Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 6) [2020] FCA 1285

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| File numbers: | NSD 1485 of 2018  NSD 1486 of 2018  NSD 1487 of 2018 |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 8 September 2020 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - claim by Inspector‑General of Australian Defence Force to public interest immunity over contents of communications undertaken for purposes of inquiry into alleged conduct of Special Forces while serving in Afghanistan - where subject-matter of inquiry overlaps matters the subject of defamation proceedings - where inquiry ongoing and being conducted in circumstances of strict confidentiality - where documents sought to be produced by respondents in possession of applicant - whether there is public interest to support IGADF's claim - whether administration of justice would be frustrated if documents withheld - whether legitimate forensic purpose for seeking documents - consideration of balancing of competing public interests - order made for IGADF to file any further confidential evidence in support of claim |
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| Legislation: | *Defence Act 1903* (Cth) ss 110A, 124  *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)  *Inspector-General of the Australian Defence Force Regulation 2016* (Cth) ss 21, 27, 28, 30, 32 |
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| Cases cited: | *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404  *Attorney General (NSW) v Lipton* [2012] NSWCCA 156  *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667  *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* [2011] FCA 938  *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; (2008) 169 FCR 227  *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88  *Cain v Glass (No 2)* (1985) 3 NSWLR 230  *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62  *Criminal Justice Commission v Collins* (1994) 74 A Crim R 63  *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* [1999] HCA 67; (1999) 201 CLR 49  *Goldberg v Ng* (1994) 33 NSWLR 639  *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532  *HT v The Queen* [2019] HCA 40  *Jacobsen v Rogers* [1995] HCA 6; (1995) 182 CLR 572  *Lee v The Queen* [2014] HCA 20; (2014) 253 CLR 455  *National Companies and Securities Commission v The News Corporation Limited* [1984] HCA 29; (1984) 156 CLR 296  *R v Meissner* (1994) 76 A Crim R 81  *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1  *Somerville v Australian Securities Commission* (1995) 60 FCR 319  *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 8 ACLC 87  *The Australian Statistician v Leighton Contractors Pty Ltd* [2008] WASCA 34; (2008) 36 WAR 83  *Von Snarski v Criminal Justice Commission* [1998] 1 Qd R 562  *Zarro v Australian Securities Commission* (1992) 36 FCR 40 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Number of paragraphs: | 101 |
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| Date of hearing: | 1 September 2020 |
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| Counsel for the Applicant: | Mr P Sharp |
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| Solicitor for the Applicant: | Mark O'Brien Legal |
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| Counsel for the Respondents: | Mr ATS Dawson SC with Ms L Barnett and 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 | Ms Anna Mitchelmore SC with Mr A Berger and Mr J Edwards |
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| Solicitor for the Inspector‑General of the Australian Defence Force | 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: | COLVIN J |
| DATE OF ORDER: | 8 September 2020 |

THE COURT ORDERS THAT:

1. On or before 15 September 2020, the Inspector-General of the Australian Defence Force do deliver to judge's chambers in Perth a sealed envelope marked 'Confidential for the personal attention of Colvin J pursuant to orders made on 8 September 2020' any further confidential affidavit evidence in support of the Inspector-General's claim to public interest immunity.
2. On or before 15 September 2020, each party do file a minute of proposed orders as to the terms upon which documents should be produced in the event that the claim to public interest immunity is not upheld in whole or in part.
3. On or before 18 September 2020, any party claiming that costs of the issue concerning public interest immunity should not be borne by the party who was substantially unsuccessful on the issue shall file short written submissions as to costs of no more than three pages and, subject to further order, any question as to the appropriate costs order shall be dealt with on the papers.

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

REASONS FOR JUDGMENT

COLVIN 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. After the defamation proceedings were commenced in this Court, Mr Roberts‑Smith was informed by the Australian Federal Police that he was considered to be a suspect in relation to an investigation into alleged war crimes committed at Darwan Village in Afghanistan on 11 September 2012. The investigation concerns matters the subject of some of the alleged defamatory imputations. Mr Roberts‑Smith has participated in an interview with the Federal Police as part of their investigation. No charges have been brought against Mr Roberts‑Smith.
3. Before those events, in May 2016, at the request of the Chief of Army, the Inspector‑General of the Australian Defence Force (**IGADF**) had commenced an inquiry to ascertain whether there is any substance to rumours and allegations of breaches of the Laws of Armed Conflict by elements of the Special Forces in Afghanistan (**Inquiry**). The Inquiry is ongoing and is being conducted by the Honourable Paul Brereton AM RFD, a Justice of the Court of Appeal of the Supreme Court of New South Wales who has been appointed to the statutory position of Assistant IGADF. It is being conducted under the provisions of the *Inspector-General of the Australian Defence Force Regulation 2016* (Cth)(**Regulation**), having been established under a previous regulation.
4. When established, the Inquiry was required to be conducted in private. In the manner described below, the Inquiry has continued to be conducted in private. It has now reached a point where notices are being issued to persons who might be adversely affected by the Inquiry's findings and recommendations (described by the Inquiry as **Potentially Affected Persons**). A number of notices have been issued to Potentially Affected Persons that contain the details of potential findings or recommendations that the Inquiry is considering whether to make that may affect the individual person to whom the notice is addressed. In addition, each notice sets out relevant factual background and a summary of relevant evidence (**PAP Notices**).
5. On 3 July 2020, the respondents served a notice to produce in the defamation proceedings requiring production by Mr Roberts‑Smith of the following documents:

1. Any notice received from the Inspector General of the Australian Defence Force (IGADF) indicating that the Applicant is a potentially affected person (PAP notice);

2. All documents accompanying the PAP notice; and

3. Any response by the Applicant to the PAP notice.

1. In addition, after being pressed by the respondents to discover documents concerning the Inquiry, Mr Roberts‑Smith filed an amended list of discovered documents dated 13 July 2020. In the part of the list setting out the documents in respect of which privilege is claimed, the following description was stated at paragraph 67:

Documents to which the *Inspector General of the Australian Defence Force Regulation 2016* applies.

1. The dates of the documents described at paragraph 67 were said to be 'various' and the grounds of the privilege claim were expressed in the following terms:

Production of the documents would constitute an offence under s21 of the Regulation.

1. Section 21(3) of the Regulation provides that it is an offence to contravene a direction given under s 21(1) which in turn provides:

If the Inspector-General ADF is satisfied that it is necessary to do so in the interests of the defence of the Commonwealth, or of fairness to a person who the Inspector-General ADF considers may be affected by an inquiry, the Inspector-General ADF may give a direction restricting the disclosure of the following:

(a) information contained in oral evidence given during the inquiry, whether in public or in private;

(b) all or part of any document received during the course of the inquiry;

(c) information contained in a report about the inquiry that is given to a person under section 27.

