au)

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

Dear Ms Allen,

**Fairfax Media, The Age and The Federal Capital Press ats Ben Roberts-Smith  
Federal Court proceeding numbers NSD 1485, 1486 and 1487 of 2018 (Proceeding)**

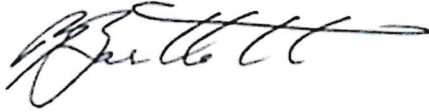
1. We refer to the Respondents' Notice to Produce dated 15 December 2020 (**Notice**) and your email of 11:53am on 11 February 2021 in which 2 screenshots and the corresponding metadata have been produced.
2. *Firstly*, your email notes that the photographs produced are screenshots of deleted images and that those images were deleted in or about April 2018. However, the metadata of the screenshots shows that the screenshots were taken on 13 June 2019. Your client appears to be asserting that screenshots were taken on 13 June 2019 of images that were purportedly deleted some 14 months earlier.
3. *Secondly*, the name of the screenshot images produced are 'IMG\_0088.JPG' and 'IMG\_0091.JPG'. Evidently, there are two images (namely IMG\_0089 and IMG\_0090) that exist on the Applicant's laptop that have not been produced in response to the Notice. In circumstances where the metadata reveals that the two screenshots were taken only 32 seconds apart, it is plain that IMG\_0089 and IMG\_0090 were taken in the intervening 32 seconds. As such, we consider it reasonable to assume that the two images (IMG\_0089 and IMG\_0090) sitting between the two images produced in response to the Notice (IMG\_0088 and IMG\_0091) are images of, or relating to, Person 17.
4. Accordingly, we request the following as a matter of urgency:
  - (a) That you clarify how, if the original photographs were deleted in April 2018, it is possible that the screenshots of the apparently deleted photographs were taken in June 2019?
  - (b) That the Applicant produce to the Respondents IMG\_0089 and IMG\_0090 from the Applicant's Apple laptop to the degree that those images relate to Person 17. If necessary, the Respondents will issue a fresh Notice to Produce for these images.



- (c) That the Applicant produce to the Respondents the native JPG files for which the metadata has been provided (noting that you have still only provided a pasted image in the body of an email rather than the native JPG file). If necessary, the Applicant should load those JPG files onto on a fresh USB drive, and provide that USB drive to the Respondents.

Yours faithfully

**MinterEllison**

A handwritten signature in black ink, appearing to read 'Peter Bartlett', written in a cursive style.

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

Our Ref: MOBL 283  
Your Ref: PLB 1183220

22 March 2021

Mr. Peter Bartlett  
Minter Ellison  
Collins Arch, 447 Collins Street  
MELBOURNE VIC 3000

By Email: [Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)

Dear Colleagues

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

We refer to your letter dated 12 February 2021 and respond as follows adopting your paragraph numbers:

- a) Our client had deleted the images from his phone in approximately April 2018 (**the images of Person 17**). As previously observed in our email of 11 February 2021, at this time our client did not know of Person 17's false allegations which did not come to his attention until August 2018. Unbeknownst to him, at some point his former wife, while searching his belongings and mobile phone, had taken photos of the images of Person 17 with her mobile phone. In June 2019, when preparing his evidence, our client was informed by his then wife that she held copies of the images of Person 17 and (with her co-operation) took screenshots of the images on his former wife's mobile for use in his evidence. Those are the images referred to in paragraph [201] of the Applicant's Outline of Evidence in Reply and then produced in the email of 11 February 2021 in response to the notice to produce.
- b) Our client does not have in his possession IMG\_0089 and IMG\_0090. Those images (which were deleted at or about the time they were taken) were attempts by our client to take photos of the two images on his then wife's mobile phone in June 2019. As you have indicated our client's former wife will be giving evidence for the Respondents, she is presumably able to assist you in your inquiries on this matter.
- c) Our client's technical advice is that the form in which the two files were exported is the only form in which they can be exported from our client's Apple laptop. Our client is happy to provide further copies of the images on a USB if you wish, but our understanding is this will not produce any additional metadata.



Yours faithfully

A handwritten signature in black ink, appearing to read 'Mark O'Brien', with a stylized flourish at the end.

