Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 14) [2021] FCA 552

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| File number(s): | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 24 May 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - claim by the Inspector‑General of Australian Defence Force (IGADF) and the Commissioner of the Australian Federal Police (AFP) to public interest immunity over documents, if they exist, which relate to witnesses that are to be called by the respondents – where it is accepted there are public interest consideration on both sides - consideration of balancing competing public interest considerations - order made for the IGADF to file any further confidential evidence in support of the claim – held that if the AFP documents exist the balance weighs in favour of non-disclosure |
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| Legislation: | *Defence Act 1903* (Cth) ss 110B, 110C, 110E, 124  *Evidence Act 1995* (Cth)  *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) ss 19, 21, 22, 23, 29, 32  *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 38B |
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| Cases cited: | *AB (a Pseudonym) v CD (a Pseudonym)* [2018] HCA 58; (2018) 362 ALR 1  *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405  *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34; [2012] 1 AC 531  *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404  *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* [2014] FCA 481; (2014) 312 ALR 403  *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38  *Attorney-General (NSW) v Lipton* [2012] NSWCCA 156  *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667  *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32; 174 FCR 547  *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; (2008) 169 FCR 227  *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* [2011] FCA 938; (2011) 283 ALR 137  *Beneficial Finance Corporation Ltd v Commissioner of the Australian Federal Police* (1991) 31 FCR 523;  *Beneficial Finance Corporation Ltd v Commissioner of the Australian Federal Police* (1991) 52 A Crim R 423  *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090  *Cain v Glass* *(No 2)* (1985) 3 NSWLR 230  *Carol Ann Matthews v SPI Electricity Pty Ltd* [2014] VSC 65  *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44  *Church of Scientology Inc v Woodward* [1982] HCA 78; (1982) 154 CLR 25  *Commonwealth v Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604  *Commonwealth v Northern Land Council* (1991) 30 FCR 1  *Conway v Rimmer* [1968] AC 910  *D v National Society for the Prevention of Cruelty to Children* (1978) AC 171  *Director of Public Prosecutions v Smith* (1996) 86 A Crim R 308  *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49  *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532  *HT v The Queen* [2019] HCA 40; (2019) 278 A Crim R 133  *Jarvie v Magistrates' Court of Victoria* [1995] 1 VR 84  *Marinovich v Director of Public Prosecutions & Anor* (1987) 14 ALD 315  *National Crime Authority v Gould* (1989) 23 FCR 191  *Polley v Johnson* [2013] NSWSC 543  *R v Khayat (No 2)* [2019] NSWSC 1315  *R v Lodhi* [2006] NSWSC 596; (2006) 199 FLR 270  *R v Meissner* (1994) 76 A Crim R 81  *R v Smith* (1996) 86 A Crim R 308  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 6)* [2020] FCA 1285  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 5)* [2020] FCA 1067  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 8)* [2020] FCA 1630  *Roberts-Smith v Fairfax Media Publications Pty Limited (No 10)* [2021] FCA 317  *Rogers v Home Department State Secretary* [1973] AC 388  *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1  *SDCV v Director-General of Security* [2021] FCAFC 51  *Spargos Mining NL v Standard Chartered Australia Ltd* *(No 1)* (1989) 1 ACSR 311  *The Australian Statistician v Leighton Contractors Pty Ltd* [2008] WASCA 34; (2008) 36 WAR 83  *Young v Quin* (1985) 4 FCR 483 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Other Federal Jurisdiction |
|  |  |
| Number of paragraphs: | 167 (including Confidential reasons) |
|  |  |
| Date of hearing: | 7 May 2021 |
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| Counsel for the Applicant: | Mr A Moses SC with Mr P Sharp |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Mr C Mitchell |
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| Solicitor for the Respondents: | Minter Ellison |
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| Counsel for the Inspector‑General of the Australian Defence Force | Mr A Berger QC with Mr J Edwards and C Ernst |
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| Solicitor for the Inspector‑General of the Australian Defence Force | Australian Government Solicitor |
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| Counsel for the Commissioner of the Australian Federal Police | Mr E Muston SC with Ms B Anniwell |
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| Solicitor for the Commissioner of the Australian Federal Police | Australian Government Solicitor |

ORDERS

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|  | | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LIMITED (ACN 003 357 720) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1486 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE AGE COMPANY PTY LIMITED (ACN 004 262 702) (and others named in the Schedule)  First Respondent | |

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|  | | NSD 1487 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITH  Applicant | |
| AND: | THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED (ACN 008 394 063) (and others named in the Schedule)  First Respondent | |

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| order made by: | Abraham J |
| DATE OF ORDER: | 24 mAY 2021 |

THE COURT ORDERS THAT:

1. The Proper Officer of the Australian Federal Police is excused from the obligation to state whether the Australian Federal Police has possession of documents answering the description set out in the subpoena dated 23 December 2020 issued by the Applicant as amended on 6 May 2021 and from the obligation to produce any such documents.
2. Pursuant to s 37AF of the of the *Federal Court of Australia Act 1976* (Cth) (the Act) and on the grounds referred to in s 37AG(1)(b) and (c) of the Act, there is to be no disclosure, by publication or otherwise, of:
   1. The reasons for judgment of Abraham J in *Roberts-Smith v Fairfax Media Publication Pty Limited* (No 14) [2021] FCA 552 until further order, or by 5:00pm on 27 May 2021 (whichever is the later).
   2. The confidential reasons for judgment of Abraham J in *Roberts-Smith v Fairfax Media Publication Pty Limited* (No 14) [2021] FCA 552 in relation to the IGADF’s public interest immunity claims until further order.
   3. The confidential reasons for judgment of Abraham J in *Roberts-Smith v Fairfax Media Publication Pty Limited* (No 14) [2021] FCA 552 in relation to the Commissioner of the Australian Federal Police’s public interest immunity claims until further order.
3. Order 2(a) does not prevent disclosures to and between Authorised Persons within the meaning of Order 1 of the orders made by his Honour Justice Besanko on 15 July 2020 (as amended on 17 December 2020, 5 March 2021 and 6 May 2021) under ss 19(3A) and s 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (s 38B orders).
4. Order 2(b) does not prevent disclosures to and between Authorised Persons within the meaning of Order 97 of the s 38B orders.
5. Order 2(c) does not prevent disclosures to and between the Commonwealth and/or a Commonwealth Representative within the meaning of the s 38B orders.
6. Upon an undertaking given by Evan Evagorou, Senior Executive Lawyer, Australian Government Solicitor, that the documents referred to in this Order will be made available to any Court on appeal, the two confidential affidavits of Assistant Commissioner Lee Sworn on 3 May 2021 and 13 May 2021, together with their annexures, exhibits and materials accompanying those affidavits, be returned to the Australian Government Solicitor.
7. On a date to be fixed, a representative of the Australian Government Solicitor is to attend on the chambers of Abraham J to collect the documents referred to in Order 6.
8. The IGADF is to provide any further confidential evidence and/or confidential submissions in relation to his public interest immunity claims to her Honour Justice Abraham’s chambers by 4:00pm on 7 June 2021.
9. Costs of the public interest immunity claims made by the IGADF be reserved.
10. Costs of the public interest immunity claims made by the AFP be reserved.
11. Liberty to apply.