1. Section 28E of the Regulations provides that an Assistant IGADF who is a judicial officer with the conduct of an inquiry may exercise the power under s 21(1) without being authorised to do so by the IGADF. Directions of the kind described in s 21(1) have been made in the Inquiry.
2. Relevantly for present purposes, s 27 provides that the IGADF must give to the Chief of the Defence Force a report about the Inquiry if an Assistant IGADF has given the IGADF a report as required by the Regulation. So, when concluded, the Inquiry will result in the delivery of a report to the Chief of the Defence Force.
3. The final hearing of the defamation proceedings is to be allocated dates commencing in the first half of 2021.
4. In those circumstances, the respondents press for production of the documents described in the notice to produce and the documents described in paragraph 67 of the amended list of documents.

## The IGADF's claim to public interest immunity

1. The IGADF claims public interest immunity over the documents sought by the respondents as described in the notice to produce and paragraph 67 of the amended list of documents. On that basis the IGADF opposes their production by Mr Roberts‑Smith in these proceedings. The claim to public interest immunity is challenged by the respondents. Mr Roberts‑Smith supports the position of the IGADF.
2. It is important to observe that the documents in issue are those that are in the possession or control of Mr Roberts‑Smith. The respondents are not seeking access to documents held as part of the Inquiry that have not been provided to Mr Roberts‑Smith. There is no dispute that the documents are the subject of directions made under s 21 of the Regulation that require the documents and their contents to be kept confidential.
3. The respondents suspect the documents held by Mr Roberts‑Smith include a PAP Notice directed to Mr Roberts‑Smith. As a basis for that suspicion, amongst other things, they rely upon evidence to the effect that (a) the investigation by the Federal Police was commenced following a referral by the Chief of the Australian Defence Force; and (b) the subject matter of that investigation includes the allegations as to events that occurred at Darwan Village being the subject of same of the alleged defamatory imputations in the proceedings. It is submitted that in circumstances where Mr Roberts‑Smith is a suspect in an investigation being conducted by the Federal Police as to those events it is likely that a PAP Notice will be directed to Mr Roberts‑Smith in the course of the Inquiry, at least as to those events.
4. In support of the claim to public interest immunity, the IGADF relies upon the matters stated in an affidavit of Commodore Fiona Sneath, the Deputy Inspector‑General of the Australian Defence Force. No issue has been raised by the respondents as to the seniority or standing of CDRE Sneath as an appropriate person to describe the matters relied upon to support the claim to public interest immunity. Therefore, in accordance with established authority, the views expressed by CDRE Sneath should be given full respect in evaluating the public interest immunity claim.

## The competing contentions

1. The position of the respondents is that the matters stated in CDRE Sneath's affidavit do not demonstrate the basis for a claim to a public interest of a kind that might support public interest immunity, or alternatively that, balancing the competing public interests of the claim to immunity on the one hand and the public interest in disclosure for the purposes of the fair and proper administration of justice in the defamation proceedings on the other hand, the Court should require the documents in contention to be produced to the respondents for the purposes of those proceedings.
2. The position of the IGADF is that the claim for public interest immunity was properly made and that if the balancing exercise is required then it should be undertaken with the scales set in favour of non-disclosure. The IGADF submits that if the claim is not upheld on the basis of the open evidence that has been filed then, in accordance with established authority, the IGADF should be given an opportunity to adduce further evidence on a confidential basis to support the claim. No submission was advanced by the respondents to the effect that the IGADF should not be afforded that further opportunity in that event.
3. The IGADF maintains that the immunity covers all documents in the possession of Mr Roberts‑Smith that were the subject of non‑disclosure orders made as part of the Inquiry and includes the disclosure of any documents that would reveal whether or not Mr Roberts‑Smith has received a PAP Notice.
4. The argument was conducted on the basis that the IGADF made no disclosure as to whether Mr Roberts‑Smith had received such a notice. There was no evidence from the IGADF as to the position, whether on an open or confidential basis. The respondents accepted that the evidence did not disclose whether a PAP Notice had in fact been served on Mr Roberts‑Smith. However, a significant part of the argument advanced by the respondents was to the effect that there would be a forensic advantage to Mr Roberts‑Smith and his legal advisers in the defamation proceedings if they had access to material of the kind that would be collected in a PAP Notice to the extent that it concerned the matters the subject of the alleged defamatory imputations in this Court, but that information was not available to the respondents. It was also submitted that any public interest in maintaining the confidentiality of matters addressed in the PAP Notice had come to an end by the time the Inquiry provided information in a PAP Notice to Mr Roberts-Smith. It was said that by then the need for confidentiality for investigative purposes was at an end as Mr Roberts-Smith was being provided with the information as a matter of procedural fairness. Further, the defamation proceedings should not be conducted in circumstances where relevant information in the hands of Mr Roberts‑Smith was not disclosed to the respondents in accordance with the usual process applying to civil court proceedings. This was said to be especially so where Mr Roberts‑Smith was the applicant who had chosen to instigate and maintain the proceedings. Therefore, to the extent that the argument depended upon the assumed existence of such a PAP Notice rather than other types of documents, an issue arose as to the proper approach in circumstances where the claim to public interest immunity included all documents which contained information about whether such a notice had been provided to Mr Roberts‑Smith.
5. The applicant provided short submissions supporting the public interest immunity claim by the IGADF.
6. Finally as to the extent of the issues between the parties, I note that the respondents did not seek production of any information given by Mr Roberts‑Smith to the Inquiry or any material derived by the Inquiry derivatively (directly or indirectly) as a result of disclosure by Mr Roberts‑Smith (**Excluded Category**). It was accepted that any document recording such information would not be admissible in the defamation proceedings because of the terms of s 32(2) of the Regulation and s 124(2CA) of the *Defence Act 1903* (Cth) which together have the consequence that the privilege against self‑incrimination does not apply within the Inquiry (on the express basis that the information given or documents produced to the Inquiry (or information or documents obtained derivatively) are not admissible in evidence against the person in any civil or criminal proceeding).
7. In written submissions for the IGADF it was indicated that, as to the category listed in paragraph 67 of the amended discovery, the claim was made to the extent that production would reveal any matters about which Mr Roberts-Smith may have been examined by the Inquiry and whether a PAP Notice had been received. However, after the indication that the respondents did not seek the Excluded Category, oral submissions were put for the IGADF on the basis that a claim of public interest was made over 'the broadly described category of documents' described in paragraph 67.
8. I note that in the present proceedings, by reason of the requirements of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), there is in existence a detailed regime, in addition to the usual implied undertaking, that limits the disclosure of documents provided in the course of the defamation proceedings. The regime applies up until the final hearing at which time any admission of particular material into evidence will be a matter for the trial judge. In due course it will be necessary to say something about the significance of the regime because the respondents submit that it is a relevant matter to be taken into account if there is to be a weighing of competing public interests.
9. For present purposes, I will refer to documents that are not within the Excluded Category that fall within the notice to produce or paragraph 67 of the list of documents as the **Contentious Documents**.

