SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v McBride (No 3)**
Citation:	**[2023] ACTSC 344**
Hearing Date:	15-16 November 2023
Decision Date:	17 November 2023
Before:	Mossop J
Decision:	See [76].
Catchwords:	**EVIDENCE –** PUBLIC INTEREST IMMUNITY – Claim for exclusion of evidence under s 130 of the *Evidence Act 2011* (ACT) – where accused facing charges of theft and communicating documents relating to military information – Commonwealth seeks to exclude redacted parts of certain documents relating to intelligence and security cooperation with foreign governments and organisations – where claim is made over a small proportion of the total documents available to the accused – accused challenges exclusion on the basis that redactions are too broad – accused submits that redactions undermine his ability to defend the charges against him – whether evidence should be excluded under s 130 of the *Evidence Act 2011* – whether exclusion of evidence should be on condition that the prosecution be stayed – evidence excluded – prosecution not stayed
Legislation Cited:	*Criminal Code* (Cth), s 131.1(1) *Crimes Act 1914* (Cth), s 70(1) *Defence Act 1903* (Cth), s 73A(1) *Evidence Act 2011* (ACT), ss 130, 133 *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth), reg 6(13) *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) *Public Interest Disclosure Act 2013* (Cth)
Cases Cited	*Alistair v The Queen* (1983) 154 CLR 404 *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; 95 NSWLR 1 *R v Francis* [2004] NSWCCA 85; 145 A Crim R 233 *Sankey v Whitlam* (1978) 142 CLR 1
Parties:	The King David McBride (Accused)
Representation:	**Counsel** P McDonald SC with C Tran and B Kaplan (Crown) E Kerkyasharian (Accused)

	A Berger KC with L Johnston (Attorney-General (Cth))
	Solicitors
	Commonwealth Director of Public Prosecutions
	Xenophon Davis (Accused)
	Australian Government Solicitor (Attorney-General (Cth))
File Number:	SCC 127 of 2019

MOSSOP J:

Introduction

1. The court made orders upholding the claim of public interest immunity on 17 November 2023. These are the reasons for those orders.

2. Following the pronouncement of orders upholding the claim of public interest immunity, the accused entered pleas of guilty on a fresh indictment. However, these reasons relate to the circumstances prior to any plea of guilty and when it was anticipated that a jury would be empanelled and the trial commence on 20 November 2023.

The application

3. The Commonwealth sought a ruling as to the admissibility at the trial of certain aspects of the Classified Brief of Evidence. The Commonwealth contended that the evidence was not admissible as a result of s 130 of the *Evidence Act 2011* (ACT). The principles applicable to a claim of public interest immunity remain highly relevant to a claim that evidence is not admissible under s 130: *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; 95 NSWLR 1 at [84]-[87]. For convenience, I will refer to this application as a claim of public interest immunity.

4. While agreement had been reached with the accused in relation to other documents over which public interest immunity was claimed, certain redactions made to the following documents remained in issue. For the purposes of the hearing, they were described as follows:

    (a) Volume 1, Tab 24;

    (b) Volume 1, Tab 25;

    (c) Volume 1, Tab 26;

    (d) Volume 3, Tab 35;

    (e) Volume 4, Tab 50;

(f) Volume 6, Tab 7;

(g) Volume 7, Tab 19; and

(h) Volume 8, Tab 23.

5. The documents at Volume 7, Tab 19 were subject to a slightly different claim. This was a claim that the information was protected from disclosure or any other use in the proceedings pursuant to reg 6(13) of the *International Organisations (Privileges and Immunities) (International Committee of the Red Cross) Regulation 2013* (Cth). Because of a need which arose to revise the redactions that had been made to the document in the Classified Brief of Evidence, a ruling on the admissibility of these documents was deferred. As a consequence, no orders were made in relation to these documents and these reasons only deal with the claims under s 130 in relation to each of the other documents and do not deal with the claim made in relation to Volume 7, Tab 19.

6. Much of the evidence relevant to the claim of public interest immunity was adduced in closed court and some of the evidence was read on a "court only" basis. These reasons have not attempted to partition the evidence relied upon, and submissions made in open court from those which were made in closed court or which relied upon "court only" evidence. As a consequence, these reasons will contain significant redactions by the time they are published on the internet.

The evidence relied upon

7. The Commonwealth relied upon open and confidential affidavits of:

(a) Susan Littlehales, the Assistant Director-General of the Office of National Intelligence, dated 13 November 2023; and

(b) Hugh Jeffrey, Deputy Secretary, Strategy Policy and Industry, Department of Defence dated 14 November 2023.