THE COURT NOTES THAT:

1. Within three months of the conclusion of the hearing of the substantive proceedings before his Honour Justice Besanko, the parties, the IGADF, and the AFP have leave to have this matter relisted before Justice Abraham to address the issue of the period of time for which order 2(b) and order 2(c) should operate.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ABRAHAM J:

1. Mr Ben Roberts‑Smith VC MG is a former soldier who was deployed on multiple occasions to Afghanistan. In August 2018, Mr Roberts‑Smith commenced proceedings in this Court seeking damages for alleged defamatory publications by Fairfax Media Publications Pty Limited, The Age Company Pty Limited, The Federal Capital Press of Australia Pty Limited and certain journalists. The publications are alleged to have carried a number of imputations concerning the conduct of Mr Roberts‑Smith whilst serving in Afghanistan. The alleged imputations include that Mr Roberts‑Smith broke the moral and legal rules of military engagement and that he is therefore a criminal. By their defence, the respondents claim to be able to justify the imputations, a matter on which they bear the onus of proof.
2. Numerous subpoenas have been issued by both the applicant and the respondents.
3. This judgment relates to public interest immunity claims made in respect to certain documents returnable under some of those subpoenas.
4. In summary the claims are as follows.
5. The Inspector-General of the Australian Defence Force (IGADF) claims public interest immunity over documents (or parts of documents) sought by a subpoena issued at the request of the applicant on 2 March 2021, reissued on 15 March 2021 and amended shortly prior to the hearing to substantially narrow the documents sought (IGADF Subpoena). It was further narrowed after the hearing of the claim so as to exclude Person 64. The subpoena now seeks the following:
6. One copy of all documents comprising a record of interview, notes of interview or transcript of interview (translated and/or untranslated) of the Inquiry’s interview with the following Afghan nationals at the Australian Embassy in Kabul in July 2019:

a. [Person 62];

b. [Person 63];

c. [Person 65];

1. One copy of all documents comprising a statement or statements (translated and/or untranslated) provided by any of the individuals in paragraph 1 above to the Inquiry in relation to the Inquiry’s investigation into the Applicant’s alleged conduct in Darwan on or around 11 September 2012.
2. The Commissionerof the Australian Federal Police Force (AFP) claims public interest immunity in relation to the documents sought by a subpoena addressed to him and issued by the applicant in these proceedings on 12 December 2020 (the Third AFP Subpoena). Again, the documents sought have narrowed to the following:
3. One copy of all documents comprising a record of interview, notes of interview or transcript of interview concerning the AFP’s investigation into Ben Roberts-Smith’s (the applicant) alleged conduct in Afghanistan on or around 11 September 2012, with the following individuals:

a. [Person 62];

b. [Person 63];

c. [Person 64];

d. [Person 65].

1. One copy of all documents comprising a statement or statements provided by any of the individuals in paragraph 1 above to the AFP in relation to the AFP’s investigation into the applicant’s alleged conduct in Afghanistan on or around 11 September 2012.
2. As is evident, the subject of the subpoenas to the IGADF and the Commissioner are now variously confined to documents relating to Person 62, Person 63, Person 64 and Person 65 (collectively referred to as “the Afghan witnesses”) who are being called by the respondents in these proceedings.
3. This Court has previously made an order pursuant to s 38B of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act), the most recent version being on 5 March 2021 (the NSI orders), which dictates the manner in which certain information must be handled in these proceedings. In addition, confidential affidavits were relied on by the IGADF and the Commissioner in support of their claims. As a consequence, it was necessary during the hearing of these applications, to hear some submissions in closed court, to enable the parties to advance their positions. I have addressed aspects of that material in brief confidential reasons which are supplementary to this judgment.
4. There was no dispute between the parties as to the relevant legal principles governing claims of public interest immunity, and it is appropriate at the outset to consider some of those principles.

## Legal principles

1. It was accepted by all parties that the claim to public interest immunity was to be determined according to common law principles because the provisions of the *Evidence Act 1995* (Cth) does not extend to pre‑trial processes: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 at [3], [16]-[17].
2. Whether a claim of public interest immunity ought to be upheld requires the Court to consider two conflicting aspects of the public interest: *first*, whether harm would be done by the disclosure of matters of state; and *second*, whether the proper administration of justice would be frustrated or impaired if the documents were withheld. If it appears that both aspects of public interest require consideration, the final step is a balancing exercise of those interests.
3. This accords with the approach outlined by Gibbs CJ in *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404 (*Alister v The Queen*) at 412:

… when one party to litigation seeks the production of documents, and objection is taken that it would be against the public interest to produce them, the court is required to consider two conflicting aspects of the public interest, namely whether harm would be done by the production of the documents, and whether the administration of justice would be frustrated or impaired if the documents were withheld, and to decide which of those aspects predominates. The final step in this process - the 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.

1. And see the observations of Gibbs ACJ in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 (*Sankey v Whitlam*) at 38‑39 as follows:

The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in *Conway v. Rimmer*, as follows:

“There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.”

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld. The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence. In some cases, therefore, the court must weigh the one competing aspect of the public interest against the other, and decide where the balance lies. In other cases, however, as Lord Reid said in *Conway v. Rimmer*, 'the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it'. In such cases once the court has decided that 'to order production of the document in evidence would put the interest of the state in jeopardy', it must decline to order production.

1. If the claim of public interest immunity is successful, (1) the information in question need not be produced for inspection by any party to the proceedings; (2) the information in question cannot be adduced in evidence by any party; and (3) 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] HCA 78; (1982) 154 CLR 25 at 61; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 (*Gypsy Jokers*) at [24]; *Assistant Commissioner Condon v Pompano Pty Ltd* [2013] HCA 7; (2013) 252 CLR 38 at [148]; *HT v The Queen* [2019] HCA 40; (2019) 278 A Crim R 133 (*HT v The Queen*) at [29], [32] and [71]-[72].
2. 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] WASCA 34; (2008) 36 WAR 83 at [46]; see also *Conway v Rimmer* [1968] AC 910 (*Conway v Rimmer*)at 940, referred to with approval by Gibbs ACJ in *Sankey v Whitlam* at 39; *Rogers v Home Department State 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.
3. The balance between competing public interests “may be struck differently in civil and criminal proceedings”: *HT v The Queen* at [33]. 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: *Alister* *v The Queen* at 414 and 456. It has been said, 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 *Commonwealth v Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604 (*Commonwealth v Northern Land Council*) at 618. 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, *Gypsy Jokers* at [5], and [24].
4. Although the categories of public interest immunity are not closed and may alter from time to time, whether by restriction or by extension as social conditions and social legislation develop, there are a number of well recognised categories of public interest immunity: *D v National Society for the Prevention of Cruelty to Children* (1978) AC 171 at 230; *Sankey v Whitlam* at 39. Such categories of public interest immunity include, Cabinet documents and other State papers: *Sankey v Whitlam* at 41-42; national security: *SDCV v Director-General of Security* [2021] FCAFC 51; documents of which production would hinder or affect proper policing: *Young v Quin* (1985) 4 FCR 483 (*Young v Quin*) at 494 and 495; documents the production of which would hinder ongoing police investigations: *Young v Quin* at 495; *Marinovich v Director of Public Prosecutions & Anor* (1987) 14 ALD 315 at 317; *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 52 A Crim R 423 at 436-437; *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 (*Attorney-General v Stuart)* at 680-681, 690E; and, the protection of police informers: *Cain v Glass* *(No 2)* (1985) 3 NSWLR 230 (*Cain v Glass (No 2)*) at 233-234; *Attorney-General v Stuart* at 679G*; Director of Public Prosecutions v Smith* (1996) 86 A Crim R 308 at 311-312.
5. Although it was said during submissions that the bases of the claims are novel, the IGADF and the Commissioner’s claims are rooted in the principles relating to the protection of informers (particularly in the context of a statutory scheme involving confidentiality), and the impeding of investigations.
6. In that context, it is appropriate to consider the principles in respect to those categories in more detail.
7. The protection of informers is a longstanding and well recognised category where there is a strong public interest in favour of protecting informers and encouraging future informers: *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; (2008) 169 FCR 227 (*ASIC v P Dawson Nominees*) at [23] ff; *Alister v The Queen* at 415, 437-438, 453-455. “[T]he true basis of the protection of material of this kind lies in the threat disclosure may provide to the free flow of information to intelligence or enforcement agencies”: *Cain v Glass* *(No 2)* at 246 ff; *R v Lodhi* [2006] NSWSC 596; (2006) 199 FLR 270 (*R v Lodhi)* at [37]. 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) 86 A Crim R 308 at 311. Generally speaking, if assurances of anonymity given to informers are not upheld, “informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders. That is why police informer anonymity is ordinarily protected by public interest immunity”: *AB (a Pseudonym) v CD (a Pseudonym)* [2018] HCA 58; (2018) 362 ALR 1 at [12]. The assurance of anonymity is merely a reflection of the public interest in maintaining the confidentiality of police informers generally, regardless of the risk to their safety. That obligation exists even absent such assurances, or a claim for anonymity: *Sankey v Whitlam* at 58-59. 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; *Attorney-General (NSW) v Lipton* [2012] NSWCCA 156 at [38].
8. Courts have also consistently recognised the protection of sensitive police methodologies, capabilities, policies and procedures to ensure the ongoing supply of relevant information, as a well-established category of public interest immunity: *Attorney-General v Stuart* at 675, 680-681; *Beneficial Finance Corporation Ltd v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 527-528; *Conway v Rimmer* at 953-954. This is to ensure that crime can be effectively investigated and prosecuted.
9. As Hunt CJ observed in *Attorney-General v Stuart* 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.