## A three step process

1. It was common ground 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) did not extend to pre‑trial processes: *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* [1999] HCA 67; (1999) 201 CLR 49.
2. All parties accepted that the three steps outlined in *Alister v The Queen* [1984] HCA 85; (1984) 154 CLR 404 at 412 (Gibbs CJ) should be followed, namely:

… 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. In considering whether the administration of justice would be frustrated, the Court considers whether there is a legitimate forensic purpose for the request to have access to the information in respect of which immunity from production is claimed: *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667 at 675‑676 (Hunt CJ).
2. Therefore, in order to resolve the issues it is necessary to consider the following matters:
3. The overall nature of the claim to public interest immunity.
4. The relevant legal principles as to the nature of the public interest that may support a claim to the immunity.
5. Whether there is a public interest to support the claim in the present case.
6. The effect upon the administration of justice that might flow if documents containing information as to whether there has been a PAP Notice or the Contentious Documents were not produced to the respondents for the purposes of the defamation proceedings, including whether there is a legitimate forensic purpose for seeking the documents.
7. If necessary, the balancing of competing public interests.

## (1) The overall nature of the claim to public interest immunity

1. The IGADF disavowed any class claim to public interest immunity. In that regard, I note the following observation by Lockhart J in *Zarro v Australian Securities Commission* (1992) 36 FCR 40:

Documents within the possession of the ASC (an investigative and law enforcement agency) of a confidential nature, which record information received by it concerning possible offences or irregularities and recording the possible course of investigations or information with respect to evidence concerning proceedings to which the ASC is a party, plainly may fall within the scope of public interest immunity; but as at present advised I cannot conceive of a case where they would fall with the class doctrine and thus be immune from disclosure irrespective of the contents of any particular document.

1. Rather, the claim was put on the basis that, by reason of (a) the manner in which the Inquiry has been conducted; (b) its subject matter; and (c) the need to maintain privacy in order to effectively undertake the Inquiry and encourage persons to come forward and provide frank and fulsome evidence to the Inquiry, there was a public interest in protecting from disclosure the contents of all communications undertaken for the purposes of the Inquiry, including the communications that formed the Contentious Documents. Further, inherent in the logic of the contentions advanced for the IGADF was a claim that the public interest would continue unless and until there was a disclosure of the report that was required to be produced when the Inquiry was complete with such disclosure to be governed by the terms of the Regulations.
2. The affidavit of CDRE Sneath and the submissions of IGADF tended to describe the claim in terms of protection of confidentiality. It is not the case that the nature of the claim was that there was anything about the nature or quality of the information or the circumstances in which it had been provided that afforded it an inherently confidential character. In particular, it was not sought to invoke the authorities concerned with the public interest in preserving confidentiality in circumstances where information about private affairs has been given on a confidential basis under compulsion of law: see the authorities quoted in *Jacobsen v Rogers* [1995] HCA 6; (1995) 182 CLR 572 at 589‑590 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ). Rather, the claim was that the environment of privacy that had been created by the non‑disclosure orders that had been made and the manner in which the Inquiry had been conducted was of considerable importance to the effective conduct of the Inquiry and there was a public interest in preserving the private nature of the inquiry.
3. In broad terms, 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.
4. 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.

## (2) The relevant legal principles

1. The principles to be applied were summarised by Gibbs ACJ in *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1 at 38‑39 in the following terms:

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. The IGADF bears the burden of establishing a claim to public interest immunity. It has been said that to establish such a claim 'involves a heavy burden' that requires the party claiming the immunity to demonstrate a real detriment to the public interest from disclosure: *Somerville v Australian Securities Commission* (1995) 60 FCR 319 at 354 (Lindgren J) applied in *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88 at [26] (Gordon J). I take such statements to emphasise the need to demonstrate a public interest of a kind that means there is a real risk that it would be harmed if complete secrecy in respect of particular information was not maintained and protected.
2. There have been a number of instances in which the harm that would result if the confidentiality of an investigative process was compromised by requiring documents to be produced before the investigative process has been concluded has been found to give rise to a sufficient public interest for the purposes of a claim of public interest immunity.
3. In *National Companies and Securities Commission v The News Corporation Limited* [1984] HCA 29; (1984) 156 CLR 296, Mason, Wilson and Dawson JJ recognised that in the exercise of statutory powers which allowed the Commission to hold public or private hearings for the purpose of investigating whether a person had committed an offence, it was consistent with meeting a requirement to afford natural justice for the Commission to conduct part of the process without the presence of legal representatives of News Corporation, being an entity whose conduct was being investigated. Their Honours said at 323‑324:

It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry. Of course, there comes a time in the usual run of cases when the investigator will seek explanations from the suspect himself and for that purpose will disclose the information that appears to require some comment. Having regard to the express statutory injunction of s. 38(l)(d) of the N.C.S.C. Act, it would clearly be a denial of natural justice if the Commission in the present hearing received evidence adverse to News Corporation without providing an opportunity to News Corporation to be heard. An effective examination of such persons would require that the substance of the adverse information received during the investigation be disclosed to them.

1. In *Spargos Mining NL v Standard Chartered Australia Ltd (No 1)* (1989) 8 ACLC 87 at 87‑88, McLelland J held that:

In my opinion, documents within the possession of the Commission of a confidential nature recording information received by the Commission relating to possible offences or irregularities, or recording information received in the course of the investigation of possible offences or irregularities, including the identity of informants, and confidential documents recording the actual or possible course of such investigations or particulars of available or potentially available evidence, are in the public interest prima facie immune from compulsory disclosure, on the basis that such disclosure could be likely to seriously impede the ability of the Commission to fulfil its function of effectively investigating possible offences under, inter alia, the Companies (NSW) Code, and in appropriate cases instituting and prosecuting criminal or civil proceedings in the public interest.