8. There was also a confidential affidavit of a Commonwealth agency head (the Agency Head). This affidavit was dated 14 November 2023. The identity of the Agency Head was disclosed in the affidavit.

9. The confidential affidavits were read and were the subject of submissions in closed court. Those affidavits included highlighted portions which were identified as being particularly sensitive, which were not disclosed to the accused or his lawyers. That approach was not contested and was consistent with the approach taken in past public interest immunity claims: see, for example, *R v Francis* [2004] NSWCCA 85; 145 A Crim R 233 at [21].

10. Counsel for the accused tendered a copy of a submission made to the Inspector General of the Australian Defence Force (the IGADF submission) dated 15 August 2014 which was the principal document that the Crown alleges the accused provided to three journalists along with a collection of other documents. It is the provision of documents to journalists which gave rise to a number of the charges faced by the accused.

Relevant principles

11. The relevant principles were uncontroversial and need not be described at length.

12. Section 130 provides, relevantly:

> **130 Exclusion of evidence of matters of state**
>
> (1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.
>
> …
>
> (3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.
>
> (4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the purposes of that subsection to relate to matters of state if adducing it as evidence would—
>
> (a) prejudice the security, defence or international relations of Australia; or
>
> …
>
> (f) prejudice the proper functioning of the government of the Commonwealth or a state.
>
> (5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:
>
> (a) the importance of the information or the document in the proceeding;
>
> (b) if the proceeding is a criminal proceeding – whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;
>
> (c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
>
> (d) the likely effect of adducing evidence of the information or document and the means available to limit its publication;

(e) whether the substance of the information or document has already published;

(f) the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution the stayed.

…

13. The court has power to order that the document in relation to which the claim is made be produced and power to then inspect the document for the purposes of determining the question: *Evidence Act* s 133.

14. The balancing exercise is provided by the terms of the statute. It is consistent with the balancing exercise described in the decisions in *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 and *Alistair v The Queen* (1983) 154 CLR 404 at 412.

15. In assessing where the balance lies, significant weight should be given to the evidence of senior government officials in relation to the public interest in preserving secrecy. Courts must recognise that national security issues "will seldom be wholly within the competence of a court to evaluate": *Alistair* at 435; see also Brennan J at 455.

16. Amongst the various categories of evidence in relation to which there is a public interest in nondisclosure, protection of national security and defence are areas which are of obvious importance: *Alistair* at 435, 436.

17. In undertaking the balancing exercise, the public interest in favour of disclosure is generally stronger in criminal proceedings than in civil proceedings: *Alistair* at 414, 456.

18. In considering the possibility of admission into evidence subject to protective orders, the possibility of inadvertent disclosure must be taken into account. That is particularly true in a litigation context where some aspects of the proceedings will take place in open court but others in closed court and in a context where the recipients of information may be unfamiliar with the discipline required for the protection of confidential information.

The nature of the case

19. The accused faces five charges:

(a) one count of theft contrary to s 131.1(1) of the *Criminal Code* (Cth);

(b) three counts of communicating documents relating to military information contrary to s 73A(1) of the *Defence Act 1903* (Cth); and

(c) one count of publishing a fact or document contrary to s 70(1) of the *Crimes Act 1914* (Cth).

20. This ruling is being made prior to the empanelment of the jury and prior to the Crown opening. The court has, therefore, a less than complete understanding of the case. It appears of the following basic facts are not disputed.

21. The accused was a military lawyer holding the rank of Major in the Australian Army. The accused had provided a copy of the IGADF submission to three different journalists. In two cases the IGADF submission was provided along with two folders of documents which had accompanied the submission. In the third case, in addition to the two folders, there were some further documents provided. Subsequently, police executed a search warrant and found eight plastic tubs of documents at the accused's residence.

22. The IGADF submission was dated 15 August 2014 and entitled "Detailed Information Relating to the Allegations of Illegal Investigations of Special Operations Task Group in 2013". It was a detailed document of 101 paragraphs extending over 24 pages and including numerous footnotes. The basic contention was that criminal investigations should not have been commenced in relation to five incidents that occurred in Afghanistan between October 2010 and September 2013 because there was not "reasonable suspicion" necessary to commence such an investigation. It is not necessary for present purposes to describe the incidents or arguments in detail, however the tone of the document is indicated by two of its early headings "The Gradual Growth of Bias Against SOTG by HQJOC Legal" and "The Commencement of Illegal/Vexatious Investigations".