1. The subpoenas in this case are directed not only to the investigative police body, but to the IGADF, which has a range of statutory functions with respect to the military justice system and the operations of the Australian Defence Force (ADF), many of which depend on confidential communication to and from the IGADF: see for example the discussion in *Roberts-Smith v Fairfax Media Publications Pty Limited* *(No 6)* [2020] FCA 1285 at [52] ff (*Roberts-Smith (No 6)*). For the same reasons, 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 Nominees* at [48]-[50]; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* [2011] FCA 938; (2011) 283 ALR 137 at [194]-[195]; *R v Meissner* (1994) 76 A Crim R 81 at 89; *Spargos Mining NL v Standard Chartered Australia Ltd* *(No 1)* (1989) 1 ACSR 311 (*Spargos Mining NL v Standard Chartered Australia Ltd* *(No 1)*) at 312. “The public interest in protecting informers, and encouraging future informers, is as important to a regulatory agency such as ASIC as it is to police in their traditional role”: *ASIC v P Dawson* *Nominees* at [48] citing *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* at 312. The issue of protection of informers is therefore in a context of a statutory scheme involving confidentiality.
2. The applications by the IGADF and the Commissioner are supported by open and closed affidavits setting out the bases for the claims. In determining a claim of public interest immunity, it is permissible for a court to consider confidential evidence: *Young v Quin* at 488-489*; National Crime Authority v Gould* (1989) 23 FCR 191 at 198-199; *Attorney-General v Stuart* at 681; *R v Baladjam & Ors* *(No 29)* [2008] NSWSC 1452 at [3] and [58]; *Polley v Johnson* [2013] NSWSC 543 at [23], [26]; *Gypsy Jokers* at [180].
3. 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, although the Court has the power to inspect the documents “privately” if this is considered necessary to determine the claim: see, for example, *Sankey v Whitlam* at 46; see also *Attorney-General v* *Stuart* at 672, citing *Conway v Rimmer* at 971, 979 and 995.
4. I also note that courts have recognised that “full respect” should be given to the evidence of the deponent who makes an affidavit in support of a claim of public interest immunity: *Sankey v Whitlam* at 46, and see 43-44, 59-60; and see *Alister v The Queen* at 435, 455; *Young v Quin* at 489-490; *R v Lodhi* at [31]-[32]; *Commonwealth v Northern Land Council* (1991) 30 FCR 1 at 38. It is relevant that the deponent is a person of seniority and standing within the executive arm of government: *Young v Quin* at 489, and that 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 and 59-60.

## IGADF Claims

### Submissions - IGADF

1. The IGADF submitted that the submissions must be considered in the following context.
2. The IGADF is a full-time statutory office-holder appointed pursuant to s 110E(1) of the *Defence Act 1903* (Cth). The office of the IGADF is established by s 110B of the Defence Act and the functions of the IGADF are set out in s 110C. The current IGADF is James Morgan Gaynor.
3. In support of his claims of public interest immunity, the IGADF relies on an open affidavit of Mr Gaynor sworn on 3 May 2021 (Gaynor Affidavit) and a confidential affidavit of Mr Gaynor sworn on 3 May 2021 (Confidential Gaynor Affidavit).
4. Mr Gaynor was appointed with effect from 1 December 2016, after over 28 years’ experience as a legal practitioner and Army officer. 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. The Acting IGADF on 20 March 2016 was 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. On 12 May 2016, Mr Gaynor (in his capacity as Acting IGADF) appointed Major-General the Honourable Paul Brereton AM RFD (a judge of the Court of Appeal) as an Assistant IGADF and directed him to conduct the Afghanistan Inquiry. The IGADF deposes to the purpose of the Afghanistan Inquiry, and the circumstances in which it was conducted.
5. The documents over which the IGADF claims public interest immunity are documents relating to the Afghanistan Inquiry.
6. 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. A heavily redacted version of the report was released to the public on 19 November 2020. The version of the report released to the public 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.
7. 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 *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) (IGADF Regulation): “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”.
8. The Afghanistan Inquiry was conducted in circumstances of strict confidentiality. Extensive measures were taken to preserve the confidentiality of the Afghanistan Inquiry. This included: (1) a direction pursuant the IGADF Regulation that the Afghanistan Inquiry be conducted in private; (2) the disclosure of information occur only on a ‘need to know’ basis and only among a small group of persons, even within the team of persons assisting the IGADF; (3) the conduct of interviews under circumstances of strict confidence and discretion; (4) 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; (5) 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; (6) 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 (7) a deliberate policy of not providing comments to the media.
9. 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.
10. Against that background I turn to the submissions specific to this subpoena.
11. This summary of submissions addresses those made in open court only.
12. The IGADF accepted that in light of the revised subpoena, the first two stages of the process are satisfied: namely that there are matters to balance on both sides of the equation. It is the balancing exercise which is in issue.
13. The IGADF submitted that the public interest favours non-disclosure, primarily on two bases: *first*, 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 *second*, 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. The IGADF referred to the evidence in support of the submission.
14. Further, the IGADF submitted that the applicant has previously accepted that concerns about the safety of Afghan witnesses could not be excluded, and the applicant 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] (*Roberts-Smith (No 10)*). The IGADF submitted the position was akin to that of an informer. The IGADF submitted that the 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 and members of foreign armed forces) from communicating freely with the IGADF, which also affects the ability of the IGADF to carry out his important statutory function. He submitted the disclosures as to identity would be contrary to the directions given under s 21, and that 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. It was also submitted that the disclosure of information sought would undermine the directions given as to confidentiality. Further, it was submitted, 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 a failure to do so is a criminal offence): see ss 19, 22, 23 and 29 of the IGADF Regulation.
15. The IGADF emphasised that it is not necessary to establish that harm to the public interest will arise from disclosure, as a matter of probability, but rather, the proper test is whether harm to the public interest could arise, citing the authorities referred to above at [15]. The IGADF submitted that this is important as the particular harm it refers to in respect to each basis of its claim cannot be precisely quantified. The IGADF submitted that nonetheless, the evidence clearly demonstrates that it is a real risk and, on both accounts, that it is a serious risk albeit for different reasons.
16. The IGADF submitted as to the safety of witnesses, a calculus of risk approach is to be applied, citing *R v Khayat (No 2)* [2019] NSWSC 1315. Adamson J at [20] observed:

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)* [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).

1. As to the second basis of the claim, the IGADF submitted that although the harm that could arise would be far less immediate and direct, on the evidence, it is more likely to eventuate if the claim was not upheld. The IGADF further submitted the harm that would thereby arise would be a systemic enduring one that, over time, could cause equally or greater damage to the public interest.
2. The IGADF submitted that the balance struck may differ between civil and criminal proceedings, citing *HT* *v The Queen* at [33]. It was submitted this was because the liberty of the subject is not at risk and nor is the protection of the community.
3. The IGADF submitted that it is not unusual that a party does not see prior statements of persons, and that in many cases parties proceed before the courts without knowing what exactly opposing witnesses might have said at various times about their recollections. Examples were given to illustrate the submission which included that in civil litigation, draft statements, draft affidavits, and correspondence that has passed between the witness and the solicitors in the course of preparing a matter, through the operation of legal professional privilege, are not provided: citing *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* [2014] FCA 481; (2014) 312 ALR 403 at [38]-[39]; *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32; 174 FCR 547 at [73]. The IGADF submitted that the prejudice that would arise to the administration of justice if the claim is upheld is less than in many other cases because here both parties would have access to the same material.
4. The IGADF expanded on the two bases of his claim in oral submissions (including in closed court), with the ultimate submission being that the impairment to the administration of justice in withholding the information sought is comfortably outweighed by the public interests against disclosure, and the IGADF’s claims that public interest immunity should be upheld.
5. The IGADF submitted that further orders made under the NSI Act, and non-publication and/or non-disclosure orders would not sufficiently ameliorate the real risk of harm as a consequence of disclosure of the documents sought.