1. In doing so, his Honour reasoned by reference to the observations in *National Companies and Securities Commission v The News Corporation Ltd* that have already been quoted.
2. In *Criminal Justice Commission v Collins* (1994) 74 A Crim R 63, the Court considered whether material obtained by the Commission in investigating a complaint alleging misconduct against certain police officers should be produced for the purposes of criminal proceedings that had been preferred at the instance of one of the officers. In considering a claim to public interest immunity, Macrossan CJ and McPherson JA said at 66:

It may be accepted that statutory bodies with functions like those of this Commission must have some necessary degree of immunity if they are to function as intended, but, when a claim is made by such bodies for protection from the ordinary processes of the courts and the claim is disputed it is the courts who will make the necessary decision. They will do so by considering the terms of relevant constituent statutes and by giving attention to relevant public policy considerations. The court's decision will involve a balancing exercise once it has been decided that a public policy entitlement to protection exists. At this point the policy need for protection of the due functioning of the body's process will be balanced against the conflicting need to ensure that the demands of justice are served with protection offered to the individual rights involved. This balancing exercise has been described as a two-stage process. At the first stage the concern is to determine whether a valid claim to public policy immunity arises by reason of the intended statutory function of the body on whom the demand for disclosure is made and then, in the particular circumstances of the case, there follows a weighing of the relative strength of that need and the competing need for reasons of justice to give access to the information which is sought: *Sankey v Whitlam* (1978) 142 CLR 1; *Alister* (1984) 154 CLR 404 …

The exercise which the examining court must undertake reflects the fact that claims to immunity are not automatically acceded to, but will be made subject to judicial assessment. It will be necessary for the body claiming immunity from disclosure to demonstrate the need for protection which its statutory function requires and establish the strength of that need in the particular case: cf Mason J in *Sankey v Whitlam* (at 96).

1. In *Attorney-General (NSW) v Stuart* at 675, Hunt CJ described a broader public interest in respect of the production of information that would frustrate or impede the police in undertaking their inquiries.
2. In *Goldberg v Ng* (1994) 33 NSWLR 639, documents held by a Law Society were sought by subpoena. The Court rejected the proposition that public interest immunity applies to documents provided by a solicitor to a Law Society in response to a complaint against the solicitor. Significant to that conclusion was the absence of any provision in the relevant legislation regulating the profession providing any assurance of confidentiality or immunity from disclosure of information provided in respect of investigations by the Law Society: at 647‑648 (Kirby P), 678 (Clarke JA). Also of significance was the way in which the claim to immunity was put. It was said to be required to protect the candour with which responses would be given to the Law Society by lawyers whose conduct was called into question. It was not a claim that there should be immunity to protect a process that was designed to secure disclosure of deficiencies or impropriety by those who might otherwise be discouraged from making complaint. It was found that confidentiality did not aid the performance of the particular responsibilities of lawyers to provide information frankly and candidly where their conduct was criticised. Therefore, as to the nature of the basis for the claim to public interest immunity, the case must be distinguished from the present instance.
3. In *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* [2008] FCAFC 123; (2008) 169 FCR 227, the Court was concerned with a claim of public interest immunity in respect of information that would identify certain informers who had provided information to the Commission. The Court had regard to the fact that the *Corporations Act 2001* (Cth) included provisions providing protection for whistleblowers. In that context, it was observed that '[t]he common law doctrine of public interest immunity should be applied consistently with the legislative policy manifest in [the whistleblower provisions] in the particular case of disclosures to [the Commission]': at [38]. However, the Court did not advance that proposition as a reason why a claim to immunity should be upheld. Rather, it was expressed as a reason why the common law should recognise a public interest in non‑disclosure for the purposes of the application of the doctrine of public interest immunity, including by weighing the competing public interests.
4. There have also been instances in which the need to protect the identity of informers has provided a basis for a claim to immunity: *R v Meissner* (1994) 76 A Crim R 81; *Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L.* [2011] FCA 938 at [194]‑[195] (Lander J); *Attorney-General (NSW) v Stuart* at 674‑676; *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 247‑248 (McHugh JA); and *Attorney General (NSW) v Lipton* [2012] NSWCCA 156.
5. However, a claim to immunity to protect information provided by informers in all likelihood does not extend to an instance where the informant acted without any assurance of confidentiality: *Cadbury Schweppes* at [29].
6. In any case, where there is a public interest of the requisite character that would be injured by disclosure, then there must be real risk of harm to that interest: *The Australian Statistician v Leighton Contractors Pty Ltd* [2008] WASCA 34; (2008) 36 WAR 83at [46]. The risk of harm to public interest must be of a kind that has been shown to require complete, not partial secrecy in order for the risk to be averted: at [41]. If such an interest is demonstrated, then in balancing the competing public interest concerned with ensuring that the due administration of justice is not frustrated, the Court may take into account the possibility that orders may be tailored in a way that would limit any harm to the public interest supporting the public interest immunity claim.
7. In *P Dawson Nominees*, in considering the balancing exercise, the Court noted that the public interest in protecting informers, and encouraging future informers, was as important to a regulatory agency such as the Commission as it is to the police in their traditional role: at [48]. The potential effect on future informers of disclosure was identified as a matter that 'carries great weight' in the balancing process that forms part of considering whether public interest immunity applied: at [51].
8. The nature of the three stage test means that it is important to identify the particular respect in which the administration of justice would be frustrated if the information remained secret. In order to show damage or impairment to the court process it must be shown that the information is material and, as has been already noted, that there is a legitimate forensic purpose to which the information may be put in the proceedings: *Attorney-General (NSW) v Stuart* at 681. In the decided cases that task is usually undertaken by seeking to identify the evidentiary significance of the information given the nature of the issues in the proceedings. However, in *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532 at [24], Gummow, Hayne, Heydon and Kiefel JJ described the consequence of upholding a claim to public interest immunity as being that 'the material was not admitted into evidence and would be denied both to the Court and the applicant'. Expressed in those terms, the consequence as described appears to embrace the need to consider the potential for the wider forensic use of the information in the proceedings, such as to indicate a line of inquiry or to expose matters that might bear upon the credibility of a particular account. The cases do not indicate that the public interest in the administration of justice is confined to a concern as to whether the information may be admitted into evidence. It is well established that public interest immunity is a substantive principle of common law and is not simply a rule of evidence: *Commissioner of Police, New South Wales v Guo* [2016] FCAFC 62 at [6]‑[14] (Collier J), [61] (Robertson and Griffiths JJ).
9. In undertaking the balancing exercise in *P Dawson Nominees*, the Court posed the question as to what should be weighed in the balance in favour of disclosure by asking what disadvantage the party seeking disclosure would suffer in its litigation by not getting access to the documents in question: at [53]. The Court reached the following conclusion in relation to that question (at [61]):

In the circumstances of this case, we do not see the documents in question as having sufficient importance for PDN's conduct of this litigation to outweigh the importance of not disclosing the identity of informers. The documents may be discoverable, and relevant, but beyond that they are not shown to have any greater significance for PDN.