**Mark O'Brien**

Principal

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M +61 412 637 304

E [mark.obrien@markobrienlegal.com.au](mailto:mark.obrien@markobrienlegal.com.au)

# MinterEllison

15 April 2021

**BY EMAIL** Mark.O'Brien@markobrienlegal.com.au

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

Dear Colleagues

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

We refer to our letters of 12 and 13 April 2021 concerning your client's discovery.

We note that in a statement issued on behalf of your client yesterday, and through his Counsel in Court yesterday, your client has denied the allegation that he buried USBs in the backyard of his former home. However, we have not received a response to our correspondence. We again invite your client to consider his discovery obligations and provide a response to our letter. If your client's position is that he does not have, and has never had, possession of the USBs referred to in Ms Scott's outline, we invite your client to verify this position in an affidavit of discovery.

Based upon what we understand to be the contents of the USBs (see attachment L to Ms Scott's outlines), it is our view that at least some documents on the USBs would have been discoverable by your client. However, to avoid a dispute about whether or not the documents are discoverable, we **attach** a Notice to Produce seeking production of the six USB drives and their contents.

Neither the public statement nor the denial in Court address other matters raised by Ms Scott's outline. In particular, we note that on 15 December 2020 we served upon your client a Notice to Produce requiring production of:

1. All photographs taken by the Applicant in the hotel room at the Hotel Realm Canberra on or around 28 March 2018, including those referred to in paragraph 201 of the Applicant's Outline of Evidence in Reply filed on 12 July 2019, with such documents to be produced in native electronic format.
2. Any video or videos taken of Person 17 on or around 6 March 2018, with such videos to be produced in native electronic format.

In response, your client produced two screenshots of the photos showing Person 17, but did not produce any further documents. It is now apparent from attachments G, H and I of Ms Scott's outline that, as at 17 August 2018, your client was in possession of .jpg files of additional images described in paragraph 201 of your client's outline of evidence in reply, although these have not been produced by your client. Further, at paragraph 15 of Ms Scott's outline, reference is made to Ms Scott providing your client with a copy of a video of Person 17 in October 2018. This document has also not been produced. We invite your client to reconsider his response to the Notice to Produce dated 15 December 2020. If your client is no longer in possession of these documents we invite your client to provide an explanation in this regard.



Please provide a response to this letter by no later than **5pm on Friday 16 April 2021**.

Yours faithfully  
**MinterEllison**

A handwritten signature in black ink, appearing to read 'Peter Bartlett', written in a cursive style.

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



Our Ref: MOBL 283  
Your Ref: PLB 1183220

30 April 2021

Mr. Peter Bartlett  
Minter Ellison  
Collins Arch, 447 Collins Street  
MELBOURNE VIC 3000

By Email: [Peter.Bartlett@minterellison.com](mailto:Peter.Bartlett@minterellison.com)

Dear Colleagues

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

1. We refer to order 16 made by Justice Besanko on 23 April 2021, your letter dated 15 April 2021 and the Notice to Produce issued by the Respondents on 15 December 2020 to the Applicant (the "Notice").
2. In response to that Notice, the Applicant produced two screenshots or photos showing Person 17. The omission to produce a copy of the JPG files of additional images described in paragraph 201 of the Applicant's Outline of Evidence in Reply dated 12 July 2019 was an inadvertent error on the part of this firm. The Applicant was not responsible for this omission. We **enclose** copies of those additional JPG files.
3. We observe that attachments H and I of Ms Scott's Outline are annexed to the Applicant's Outline of Evidence in Reply at Annexure G.
4. We refer to paragraph 15 of Ms Scott's Outline of Evidence and the copy of a video of Person 17 in October 2018 that is referred to therein. A copy of that video was not produced in response to the Notice because the Applicant was unaware, until after he received the Outline of Ms Scott served on 12 April 2021, that he was in possession of a copy of this video (in that the video was apparently stored in a folder of financial records on one of the six USBs that he subsequently consolidated in/or about August or September 2020). A copy of the video is also **enclosed**.

Yours faithfully

A handwritten signature in black ink, consisting of a vertical line followed by a series of connected loops and a horizontal tail.

**Paul Svilans**

Principal

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M +61 410 687 900

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