### Submissions – applicant

1. The applicant emphasised the role of the Court in conducting the balancing exercise, referring to the oft-cited passage from *Sankey v Whitlam* at 38:

The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it. However the public interest has two aspects which may conflict. These were described by Lord Reid in Conway v. Rimmer (43), as follows:

“There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.”

It is in all cases the duty of the court, and not the privilege of the executive government, to decide whether a document will be produced or may be withheld.

1. The identity of the Afghan witnesses in these proceedings has not been suppressed. No application was made by the IGADF to have their names suppressed, despite being represented in these proceedings. Their identities are now a matter of public knowledge. It is significant that the Afghan witnesses have not sought an order for suppression of their identities in the defamation proceedings.
2. In respect to the safety of the Afghan witnesses, the applicant referred to a submission made during previous proceedings before the primary judge as to these witnesses giving evidence by AVL, which the applicant contends is an acknowledgement of the concerns about the safety of the Afghan witnesses have abated, referring to an affidavit of Mr Bartlett sworn on 11 February 2021. It was submitted that the Court has not issued a subpoena for the witnesses, and that they are voluntarily giving evidence. It was also noted that in relation to the Afghan nationals who assisted the Inquiry, no s 21 non-disclosure directions were issued.
3. The applicant took issue with the IGADF’s submission that “some lesser weight on the balancing consideration in terms of the Court’s search for the trust in this case, because at the end of the case nobody will go to jail, people get to go home”. The applicant referred to the purpose or consequences of defamation proceeding, citing *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; (1993) 178 CLR 44 at 60 (*Carson v John Fairfax*). In support of the submission the applicant outlined that “the respondents are asserting before this Court and what they wish to establish is that the applicant engaged in multiple war crimes in Afghanistan, very serious allegations”. This is in the context where the respondents have in their possession the PAP notice from the IGADF, which contains the names of individuals.
4. The applicant submitted that the respondents’ allegation that he kicked an unarmed man off a cliff in Darwan, Afghanistan, and then either killed him or in some way participated in his killing is a grave one which, if the allegation were true, would constitute a war crime. It was submitted that those allegations have not only been denied, but that he has put forward his account of what occurred on 11 September 2012 in both these proceedings, and in an interview that he voluntarily attended with the AFP in February 2020.
5. The applicant directed attention to the allegations of truth which are pleaded in these proceedings. The applicant referred to the summary of the evidence of the Afghan witness in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 5)* [2020] FCA 1067 at [61] ff (*Roberts-Smith (No 5)*). The applicant also provided the Court with outlines of those witnesses proposed evidence. He submitted that it is apparent that the accounts do not necessarily corroborate each other, and are at odds with the applicant’s account. He also submitted the accounts are inconsistent with what Person 11 says occurred. The applicant submitted that he “should have an unhindered opportunity to test the case of the respondents, and in particular, those individuals who they say will give evidence against [his] client in relation to that issue. Credibility…will be central to the respondent’s case”.
6. The applicant emphasised the position that he is now in has occurred by Colvin J ordering, over the objection of the IGADF, that the PAP notice be provided to the respondents: *Roberts-Smith (No 6)*. The applicant submitted that “this is a cancer, basically. Once you let it out of the bag, it spreads, and now that [the respondents have] got that, it means the other material is at play... Once the Court did that and there was no appeal, it contaminates everything else that flows from there. You can’t do one without the other”.
7. The applicant made submissions as to the significance of Colvin J’s judgments. The applicant submitted that Colvin J concluded that there was a real likelihood they will contain information of considerable forensic importance of the conduct of the respondent’s defence. It was submitted that his Honour directed the IGADF to redact that PAP notice to protect from disclosure any information which was given by the applicant to the Inquiry, or any material derivatively obtained as a result of disclosure by the applicant or by any third party. This was done on the basis that any document recording such information would not be admissible in defamation proceedings, being a civil proceeding, because of the terms of s 32(2) of the IGADF Regulation and s 124(2C)(a) of the Defence Act. It was said that those provisions, together, have the consequence that the privilege against self-incrimination does not apply within the Inquiry on an express basis that any information given, documents produced or material derivatively obtained therefrom, is not admissible in evidence against any person in civil or criminal proceedings. It was submitted that apart from those redactions, the PAP notice was an open document that the respondents could view and see not only the names of Afghan nationals but also a summary of what it is said they told the Inquiry.
8. Addressing the submissions of the IGADF, the applicant emphasised that the outlines of the Afghan witnesses’ evidence were being converted to signed statements, and that that is occurring after the respondents have had the PAP notice. He submitted that there can be no issue that there has been derivative use of the PAP notice as there has been an unsuccessful application by the respondents to amend their allegations based on the information in the PAP notice.
9. The applicant also took issue with the IGADF submission that there is a difference between giving evidence to assist the Australian media, as opposed to assisting somebody associated with Australian Government.

### Submission - reply

1. In response, the IGADF made submissions as to why the judgment of Colvin J does not have the effect the applicant contends. This included, inter alia, the IGADF opposing the release of that document to the respondents, and therefore having acted entirely consistently, without any favouritism or distinction between the parties. The IGADF also submitted that, the information asymmetry between the parties was a factor which weighed heavily in the way Colvin J balanced the application, a factor not present in this application. Further, the IGADF submitted that the orders were made by Colvin J in December 2020, and the four witnesses dealing with the respondents had commenced well before then in August 2020. That was not triggered by the release of the PAP notice.
2. The IGADF submitted that as the current NSI orders apply to the redacted version of the PAP notice, it therefore cannot be shown to certain witnesses and is protected from disclosure through those orders. As a result it was submitted that it has not been released at large and the cancer not is off and running. However, the IGADF submitted that although the disclosure of the PAP notice undoubtedly caused some damage to the public interest, it is “not a reason to effectively let the cancer spread untreated wherever it may go”, but rather, it is “a reason to … try and contain it and treat it and stop it spreading further, because the harm that would arise by further disclosure is greater. Particularly, because here, if the information subpoenaed exists and was produced, it could be expected to place the safety of people in Afghanistan at risk, and the sort of risk that they would be exposed to is well set out in the evidence”.
3. The IGADF also submitted that the result of not upholding the claims it that there will be a cascading series of “tit-for-tat” subpoenas from the parties.
4. The respondents did not take a position on the application.

### Consideration

1. As noted above, the IGADF accepted, and properly so, that there was a relevant public interest consideration on each side of the equation (that harm would be done by disclosure of the documents sought and the proper administration of justice would be frustrated or impaired if the documents were withheld), and that the balancing exercise described in *Alister v The Queen* is to be performed.
2. The documents sought are documents which, if they exist, arose as a result of the Inquiry. The circumstances in which the Inquiry arose and the role of the IGADF are described above and are unnecessary to repeat. Suffice to say for present purposes, that significant steps were taken in its conduct and the reporting of its findings, to ensure confidentiality. Given the basis of the Inquiry was to ascertain whether there was any substance to rumours and allegations of breaches of the Laws of Armed Conflict by elements of the ADF's Special Forces in Afghanistan, the seriousness of the subject matter and the consequent need for confidentiality to enable Major-General Brereton to conduct his investigation, is self-evident.
3. I accept the evidence given by the IGADF in the open and confidential affidavits. The deponent plainly has extensive experience both in the military and in his role as Inspector-General of the Australian Defence Force. It is also evident that care has been taken in the preparation of the affidavits. The issues addressed concern matters not wholly within the Court’s experience. 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.
4. The basis on which the issue of safety is put is readily understandable. In respect to the second basis of the claim Mr Gaynor in his open affidavit at [47] states that:

The types of inquiries that the Office of the IGADF conducts pursuant to its statutory mandate are very often of a most serious nature, as was the case with the inquiry. Investigations of this kind require a very high degree of trust and confidence in the integrity of the Office of the IGADF and I and members of the inquiry team have taken great care to build and foster sufficient trust and confidence within the ADF and with others who may be considering engaging with my office.