1. In *R v Meissner*, Carruthers J (Smart J agreeing) considered various formulations of the way the balancing task should be undertaken: at 87‑88. In upholding the claim to immunity his Honour put the matter in terms that it could not be concluded that non-disclosure may amount to 'substantial prejudice' to the appellant's defence of criminal proceedings and the case amounted to no more that 'the speculative possibility' that the material provided by informers (that would disclose their identity) may expose discrepancies in the Crown case. In *Von Snarski v Criminal Justice Commission* [1998] 1 Qd R 562, where documents the subject of an immunity claim by the Commission were sought by an accused person in criminal proceedings it was said that '[u]nless there is some likelihood that the documents will materially assist the defence it is unnecessary to embark upon any … balancing exercise': at 564 (Pincus and Davies JJ).

## (3) The public interest relied upon to support the claim

### Relevant aspects of the Regulation

1. The Regulation contemplates that inquiries may be undertaken in private and that directions may be made that require utmost confidentiality during the inquiry process. There is no provision which confines those obligations to the point up to which a report is delivered with findings and recommendations. The statutory process is not focussed upon the preparation of a report which must be released publicly. Rather, it entrusts the making of any decision as to public release of the report to particular identified persons at the highest level. Plainly, the Regulation contemplates the possibility of an entirely private investigation and report. No doubt it does so by reason of the nature of the subject matter that may be addressed by inquiries undertaken under the Regulation.
2. It may be noted that although the Regulation permits disclosure of the final report any such disclosure would only occur after deliberation as to whether to exercise the power to make part or all of the report and its recommendations and findings publicly available. It may be expected that any such deliberation would be guided by the objects for which the Inquiry was undertaken. Those objects are expressed in s 110A of the *Defence Act* as being to provide the Chief of Defence with 'a mechanism for internal audit and review of the military justice system independent of the ordinary chain of command' and 'an avenue, independent of the ordinary chain of command, by which failures and flaws in the military justice system can be exposed and examined so that the cause of any injustice (whether systemic or otherwise) may be remedied'. At the point where an inquiry has been concluded and a report delivered as required by the Regulation there may be other public interests that are relevant to whether part or all of the report should be made public. However, the issue in this case concerns the nature of any public interest in non-disclosure at the time the inquiry is being conducted.
3. The privilege against self‑incrimination does not apply to an inquiry being conducted under the Regulation. However, that position pertains on the express basis that there is protection as to direct and derivative use of information obtained from any individual when it comes to any subsequent criminal proceedings. A statutory regime of that kind must contemplate restrictions on the disclosure of information obtained by reason of the abrogation of the privilege. Otherwise, the restriction upon direct or derivative use would be compromised with the consequence that a stay may be sought of any criminal proceedings in which that information has significance: *Lee v The Queen* [2014] HCA 20; (2014) 253 CLR 455.
4. Section 30(4) of the Regulations provides that a person commits an offence if they engage in conduct that would, if an inquiry being conducted under the Regulations were a court of record, constitute a contempt of that court. As has been noted, it is also an offence for a party not to comply with a non-disclosure direction made in the course of an inquiry being conducted under the Regulations.

### The nature of the evidence advanced to support the immunity claim

1. CDRE Sneath explained the background to the Inquiry. It arose because of rumours that were circulating concerning the alleged conduct of members of the Special Forces while serving in Afghanistan. The Inquiry has involved evidence and information gathering, consideration of alleged incidents, consideration of cultural, psychological, operational and organisational factors to determine if and how they may have contributed to the rumoured and alleged incidents and the preparation of a report. Preparation of the report of the Inquiry is underway but lines of inquiry have continued to emerge as the Inquiry has progressed, including in recent times.
2. The Inquiry has been conducted in circumstances of strict confidentiality. The steps taken extend beyond the making of directions under the Regulations. The number of people involved in the conduct of the Inquiry has been kept to a minimum and the sharing of information about particular lines of inquiry has been limited to those who 'need to know'. At the outset, refurbishment works were carried out within the Office of the IGADF to ensure confidentiality of the Inquiry. Arrangements for interviews have been kept strictly confidential. No information about the lines of inquiry being pursued as part of the Inquiry has been provided to the Australian Defence Force chain of command, the Secretary of the Defence Department or the Minister of Defence.
3. CDRE Sneath deposed that, at this stage, the Assistant IGADF does not propose to exercise the power he has under the Regulation to make the Inquiry report available to certain persons and proposes only to provide his report to the IGADF. This is consistent with the evidence advanced as to the importance of the Inquiry being conducted in private. As has been noted, under the Regulation the IGADF must give the report to the Chief of the Defence Force who may determine whether to release part or all of the report.
4. CDRE Sneath expressed the reasons for the above confidentiality measures in the following terms (para 33):

The main reasons why the Inquiry has been conducted confidentially are as follows:

a. To encourage all persons who have information regarding the subject matter of the Inquiry (including, in particular, members of the ADF's Special Forces) to come forward and speak the truth.

b. To protect the integrity of the Inquiry's evidence‑gathering processes and methods and, in particular, to protect from premature disclosure the lines of inquiry being pursued and the evidence gathered in respect of these lines of inquiry, on the basis that any such premature disclosure, especially to persons of interest, might permit witnesses to be harmed, intimidated or prevailed upon or evidence to be otherwise destroyed, concealed or fabricated (including by persons of interest or witnesses colluding with one another).

c. To avoid potential prejudice to any criminal investigation that may be occurring in parallel to the Inquiry, or that may flow from the Inquiry (noting that it is a matter of public record that the Australian Federal Police are conducting a criminal investigation that overlaps in part with the subject matter of the Inquiry), and to avoid prejudice to any criminal prosecution to which any such investigation may lead.

d. To protect information that is operationally sensitive and/or security classified, including: (i) information relating to the tactics, techniques and procedures (**TTPs**) of the ADF's Special Forces; (ii) information identifying Special Forces personnel, including the names of Special Forces personnel; (iii) information obtained confidentially from allied and partner forces with whom Australia maintains ongoing military relations; (iv) information relating to the rules of engagement (**ROE**) used by the ADF's Special Forces in the conduct of its military operations and activities; (v) information relating to Defence intelligence operations, including capabilities, sources, processes, analysis and advice; (vi) information relating to the manner in which the ADF conducts detention operations; and (vii) information relating to the technical and equipment capabilities of Special Forces.

e. To protect the reputations of persons who may be unfairly harmed by disclosure or publication of rumours or allegations that may be found to be unfounded or unsubstantiated.

1. 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.
2. 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:

a. **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.

b. **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.

c. **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.

1. The Inquiry has not disclosed the identity of any person who has or is likely to receive a PAP Notice.
2. In the opinion of CDRE Sneath disclosure of the information sought by the respondents, including information as to whether a PAP Notice had been issued to Mr Roberts‑Smith would be contrary to the public interest because it would give rise to a number of risks enumerated in her affidavit. In summary, they are:
3. Disclosure would undermine the directions made under the Regulation, including those designed to preserve the confidentiality of the PAP Notice process for the reasons that have been described.
4. Disclosure would give rise to the very real risk that persons who have information regarding the subject matter of the Inquiry would be discouraged from communicating freely with the Inquiry and this risk was manifest because the Chief of Army had raised concerns about a culture of silence within the Special Forces of the Australian Defence Force.
5. It has taken some years for members of the Special Forces community - both those who continue to serve and former members - to develop sufficient confidence in the Inquiry and in the genuineness of the desire to find out if the rumours are true that gives rise to a preparedness to make disclosures to the Inquiry.
6. The process of gaining trust and confidence of persons with information has been greatly assisted by the strict confidentiality with which the Inquiry has been conducted.
7. Some of the persons who have provided information to the Inquiry 'have in essence acted as "informers" by making allegations of the utmost seriousness against colleagues, former colleagues and friends'.
8. There was a very real risk that if the confidentiality of the Inquiry was not maintained its investigation, which had not concluded, would be hampered because those who had provided information may be unwilling to continue to do so and new and emerging witnesses may decide that approaching the Inquiry is simply 'not worth it'.
9. In the course of argument, senior counsel for the IGADF confirmed that there was no reason why any step that had been taken in relation to confidentiality might not be described in an open affidavit and therefore it was appropriate to proceed on the basis that the extent of confidentiality arrangements made with those who had provided information to the Inquiry was as described by CDRE Sneath.
10. Therefore, those arrangements might be described as having been established within, and limited by, the terms of the Regulation. In consequence, they include the possibility that the report might be provided publicly. However, that is not to say that the reasons deposed to by CDRE Sneath for the confidentiality of the Inquiry will come to an end when the report is prepared and will not be brought to account as part of any future consideration as to whether to exercise the power to make part or all of the report of the Inquiry publicly available. It might also be said that it would be expected that given the terms of the Inquiry and its purpose as well as the manner in which the Regulation dealt with the privilege against self-incrimination and the possibility of criminal proceedings that there would be reason for considerable circumspection when considering the nature and extent of the findings and recommendations of the Inquiry that might be made public.
11. In any event, whether such a step is to be taken is a matter for future consideration. This is not an instance where the prospect of inevitable disclosure in due course means that at this point in time there is no public interest in the information in the Contentious Documents being kept confidential to those responsible for the conduct of the Inquiry. At this stage, the evidence shows that complete secrecy in the information has been maintained. It has been maintained for reasons and in circumstances where there has been demonstrated that there will be harm to the public interest if the secrecy is not preserved. The nature of the investigative process being conducted by the Inquiry has been shown to be such that there would be a real risk to its effectiveness if the secrecy of information contained in communications with Mr Roberts‑Smith was not maintained. Those risks would not be confined to the Inquiry's dealings with Mr Roberts‑Smith. There is a demonstrated public interest in being able to maintain the private nature of the Inquiry up until a decision is taken as to the extent to which the Inquiry's report is made public. That public interest includes the need to provide procedural fairness through a confidential delivery and response to PAP Notices. The process that has been adopted in the conduct of the Inquiry is one that is contemplated by, indeed provided for, in the Regulation. It reflects the nature of the subject matter that might be expected to be the subject of an inquiry governed by the Regulation. This is not an instance where the Executive seeks to maintain secrecy, it is an instance where the Legislature has put in place regulations to facilitate that course and to sanction its breach with offence and contempt consequences.
12. I have reached these conclusions after taking into account the submissions for the respondents to the effect that there was no public interest in non-disclosure and I set out below my reasons for not accepting those submissions.