1. Significant weight can be attached to the opinions he expresses about the impact of disclosure of the information sought, particularly on his ability to fulfil his statutory role.
2. That said, this case has an added feature, not ordinarily present in cases where such a claim is made, in that there has already been orders made by Colvin J which have had consequences in the production of material to the parties generated from the Inquiry: *Roberts-Smith (No 6)*; *Roberts-Smith v Fairfax Media Publications Pty Limited (No 8)* [2020] FCA 1630 (*Roberts-Smith (No 8)*). For the reasons explained below, that may affect the weight to be attached to the various considerations in the balancing exercise, including relatively to each other, which must necessarily include the weight to be attached to the evidence of the IGADF. Given the information sought, the consequences of the previous orders are part of the factual matrix against which these claims are made and must be considered.
3. Before returning to the orders of Colvin J there are five submissions that it is appropriate to address at the outset.
4. *First*, as the High Court has recognised, in the balancing of competing interests, the balance may be struck differently in civil and criminal proceedings: *HT v The Queen* at [33], citing *Al Rawi & Ors v Security Service & Ors* [2011] UKSC 34; [2012] 1 AC 531 at [101] (*Al Rawi*). In the context of civil law, the liberty of the subject is not at stake: *Al Rawi* at [102]. The applicant added to that the necessary consequence for the protection of the public. Although the applicant strenuously took issue with the submission by the IGADF (and a similar submission made by the Commissioner), there is an obvious difference, and its significance to the balancing exercise is self-evident: see for example, *Alister v The Queen* at 414, 456; *Sankey v Whitlam* at 42, 61-62.
5. Although it may be readily accepted that the imputations alleged to have been made against the applicant are of the most serious kind, nonetheless, these are defamation proceedings. Accepting the consequences of the outcome of a defamation proceedings, as described in *Carson v John Fairfax* at 60-61, nonetheless, liberty is not at stake. Indeed, it could be said that a corollary of the fact that these allegations are serious, is that the public interest in the ability of the IGADF to fulfil his statutory functions in relation to such matters as those that underlie the proceedings is high (as is the Commissioner’s ability to investigate such alleged crimes). What can be said is that these defamation proceedings, from the applicant’s perspective, are directed to an outcome broader than some civil proceedings in that, as he emphasised, the purpose includes vindication of the applicant’s reputation.
6. *Second*, this public interest claim is made in a context where, although the identity of the Afghan witnesses in these proceedings were initially suppressed on application of the respondents, they are no longer so, as a result of there being no application by anyone to extend that suppression order: see *Roberts-Smith (No 10)* at [5]. Their identities are now a matter of public knowledge. It appears no subpoenas have been issued requiring them to give evidence, accepting the jurisdictional issues that arise given the witnesses are in Afghanistan. The import of that, regardless of the jurisdictional issues, is that it appears there is no necessity for the witnesses to be compelled to give evidence. It appears that it is expected that they will voluntarily giving evidence.
7. *Third*, in this regard, there is substance to the submission by the IGADF that it is one thing to give such evidence in support of Australian media in respect to these allegations, but another, to co-operate (if that be the case) with what would be seen as a government of the coalition forces. The risks to a person in that latter circumstance were described by Mr Gaynor, and can be accepted. I do not accept the applicant’s submission that the IGADF had previously accepted the risk had abated. This submission, recited above at [51], is a reference to an affidavit of Mr Bartlett and a submission based thereon, which was before the Court in the respondent’s application that the evidence of the Afghan witnesses be given by audio-visual link: *Roberts-Smith (No 10)* at [58]. I accept the submission of the IGADF that properly read, the submission at its highest, is that there was no evidence available before the Court to show what the risk was after December 2020. That alone does not support the proposition that the risk has abated. Moreover, Mr Gaynor’s evidence, which is current, is before the Court.
8. *Fourth*, I am mindful of the potential effect on s 21 directions, which prohibited the disclosure of the identities of persons who have given evidence to the Inquiry, if the public interest claim is not upheld. As a general proposition it can be accepted that the use of 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.
9. *Fifth*, if it exists, the material sought by the subpoena in this application arises because of the respondents’ reliance on the defence of truth. As noted by the IGADF, this subpoena is directed to third parties to the proceedings. As the IGADF submitted, the consequence of upholding the claim is that neither party has access to or could use the material. I also accept, as the IGADF submitted, that as a general proposition cases proceed, particularly in the civil context, where the opposing party does not necessarily have the prior statements of the witnesses, and it does not result in a trial being necessarily unfair. However, the balancing exercise is being conducted in the context where the IGADF accept that the withholding of information is directly relevant to the credibility of any Afghan witness who will give evidence in these proceedings would impair, at least to some extent, the administration of justice. I accept the applicant’s submission as to the significance of credit of the Afghan witnesses to these proceedings having considered the material relied on by the applicant to illustrate why that is so as articulated in the submissions. The proposed evidence of the Afghan witnesses is summarised in *Roberts-Smith (No 5)* at [59]-[64]: *Roberts-Smith (No 10)* at [13] and [42]-[49]. In *Roberts-Smith (No 10)* Besanko J observed at [52]-[53]:

[52] Secondly, in *Roberts-Smith (No 5)* I noted that, on the face of a number of the outlines of evidence, including those of the Afghan witnesses, there appeared to be some inconsistencies in the evidence to be advanced by the respondents about the events in Darwan on 11 September 2012. I said (at [72]):

Other inconsistencies or uncertainties identified by the applicant are as follows: (1) the amendments do not contain a statement identifying the place where Ali Jan was shot and the outlines of evidence are inconsistent (Person 4: the dry creek bed below the cliff; Person 13: in the bushes nearby; Person 62: pulled or dragged by two soldiers short in stature from the creek bed to the cornfield and not known to Person 62 whether at the time Ali Jan was dead or alive; Person 63: Ali Jan’s dead body lying in the cornfield; Person 64: Ali Jan’s dead body found under a berry tree); and (2) the statement by the respondents’ solicitors on 24 June 2019 that Person 4’s outline of evidence should not be construed as suggesting that Person 11 executed Ali Jan (see [41] above).

[53] The evidence of the Afghan witnesses if accepted as identifying the applicant, and if accepted generally, is evidence of very serious misconduct by the applicant and is an important aspect of the respondents’ case. The conduct is denied by the applicant and, on this application, it is appropriate to assume that it will be the subject of a very vigorous challenge. It is appropriate to assume that credit and reliability will be in issue in cross-examination…

1. I accept the applicant’s submission as to the potential relevance and significance of the material.
2. Given that the applicant’s submission is that this material is relevant as it potentially goes to the Afghan witnesses’ credibility, the submission that neither party would have the material does not have the significance in this case that it might otherwise have. The IGADF submitted that in many cases, a litigant would be deprived of both the evidentiary benefit and the forensic benefit that might come from access to particular information that, if it exists, would be protected by public interest immunity, but in this case it is “unlikely that either party would be deprived of either of those two things if our claim is upheld”. The absence of prior material or statements, if it exists, as a general proposition, is likely to have more of an impact on the applicant’s ability to conduct his case, than the respondents. The respondents are calling the Afghan witnesses and prior statements of any witness to its case, have a different and more limited potential relevance (particularly given the stage of the proceedings), to that of the applicant. This is also reflected by the fact the respondents did not take a position on the application; they did not argue to obtain access to the material. The material is sought by the applicant so as to potentially use it to impugn the credit of witnesses.
3. Having made those observations, it is appropriate to return to the orders made by Colvin J. It is timely to recall that it was the respondents who were seeking the documents in that hearing.
4. The issue of most significance for present purposes was the consideration by Colvin J in *Roberts-Smith (No 6)* of the PAP notice directed to the applicant, over which the IGADF made a claim for public interest immunity. The claims were described in broad terms at [33]-[34]:

[33] …the submission for the IGADF was to the effect that the private nature of the process established for the Inquiry and protected by the directions that had been made in the course of the Inquiry provided an assurance to encourage those with relevant information to come forward to assist the Inquiry. They could do so on the basis that there would be privacy unless and until a decision was made as to whether the final report of the Inquiry would be made public, and if so to what extent.

[34] Reliance was placed upon cases concerned with protecting the integrity of an investigative process as well as those concerned with protecting the identity of informers.

1. At [60]-[61] of *Roberts-Smith (No 6)*, Colvin J summarised the evidence as to the nature of such a notice which, in light of the applicant’s submissions in this matter, it is appropriate to recite:

[60] The final matter stated in paragraph e. above deserves some amplification for present purposes. The purpose in providing PAP Notices to individuals is to afford them the opportunity to present submissions and further information as to matters that may be the subject of adverse findings against them. In the course of a private investigation it is likely to be the first and only opportunity that a party has to provide a response to the nature of claims made and the basis for them because up until then, other than by providing evidence personally, the party will not have participated in the process by which evidence has been gathered from others and considered by those with the conduct of the Inquiry. If the process of serving the PAP Notices was not conducted confidentially then there would be the risk of considerable unfairness because the matters in the PAP Notices would be released without a proper opportunity to answer the claims. The unfairness that the process of serving notices was designed to avoid would be manifest. By logical extension the fact that a PAP Notice had been given to a particular person is a matter that is justified as being required to be kept confidential because it reflects views that may not ultimately be expressed in the report. Adverse inferences that could be quite damaging to the reputation of a person may be drawn from that fact that a person has been given a PAP Notice given the publicly available information concerning the subject matter of the Inquiry. They may be drawn in circumstances where, after receiving a response to a PAP Notice the Inquiry is persuaded to make different findings or no adverse findings. There is a public interest in ensuring the fairness of the process conducted by the Inquiry and, on the evidence, and for the above reasons that includes the confidentiality of the process by which the communications with Potentially Affected Persons is conducted.

[61] The Inquiry has commenced the process of using PAP Notices. To date, not everyone who is likely to receive a PAP Notice has been issued with a notice. As to the nature and content of a PAP Notice, CDRE Sneath deposed as follows (para 29):

A PAP notice is not a pro forma document; each notice is tailored to the circumstances of the individual recipient. However, generally speaking, PAP notices contain the following information:

1. **Potential findings or recommendations:** PAP notices identify each finding or recommendation that the Inquiry is considering whether to make. While various types of potential findings and recommendations are included in PAP notices, some are of a serious nature. For instance, some PAP notices contain potential findings to the effect that there is credible evidence that a named person committed a criminal offence and/or that there is a realistic prospect of a criminal investigation obtaining sufficient evidence to charge a named person with a criminal offence. Further, some PAP notices contain potential recommendations to the effect that the CDF should refer a named person to a law enforcement body for criminal investigation.
2. **Factual background:** PAP notices summarise the factual background relevant to each finding or recommendation that the Inquiry is considering whether to make. Ordinarily, this summary describes in narrative form the incident or incidents giving rise to the potential finding or recommendation. Because of the subject matter of the Inquiry, these incidents are ordinarily incidents which occurred in Afghanistan during operations carried out by the ADF's Special Forces.
3. **Evidence:** PAP notices summarise the evidence relevant to each finding or recommendation that the Inquiry is considering whether to make. In many cases, this summary of the evidence is lengthy and highly specific. The summary ordinarily contains the following: (i) a summary of relevant documentary evidence (whether sourced from the ADF, the Department of Defence, a partner military force or otherwise, and including documentary evidence that is operationally sensitive and/or security classified); (ii) a summary of relevant oral evidence given by witnesses in their interviews with the Inquiry (including, in many cases, extensive extracts from the transcripts of those interviews and also including oral evidence that is operationally sensitive and/or security classified); and (iii) a summary of relevant oral evidence given by the recipient of the PAP notice in his or her interviews with the Inquiry (including, again, extensive extracts from the transcripts of those interviews and oral evidence that is operationally sensitive and/or security classified). Some PAP notices also contain, at least to some extent, observations about the evidence that has been gathered, including consideration of issues such as the reliability of particular evidence and/or the credibility of particular witnesses.

(original emphasis)

1. Colvin J concluded at [87]-[88] of *Roberts-Smith (No 6)* that:

[87] On the evidence as it presently stands, I would order the disclosure of the Contentious Documents. I would do so on the basis of the concession made by the respondents that the documents will need to be redacted to exclude material in order to protect the privilege against self-incrimination and on the basis that steps will need to be taken to ensure that the contents of the documents are otherwise protected by appropriate orders restricting the persons to whom their contents may be disclosed, subject to further order. I am not persuaded that there should be any different approach taken concerning any PAP Notice, if it exists.

[88] Before making final orders, I would afford to the IGADF an opportunity to put on a further confidential affidavit concerning any aspect of the contents of the Contentious Documents that should cause me to reach a different conclusion. I would receive that affidavit confidentially in accordance with the authorities and make final orders taking account of the contents of the affidavit

1. His Honour thereafter addressed ten issues which had been taken into account in the balancing exercise, three of which it is appropriate to recite. At [92] Colvin J concluded that on the available evidence if the documents (including the PAP notice) existed, there is a “real likelihood that they will contain information of considerable forensic importance for the conduct of the respondents’ defence”.
2. At [97] of *Roberts-Smith (No 6)* Colvin J concluded that:

Eighth, the submission was advanced for the IGADF that there may be instances where public interest immunity may mean that a party is unable to establish its case. So much may be accepted. However, instances where the balancing exercise will lead to the result that information that is materially relevant to a case of a kind where the subject-matter is of real significance for the party seeking disclosure being immune from production at common law may be expected to be confined to instances where there is a great risk of harm to the public interest if the information was disclosed. The risk here is the prospect that the assurances of confidentiality provided to those who are to be encouraged to co‑operate and provide information to the Inquiry may be undermined. For reasons already given, a risk of that kind has been demonstrated. However, in circumstances where adequate steps are taken to maintain the confidentiality of the Contentious Documents and public interest immunity could be claimed before any such document (or the information obtained from the document) was admitted into evidence in the proceedings, that risk must be low. Further, it is a risk the significance of which must be assessed in the context of the prospect that part or all of the report of the Inquiry may be made public and that parties providing information may be called upon to give evidence in any future criminal proceedings. In other words, this is not an instance where those participating in the Inquiry could be given an assurance that information that they may provide to the Inquiry will be kept private in all circumstances.

1. And at [99] of *Roberts-Smith (No 6)* Colvin J observed:

Tenth, there is always a risk of inadvertent disclosure of information the wider its dissemination. By reason of their subject matter, these proceedings are being conducted with detailed arrangements in place to protect the confidentiality of certain information disclosed in the proceedings, including the identity of particular individuals. There is no suggestion that there have been issues with complying with those arrangements which deal with information of equivalent or greater sensitivity to that which may be expected to be included in the Contentious Documents. The existing arrangements may be extended to cover the Contentious Documents and the information within them.

1. After considering the further information put by the parties, the orders included production of any PAP notice in respect to the applicant but that it be redacted to protect from disclosure any information which was given by the applicant to the Inquiry, or any material derived by the Inquiry derivatively as a result of disclosure by the applicant or by any third party. Any document recording such information would be inadmissible in the proceeding because of the relevant statutory scheme under which the Inquiry was conducted which has the consequence that the privilege against self-incrimination does not apply within the Inquiry on an express basis that the information given or documents produced to the Inquiry, or documents obtained derivatively therefrom, are not admissible in evidence against any person in civil or criminal proceedings.
2. I note that in *Roberts-Smith (No 8),* which led to the orders, Colvin J identified the question then before him at [14], as follows:

The question which requires further deliberation does not concern whether information provided by one party to the Inquiry (on the basis that the privilege against self-incrimination had been conditionally abrogated) (**Third Party Information**) may be adduced in the defamation proceedings brought by Mr Roberts Smith. It concerns whether the disclosure of Third Party Information gives rise to a real risk that the information might enter the public domain such that in the event of any criminal proceeding against the third party it might be argued that there had been at least an indirect use of the Third Party Information with the result that an application might be brought to stay the criminal prosecution. This was a concern deposed to by Ms Sneath in her open affidavit in support of the claim to public interest immunity: para 58(c).

1. A number of observations can be made. *First*, the orders made by Colvin J were not the subject of an appeal by the IGADF. *Second*, as the IGADF submitted, a basis of Colvin J’s conclusion in *Roberts-Smith (No 6*) as set out at [93] was that:

…the information is in the hands of Mr Roberts‑Smith. This is not an instance where a party to litigation seeks access to information in the hands of a third party and the consequence of upholding a claim to public interest immunity will fall equally in the sense that it will mean that the information is not available to either party. Further, some lawyers who act on behalf of Mr Roberts‑Smith in the investigation also act for him in the conduct of the defamation proceedings. Therefore, if the public interest immunity claim is upheld, those lawyers will have access to the Contentious Documents whereas lawyers acting for the respondents will not.