### The submissions for the respondents

1. It was submitted for the respondents that the Minister for Defence is on record as saying that the Minister intends to release at least part of the report given the extraordinary public interest in its subject matter. There was no evidence before me to that effect, but it was a submission advanced without demur. Assuming that to be the case, for reasons I have given above, the future possibility that part or all of the report may be released to the public is not a matter which leads to the conclusion that there is no public interest in maintaining confidentiality in the Contentious Documents at this time.
2. It was also submitted that there was the prospect of the referral of matters to law enforcement bodies of persons of interest and that the recommendation that criminal charges might be brought was inherent in the nature of the subject matter of the Inquiry. Therefore, so it was put, no person providing information or evidence to the Inquiry could be given an assurance that the information they provided would be confidential in all circumstances. Indeed, it was said that any such assurance would be inconsistent with the Regulation and contrary to one of the purposes of the Inquiry. Further, those providing information to the Inquiry must expect and presume that to the extent that the information establishes that there has been criminal conduct then they may be required as witnesses in a prosecution. This, it was submitted, was part of the reason for the Inquiry so as to provide proper accountability for any criminal behaviour. Therefore, no person providing that information could expect complete and ongoing secrecy as to what they told the Inquiry.
3. However, that limited prospect does not mean that there is no public interest in maintaining the secrecy of information provided to the Inquiry prior to the point where a prosecution is brought or that all information provided to the Inquiry should be treated as information that will in due course find its way into the public arena. While the Inquiry is still underway and until it is concluded by the delivery of a report as required by the Regulation, on the evidence there is a real risk that its effectiveness as a means by which matters of the utmost seriousness that are the subject of rumours being investigated within a culture of secrecy in which there are close personal associations of a kind that are unlikely to be properly comprehended by those who have not been in the same circumstances may be compromised by any action that would jeopardise the private nature of the Inquiry. Further, the process outlined in the Regulation ensures that once the report is prepared there will be a considered decision made as to the extent to which findings and recommendations in the report and information provided to the Inquiry may be made public. There is a demonstrated public interest in keeping information confidential at this point in time so that such a decision may be made in an informed way on the basis of the content of the report.
4. To the extent that the confidentiality being maintained by the Inquiry is concerned with national security information such as the identity of members of the Special Forces or strategic or operational information then it was said that there was no need for secrecy to be protected by common law principles because that information was protected by the *National Security Information (Criminal and Civil Proceedings) Act* and a regime under that legislation was in place in respect of the proceedings in this Court. There are two reasons why that submission is no answer to the claim by the IGADF that there is a public interest to support the claim of immunity. First, the claim rests upon a much broader reason for secrecy that is principally concerned with creating an assurance of confidentiality that will encourage those with information to come forth and assist the Inquiry by providing evidence in frank and fulsome terms. Second, the extent to which orders might be made to limit the risk to the public interest relied upon is a matter to be considered as part of the balancing process. It is not a reason for rejecting the existence of any public interest.
5. It was submitted, that the form in which the public interest was described amounted to a class claim because it was said to apply to all communications with the Inquiry irrespective of their subject matter. It was said that the IGADF had to deal with each document and explain why there was a public interest in the content of the document not being disclosed to the respondents for the purposes of the proceedings. It was further submitted that there might be expected to be a whole lot of correspondence passing back and forth between the Inquiry and Mr Roberts‑Smith (and those acting on his behalf) and it was difficult to maintain the proposition that the entirety of the series of communications would all attract immunity from disclosure by reason of their content.
6. I accept that caution must be exercised where a blanket reason is advanced as applying to a large number of documents to support a claim to public interest immunity that is not a class claim. However, this is not a case where a claim is made that irrespective of the circumstances of their contents or context there is a public interest in non-disclosure of a particular type of document. For example, it is not said that whenever an inquiry is conducted in private in accordance with the provisions of the Regulation that there is a public interest in maintaining secrecy in all communications with the Inquiry. What is put in the present case is that because of the particular sensitivity of the subject matter and the concerns about a culture of secrecy within the Special Forces, there has been a need to demonstrate to those who might assist the Inquiry with its investigations that the Inquiry is being conducted strictly in private. In those particular circumstances, it is claimed that there is a public interest in maintaining confidentiality in any communication with the Inquiry where the content of that communication has been brought into existence for the particular purpose of conducting the Inquiry. The descriptions of the documents that are sought to be produced indicate that all documents sought have content of a kind that would bring them within such a category.
7. In effect, the claim made is that any document recording information communicated as between a person and the Inquiry for its purposes is information of a kind to which the public interest applies. Therefore, this is an instance where information concerning arrangements that are made for an interview or to provide materials are within the public interest. I accept the position of the IGADF in the particular circumstances of this case. In reaching that conclusion I note that to the extent that there may be documents that do not contain information about the subject matter of the Inquiry they would not be materially relevant to the defamation proceedings. Therefore, if and to the extent that it might be said that the content of some documents is sufficiently innocuous that there is no public interest in preserving the non-disclosure of their content, then that set of documents would be irrelevant in any event and therefore not discoverable and documents for which there would be no legitimate forensic purpose in seeking their production.
8. It was submitted that the purpose of conducting a private investigation was confined to the matters described in *National Companies and Securities Commission v The News Corporation Ltd* so that the investigator could gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. Therefore, so it was put, it was only during the investigative phase that there was a public interest in allowing an investigator to act confidentially so as not to alert the suspect to the progress of the investigation in a way that may close off other sources of inquiry. On that basis it was submitted that as the Inquiry had reached the point of issuing PAP Notices, the point had been reached where the Inquiry was seeking explanations from those persons who were suspected of acting improperly and the relevant information was being disclosed for comment in a way that meant that any harm to the investigative public interest that required non-disclosure was at an end.
9. I accept that an aspect of the public interest claimed is of that kind, but on the evidence the reason for the private nature of the Inquiry is not confined to facilitating the investigation of suspects as would be the usual case with a police or regulatory investigation. In the particular circumstances of the present case, the public interest extends to providing an assurance to those who might be forthcoming to assist the Inquiry that the whole process will be conducted in private. Also, on the evidence, lines of inquiry are still being pursued. The process of receiving information has not yet concluded. Any disclosure contrary to the private nature of the Inquiry compromises the ability to provide that assurance which, on the evidence, has facilitated and continues to facilitate the conduct of the Inquiry. In effect, it is an assurance that the Inquiry will be confidential save to the extent that a considered decision is made upon its completion as to the extent of disclosure which may be expected to include disclosure to prosecuting authorities if there is a reason to believe there is a basis for a prosecution for any criminal offence.
10. Also, for reasons I have given, the private nature of the Inquiry ensures that the decision as to the nature and extent of the information to be made public is made at a time when the outcome of the Inquiry is known and the report has been provided. It can then be made by reference to all matters of public interest that would bear upon whether there should be such disclosure, including matters of national interest associated with the subject matter of the Inquiry. Therefore, even on the assumption that a PAP Notice has been given to Mr Roberts‑Smith, I am not persuaded that the taking of that step brings to an end the public interest in the continuation of the conduct of the Inquiry in private.
11. In reliance upon the reasoning of Kiefel CJ, Bell and Keane JJ in *HT v The Queen* [2019] HCA 40 at [32], it was submitted that public interest immunity respects common law principles of natural justice. In their reasoning in that case, their Honours went on to observe:

If it is held that the documents should be produced, and thereby disclosed, they are available to both parties; if they are not to be produced they are not available to either and the court may not use them. There is no question of unfairness or inequality.

1. On that basis their Honours concluded that the common law principles of public interest immunity could not be advanced to justify a procedure by which confidential evidence that may have disclosed the identity of an informer was presented to a sentencing judge without disclosure of that evidence to the legal representative for the defendant being sentenced. It was described as a doctrine concerned with the production of documents on the basis of their contents or class: at [28]‑[29]. The outcome of the balancing exercise may be that a document in respect of which there was a demonstrated public interest supporting its non-disclosure was received into evidence on the basis of a suppression or non‑publication order: at [30]. Those observations were steps along the way to concluding that the principles of public interest immunity were not a justification for allowing the trial to be conducted in a manner that was contrary to the requirements of procedural fairness: at [34]. If such a course was to be adopted it must find some other principled justification.
2. The submission advanced by the respondents on the present application was to the effect that the above reasoning concerning the doctrine of public interest immunity did not justify the procedurally unfair course of allowing one party (in this case Mr Roberts‑Smith) to have access to the Contentious Documents (including any PAP Notice directed to him) where the other party (in this case the respondents) had no such access. Therefore, so it was submitted, the Court should tailor appropriate orders to ensure that there was no procedural unfairness. I do not accept that submission. In *HT v The Queen* the Court was concerned only with whether the course that had been followed was justified on the grounds of public interest immunity. It was not concerned with what the application of the common law principles might require in circumstances where one party was in possession of information in respect of which a public interest against disclosure had been established and the other party sought access. It could not be the case that in such instances, in effect, the immunity (which protects the public interest not any interest of the parties) cannot apply because the information is in the hands of one party to the litigation. In my view, it is the three stage approach outlined in *Sankey v Whitlam* and *Alister v The Queen* that is to be applied. Its proper application may result in the information being known to one party and not the other. However, if such an information asymmetry may result, which would be contrary to the usual procedures adopted for the administration of justice that require disclosure then that is a matter to be brought to account when undertaking the balancing process between the competing public interests. It does not mean that there is no public interest immunity where a party to the suit has documents that may cause harm to the public interest if they are not kept secret.