1. However, that that reason does not apply here, does not alter the consequences of the orders made. Regardless of the reasons for doing so, the fact is, that the material has been released. *Third*, even though the respondents were aware of the Afghan witnesses before the orders of Colvin J, the respondents now have the benefit of the material released. Regardless, that does not gainsay the submission that the respondents now have the material, to which apparent use has been made. *Finally* I note that the documents which were released as a result of the orders of Colvin J are subject to the NSI orders which dictate their handling and therefore limit the use that can be made of them.
2. That said, it does not follow, simply because information was released by Colvin J, with some of the public interests claims by the IGADF not being upheld, that the claims made by the IGADF in this application must necessarily fail. Any determination as to whether a claim of public interest immunity is established is necessarily fact specific.
3. A resolution of this claim is not simply a question of the inevitable consequence of the “cancer spreading” from the release of that material or that the claims should be refused because you “can’t do one without the other”. Nor does it simply mean that the applicant “should have an unhindered opportunity to test the case of the respondents”. A resolution of the claim is also not simply about trying to stem the tide, stopping the further spread of material. Nor is it relevant, as the IGADF appeared to contend, that the result of not upholding the claim may result in a cascading series of subpoenas from the parties seeking material. Any subpoenas issued in the future will also be addressed, according to the facts and evidence relevant to it at the time the issue arises for determination. To be clear, it certainly does not follow, and it cannot be assumed from the outcome of these proceedings, that material can be obtained by any subpoena to the IGADF over an objection of public interest immunity. As referred to below, and explained in more detail in the confidential reasons, there are very particular circumstances applicable to the determination of this claim.
4. I appreciate that, as the IGADF submitted, he opposed the release of those documents in the proceeding before Colvin J. Although that reflects a consistency in the approach taken, which reflects upon the attitude and opinion of the IGADF, it does not otherwise advance his case. Regardless of that fact, or the reasons why Colvin J concluded that balancing of the respective interests resulted in the documents being released, the consequence was that they were released, with the respondents now having possession and use of certain documents, including the applicant’s PAP notice (and the non-redacted information contained therein). As noted above, that must be the context in which these claims are considered, as it plainly affects the weight to be attached to various considerations relevant to the balancing exercise, and the relative weights of those considerations.
5. It is timely to recall the limited nature of the material sought by this subpoena, being certain material if it exists, relating to the Afghan witnesses, in relation to a particular allegation against the applicant related to conduct in Darwan on or around 11 September 2012.
6. In addition to the submissions referred to above, the IGADF submitted that if the public interest claim is not upheld there is a risk of inadvertent disclosure, even if there were protective orders. As is apparent from Colvin J’s observations at [99], recited above, his Honour recognised that there is always a risk of inadvertent disclosure. That may be accepted. However, as Colvin J recognised, there are protective orders in place in relation to the conduct of these proceedings which could be extended to cover the material his Honour was considering. They were so extended, as is apparent from *Roberts-Smith (No 8)*. Although I accept what is involved in amending NSI orders, it has previously been done to accommodate those documents in these proceedings. There is no reason to suppose, if there are documents to be produced, given the basis of the public interest immunity claims in this application, that that could not occur again. I proceed on that basis. I note in that context the apparent co-operation between the subpoenaed parties (those acting for various Commonwealth agencies) and the applicant, which has led to the reduction of the scope of subpoenas and of the claims for determination by the Court. In this context the IGADF also submitted that, subject to the consideration of the Attorney-General, one of the options available is for the documents to be produced under the NSI orders as “sensitive documents” without an order being amended. The concern expressed by the IGADF in that respect seems to be that such classification permits an application to the Court by a party to reclassify the documents to a lesser standard which, if it occurred could lead to greater dissemination. That submission at this stage is speculative. If such a path was followed and if an application was made to the Court, it would be for the Court to decide the application based on the material then before it.
7. As noted above, some submissions were made in closed court due to the application of the NSI orders to certain material, and I have addressed aspects of those submissions in a brief confidential reasons which is supplementary to this judgment. Suffice to say that in balancing all considerations I encompass those in the confidential reasons. Balancing all the considerations in the very particular circumstances of this case, I am satisfied that, subject to any further confidential evidence the IGADF may adduce, there should be production of documents, if such documents exist, sought in the manner described in the confidential reasons.
8. In that context I provide an opportunity to the IGADF to provide any further confidential evidence it wishes in support of his claim, including a confidential submission if considered necessary.

## Commissioner’s Claim

### Submissions - Commissioner

1. As with the IGADF subpoena, the material sought by the Third AFP Subpoena, is now confined to the Afghan witnesses.
2. In support of his claim, the Commissioner relies on 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 a confidential affidavit of Assistant Commissioner Lee also sworn on 3 May 2021 (the First Confidential Lee Affidavit). The Commissioner, with leave, supplemented that evidence after the hearing with a further confidential affidavit of Assistant Commissioner Lee sworn on 13 May 2021 (the Second Confidential Lee Affidavit).
3. The Assistant Commissioner is responsible for the investigations of domestic and international terrorist activity, espionage and foreign interference, and special investigations, which includes, relevantly, the investigation of alleged war crimes.
4. The Commissioner, relied on and embraced, without repeating, many of the submissions advanced by the IGADF. This summary only refers to those submissions made in open court. As noted above, the confidential material is addressed in confidential reasons, which supplement these reasons.
5. It was submitted that when weighing the strength and persuasiveness of Assistant Commissioner Lee’s affidavits, the Court should take into account the following factors: the need to give due weight and proper respect to the deponent’s reasons for claiming public interest immunity; the seniority and standing of the deponent; the importance of the public interests sought to be protected by the claim; whether those issues are wholly within the competence of a court to evaluate; whether the call for production takes place in criminal or civil proceedings; and the importance of the subject documents to the issues in the proceedings. It was submitted that those factors lend significant support to the Commissioner’s claims.
6. The Commissioner’s claim is made on the basis that the disclosure of the documents sought (if they exist) would prejudice the AFP’s ongoing criminal investigations. He submitted, by reference to the evidence, that disclosure would be contrary to the public interest because, inter alia, it would disclose information that would prejudice the availability of reliable witness evidence; reveal details of evidence and lines of enquiry currently being explored during the AFP’s investigative process; and risk evidence contamination which cannot be eliminated by the orders currently made in the proceedings pursuant to the NSI Act. The Commissioner made these submissions, with reference to relevant authority, and emphasised that the claims 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.
7. The Commissioner submitted:

The [First] 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.

1. Further, the Commissioner submitted that these proceedings concern private rights, and in that context, 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: citing *Commonwealth v Northern Land Council* at 618-619 and *Carol Ann Matthews v SPI Electricity Pty Ltd* [2014] VSC 65 at [24(I)] (*Matthews v SPI)*.
2. The Commissioner submitted that 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. Relevance to the proceedings is of itself insufficient: *Matthews v SPI* at [24(k)].
3. The Commissioner emphasised the difference between civil and criminal proceedings for the purposes of the balancing exercise. In doing so the timing of this subpoena was also emphasised, as unlike the usual situation where a subpoena is issued against the Commissioner which is after criminal proceedings are commenced, this subpoena is at the investigative stage. This is relevant to the integrity of the ongoing investigation and any charges that might be laid therefrom.
4. The Commissioner submitted, based on the reasons in the First Confidential Lee Affidavit, further orders made under the NSI Act, and non-publication and/or non-disclosure orders would not sufficiently ameliorate the real risk of harm as a consequence of disclosure of the Relevant Documents.
5. The Commissioner submitted that the fact that the individuals have apparently been identified by the respondents as witnesses that they hope will give evidence in the proceedings does not remove the risk in relation to their safety which Commissioner Lee says is present. The Commissioner submitted that the Court ought not to draw any concrete conclusions as to the absence of risk from the fact that the respondents have not sought to apply for an extension of the suppression orders which had been made in respect of the identities of these individuals. The Commissioner submitted that at a conceptual level, even if certain individuals are willing to give evidence in the proceedings, “there may be an important difference between providing assistance to a foreign media outlet to expose conduct of the type which has been alleged in the proceedings and in the report which has given rise to the proceedings on the one hand, and on the other hand it being known that ‘you have provided assistance to an agency of the Australian government’, particularly having regard to the relationship between the Australian government and those who might pose a threat to these individuals in Afghanistan”.

### Submissions – applicant

1. Aspects of the applicant’s submissions in respect to the IGADF’s claim were also relied on in respect to this claim. It is unnecessary to repeat those submissions here.
2. The applicant submitted that relevance of any prior account of the witnesses is clear, as it will enable him to test the evidence of these witnesses. It was submitted that denying access to the material would materially prejudice the applicant’s ability to challenge the evidence of his accusers and thereby his right to a fair trial. It was contended that may result in the Court being misled as to material facts which would hinder its ability to get to the truth of these matters. The applicant submitted that production of the records sought would not frustrate the AFP’s ongoing investigation. It was contended that the scope of the documents sought is deliberately narrow. The applicant submitted that transcripts of interview, if they exist, containing the accounts of what the Afghan witnesses claim they saw or heard in Darwan on 11 September 2012 (and correspondingly, questions from AFP investigators prompting the interviewees about what they saw and heard) are unlikely to reveal lines of inquiry or police methodology of a kind that could frustrate the investigation if disclosed to the applicant. The applicant contended that the production of the transcripts of interviews with the Afghan witnesses, if they exist, will neither alert the applicant to either the existence of the investigation (which was disclosed to the applicant by the AFP) or to the substance of their allegations against the applicant. The applicant emphasised that he has already given his account to the AFP about the events at Darwan describing in detail the events that occurred on 11 September 2012, which, it was submitted he no doubt he will be cross-examined extensively on in these proceedings.
3. It was submitted that there is no plausible reason to believe that disclosure of the material will prejudice any investigation by the AFP or any other law enforcement agencies.
4. During oral submissions the applicant emphasised that the respondents have a copy of the applicant’s interview with the AFP, which the AFP provided in answer to a subpoena issued at the request of the respondents. It was provided without any restriction on its use including any prohibition on the transcript or its contents being shared with the Afghan witnesses, or being used by the lawyers for the respondents to prepare the signed statements that the Court has directed be served by 14 May 2021, or being tendered as evidence in the case.
5. The applicant described the provision of the interview as “a misstep” because “not only [have the AFP] contaminated their investigation and put that at grave risk, they’ve also contaminated these proceedings”. The applicant submitted that he is in a “remarkable situation” where the Commissioner produced to the respondents the record of his interview concerning his version of events, with no prohibition on its use. The respondents could have made derivative use of the interview when seeking to obtain statements from witnesses.

### Submissions – reply

1. The Commissioner submitted that it is apparent from the Open Lee Affidavit that the Assistant Commissioner was aware, when swearing it, that the applicant’s interview had been released.
2. The Commissioner submitted that although one cannot say with precision the consequence of releasing the information sought there is some real risk that it will have some negative impact and that there is a real risk it could have a prejudicial impact upon the ongoing investigation.
3. The respondents did not take a position on this application.

## Consideration

1. As with the IGADF, the Commissioner properly accepted that each interest is affected, such that the balancing step is required to be undertaken.
2. Given that, in many respects, the submissions the Commissioner advanced in support of his claims in open court were the same (or very similar submissions) to those of the IGADF and a number of the observations made above in respect to those claims apply to consideration of this claim: see for example, [69]-[72] and [74]. It is unnecessary to repeat those observations here. That said, the weight, and relative weights may well be different, as the factual context in which this claim is made is necessarily different. The extent of the difference is explained more fully in my confidential reasons in respect to this claim.
3. An obvious point of difference is that the Commissioner was not a party to the proceedings in which the orders of Colvin J were made. Relevantly, that judgment addressed claims by the IGADF, with the consequences which flowed including that the parties have access to some IGADF material including the applicant’s PAP notice, (albeit with NSI orders protecting that document). The extent of information generally in a PAP notice is referred to above at [79], in an extract from the judgment of Colvin J.
4. Nor is the Commissioners’ investigation conducted in the context of the particular statutory regime which applied to the conduct of the Inquiry. Rather, the Commissioner relies on traditional and well established categories of public interest immunity that apply to informers, and disclosing information which may impede an investigation.
5. Moreover, importantly, unlike the IGADF claim where the Inquiry has completed and the Report has been issued, the Commissioners’ investigation is ongoing and relates to the investigation of serious allegations which may result in persons being charged with criminal offences.
6. I accept that the Commissioner has been issued this subpoena at a stage earlier than would typically be the case in relation to a police investigation. Subpoenas are more likely to be issued after criminal proceedings have been instituted, and therefore when a matter has been investigated at least to the extent that it has been determined that there is sufficient evidence to proceed with a prosecution (although the investigation would no doubt be continuing). The stage of the investigation is a relevant matter which may affect the weight of the relevant considerations in the balancing exercise. As the investigation is ongoing, as a general proposition the potential impact is likely to be greater than if charges had already been laid. Accordingly, again as a general proposition, the impact is likely to be more immediate than, for example, the position of the IGADF where the impact in interfering with his ability to perform his statutory functions is directed to the future, not to this ongoing investigation.
7. The Open Lee Affidavit deposes at [22] that, in summary, the public interest immunity claims are being made to ensure that the Commissioners’ ongoing criminal investigations are not prejudiced by the disclosure of information in the defamation proceedings, contrary to the public interest. He deposes that specifically the integrity of the criminal investigation process is protected and not compromised by: (1) the availability of reliable witness evidence; (2) revealing details of evidence and lines of enquiry currently being explored during the AFP's investigative process; and (3) evidence contamination which cannot be eliminated by the orders currently made in the proceedings under the NSI Act. The claims are supported by additional evidence in the First Confidential Lee Affidavit and expanded upon in the Second Confidential Lee Affidavit.
8. As will have been apparent from the recitation of the applicant’s submission, he relied heavily on the fact that his voluntary interview with the AFP was produced to the respondent by the Commissioner under a subpoena issued by them. Emphasis was placed on the fact that no claim of public interest immunity was made by the Commissioner in relation to that material.
9. The Open Lee Affidavit deposes at [23]:

The AFP has previously produced some documents in response to the subpoena issued at the request of the Respondents dated 7 May 2020 that related to its ongoing criminal investigations. This is because the AFP did not consider disclosure of that material to be prejudicial to those investigations, or otherwise contrary to the public interest.

1. As set out above at [111], the applicant describes the approach taken by the Commissioner as a misstep. The implication appears to be that the respondents have had the interview and have had the opportunity to use his version of events, including when obtaining statements from the Afghan witnesses, which may have infected the proceedings. True it is that a consequence of the release of the interview appears to be that it can be used, which includes derivate use and that it can be shown to potential witnesses. I do not have the interview before me (although I have the applicant’s outline of evidence) and nor was it suggested by reference to the interview and the outlines of evidence of the Afghan witnesses filed by the respondents that anything in particular gave rise to any such concern. Rather, as noted above, it appears that the submission is based on the proposition that release of the interview with the possible attendant consequences should result in “an unhindered opportunity to test the case of the respondents”, which includes the Afghan witnesses, without which it will not be a fair trial.
2. It is not to the point whether the release of the applicant’s interview can be characterised as a misstep, or even, whether or not, with the benefit of hindsight it ought to have occurred.
3. If it is suggested that the approach taken on this claim by the Commissioner is inconsistent with that taken in respect to the interview, I do not accept the submission, as it does not take account that each decision is fact specific. Nor do I accepted the proposition (if it is suggested) that the release of the interview which permitted its use by the respondents in preparation of its case (including its witnesses) results in an untrammelled right in the applicant to cross-examine witnesses called by the respondent.
4. The observations made above at [89] apply similarly to this claim. An entitlement to documents if they exist, is not granted on a tit-for-tat basis.
5. As with all claims the weighing process is fact specific. The documents sought by this subpoena, if they exist, relate to the Afghan witnesses, with the potential relevance to the applicant, said to relate to the credit of these witnesses.
6. As noted above, some submissions were made in closed court and confidential material is relied on in support of the claim. I address the confidential material in confidential reasons which supplement these reasons. Those matters have been considered in the balancing process. Balancing all the relevant considerations in this case, I am satisfied that if documents exist which fall within the terms of the subpoena, the balance weighs in favour of non-disclosure on the basis of public interest immunity. On the evidence before me the Commissioner has established his claim for public interest immunity.

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| I certify that the preceding one hundred and thirty (129) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 24 May 2021

**SCHEDULE OF PARTIES**

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| --- | --- |
|  | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
| Respondents |  |
| Second Respondent: | NICK MCKENZIE |
| Third Respondent: | CHRIS MASTERS |
| Fourth Respondent: | DAVID WROE |