## (4) The effect on the administration of justice

1. It could not be seriously contended that the Contentious Documents were not materially relevant to the defamation proceedings. It has been established that there is considerable overlap between the subject matter of the Inquiry and the alleged defamatory imputations. The truth of those imputations is in issue. Therefore, on the evidence as it presently stands, the Contentious Documents have been shown to be material to the defamation proceedings and no issue arises as to whether there is a legitimate forensic purpose in seeking the documents.
2. There was a dispute between the parties as to what was demonstrated by the inclusion of paragraph 67 in the amended list of documents and whether it amounted to a concession that documents of the kind described were discoverable. I do not find it necessary to resolve that issue. Irrespective of the content of the amended list of documents the categories of documents described in the notice to produce and in paragraph 67 have been shown to be materially relevant.
3. Therefore, in the ordinary course, discovery obligations would require the Contentious Documents to be disclosed within the protection of the obligation to use the documents solely for the purposes of the litigation.
4. Submissions were advanced for the respondents to the effect that if the Contentious Documents included a PAP Notice then the notice may be expected to include material of considerable forensic significance. That was because the evidence of CDRE Sneath showed that the contents of any such notice would be detailed and would outline the evidence relied upon for any proposed adverse findings, including views as to the credibility or otherwise of accounts given to the Inquiry. It was submitted that material of that kind might be used by those advising Mr Roberts‑Smith in the conduct of the defamation proceedings to make forensic decisions as to which witnesses to call, the nature of the matters to be put to other witnesses and lines of inquiry to be pursued. It was said that was so even if the Contentious Documents, particularly any PAP Notice, were not in a form that may be admitted into evidence. I accept those submissions. The nature of the information that may be expected to be included in any PAP Notice may be expected to be of considerable forensic significance in the defamation proceedings.
5. It was submitted that the respondents' interests in disclosure were 'private and largely commercial'. I do not accept that characterisation. The present proceedings have been commenced by Mr Roberts‑Smith. He claims to have been seriously defamed and seeks damages. The relevant interest to be considered in the present context is the public interest in the administration of justice that may be frustrated if the respondents do not have access to material information in the hands of Mr Roberts‑Smith in the conduct of their defence.
6. Therefore, I am satisfied that there is a risk that non‑disclosure of the Contested Documents would frustrate the administration of justice. Further, this is not a case where the nature of the public interest in non-disclosure is so overwhelming that there could be no countervailing interest in the administration of justice that might support the need for disclosure. Therefore, this is an instance where it is necessary to balance the competing public interests.

## (5) Balancing the competing public interests

1. 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.
2. 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.
3. My reasons for concluding that the Contentious Documents should be provided on the basis that I have indicated are as follows.
4. First, the subject matter of the alleged defamatory imputations is serious. The respondents seek to justify the imputations. Therefore, they concern serious claims by both parties. They are not matters that may be readily measured in monetary terms. Mr Roberts‑Smith claims that his reputation has been impugned. The respondents maintain that they were justified in reporting to the public matters of considerable seriousness.
5. Second, I am inclined to the view that it is not significant that the proceedings were commenced by Mr Roberts‑Smith. Reasoning in that way may be said to lead to the view that the proceedings were invited by the publications made by the respondents. What may be said is that the matters in dispute are important to both parties. The subject matter is such that there is a public interest in ensuring that both parties have access to a process that affords them a fair hearing that, to the extent possible, incorporates access to the disclosure procedures usually available to parties involved in court proceedings, at least to the extent that information is material to the conduct of those proceedings.
6. Third, on the available evidence, if the Contentious Documents include a PAP Notice, there is a real likelihood that they will contain information of considerable forensic importance for the conduct of the respondents' defence.
7. Fourth, 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.
8. Fifth, the Inquiry has been conducted on the basis that the information in the Contentious Documents will be in the hands of Mr Roberts‑Smith. This is not an instance where the party under investigation seeks access to documents in circumstances where the investigation is at a stage where the effectiveness of the investigation is likely to be compromised and lines of inquiry closed if the information is provided to one of the parties to the court proceedings. Those with conduct of the Inquiry mean and intend Mr Roberts‑Smith to have access to the Contentious Documents, including any PAP Notice. The respondents are not participants in the Inquiry and no concern has been raised for the effectiveness of the Inquiry if the content of the Contentious Documents are provided to the respondents in particular. The concern raised is the harm from disclosure to anyone other than in accordance with the directions that have been made, being an action that risks the private nature of the Inquiry.
9. Sixth, it is conceded that steps should be taken to preserve the privilege against self‑incrimination and the respondents do not seek the Contentious Documents to the extent that disclosure would compromise that protection.
10. Seventh, the submission for the IGADF to the effect that the respondents must have had a proper basis for the plea of justification at the time they filed their defence is not persuasive. It is not a reason why the respondents should be denied access to other material information.
11. 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.
12. Ninth, it was submitted for the respondents that it was significant that Mr Roberts‑Smith supported the application by the IGADF. Whether there is public interest immunity is not to be determined by reference to the position adopted by Mr Roberts‑Smith. Whatever his private interests may be, the immunity exists to protect the public interest. At its highest, the position adopted by Mr Roberts‑Smith may lend support to the conclusion that I have reached independently that there is likely to be information in the Contentious Documents that is material to the issues in the defamation proceedings.
13. 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.
14. Balancing all the considerations, I am satisfied that, subject to any further confidential evidence the IGADF may adduce, that there should be production of the Contentious Documents on the basis I have indicated.

## Orders

1. There should be orders to the effect that the IGADF should file any further confidential affidavit evidence in support of its claim to public interest immunity within seven days. The IGADF, Mr Roberts‑Smith and the respondents should each file a minute of proposed orders as to the terms upon which the Contentious Documents should be produced in the event that the claim to public interest immunity is not upheld in whole or in part. Any party claiming that costs of the issue concerning public interest immunity should not be borne by the party who was substantially unsuccessful on the issue shall file short written submissions as to costs of no more than three pages and any question as to the appropriate costs orders shall be dealt with on the papers.

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| I certify that the preceding one hundred and one (101) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 8 September 2020

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 |