23. The fact that the apparent purpose of the IGADF submission was to prevent further investigation of the conduct of Australian soldiers in Afghanistan is relevant to assessing the significance of the documents which are sought to be excluded from evidence for the accused's defence of the charges.

24. Both s 73A and s 70 require the prosecution to establish that the disclosures to journalists made by Mr McBride were in breach of his duty. As I understand it, the accused will place significant emphasis on whether or not the prosecution has proved beyond reasonable doubt that he was reckless as to his disclosures being contrary to his duty. The nature of the IGADF submission, as described briefly above, is relevant to the possible contention on the part of the accused that he was not reckless as to a breach of his duty when he provided the documents to the journalists.

25. The court has ruled against a submission put by Mr McBride that his duty extended to disclosing matters in the "public interest" or the "Australian public interest" even where that involved breaching a lawful order applicable to him as a military officer: *R v McBride* [2023] ACTSC 328; *R v McBride (No 2)* [2023] ACTSC 330. The fact that the jury will be

directed in a manner consistent with that decision will constrain the evidence adduced by the accused in relation to the charges.

Description of documents

26. As indicated by the list of documents provided earlier, for the purposes of the hearing relating to the Commonwealth's claim under s 130, documents were referred to by reference to their place within the prosecution's Classified Brief of Evidence. Of the eight volumes in the Classified Brief of Evidence, the two volumes of material that accompanied the IGADF submission and were provided to the journalists were contained within volumes 7 and 8. The additional documents provided to the third journalist came from within the documents which have become volumes 1 to 6 of the Classified Brief of Evidence.

27. For the purposes of these reasons, documents will be referred to by reference to the volume and tab number that they bear in the Classified Brief of Evidence. They will also be referred to by reference to where they are located in the evidence before the court, namely, as particular page numbers in attachments or exhibits to the relevant affidavits.

28. For the purposes of the determination of the public interest immunity claim, the court did not have access to the Classified Brief of Evidence or to those parts of the brief which would be put before the jury. However, the court was informed that the total number of documents in the accused's possession when they were seized by police was in the order of 400, and that these comprised thousands rather than hundreds of pages. Those volumes are significant in that they cast some light on the volume of contested material the subject of the public interest immunity claim, namely, redactions of parts of eight documents.

Overview of the issues

29. In general terms, the evidence put forward by the Commonwealth relating to the portions of the documents over which public interest immunity is claimed arose from agreements, arrangements or understandings between the Australian government and foreign governments or organisations relating to the maintenance of secrecy or confidentiality of sensitive information shared between them, particularly in relation to military and intelligence matters. It explained that disclosure of the material proposed to be redacted would contravene the Commonwealth's undertakings to its foreign partners and the potential for that to disappoint the expectations of those foreign partners in a way that affected the intelligence sharing relationship that Australia has with them and with other governments.

30. In assessing those contentions for the purposes of the exercise in s 130(1), regard must be had to the matters in s 130(5). The proceedings are criminal proceedings. The party seeking to present the evidence is the prosecution, although it is the accused who seeks to have it admitted only in unredacted form. The proceedings involve allegations of serious criminal offences. Protective orders are in place pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (NSI Act) which would reduce the risk of disclosure of sensitive material put into evidence. The objection to the admissibility of material comes in the context where the accused and journalists have had access to the material in the past. Further, the accused and his lawyers continue to have access to some of the material. The additional disclosure, if the evidence was allowed to be admitted, would be to the judge and the jury during the course of the trial and that disclosure would be managed in accordance with court orders.

31. Having regard to the nature of the proceedings and the contentions of the parties, the principal issue so far as the accused is concerned is the extent to which the redacted portions of the documents would assist in his defence of the charges and whether their value for that purpose outweighs the prejudice that would arise from the limited further disclosure that would be necessary if they were used in the trial.

32. I did not find necessary to exercise the power, available in s 133, to inspect the documents in order to reach a conclusion as to the balancing exercise in s 130(1). In each case, having considered the evidence before me, the position was clear.

Volume 1, Tabs 24, 25 and 26 (Sergeant Hekmatullah)

33. These documents are dealt with in the affidavit of the Agency Head. The documents in Tabs 24, 25 and 26 are Annexures A, B and C to the Agency Head's affidavit. Each of the documents relates to efforts to capture a Sergeant Hekmatullah. He was an Afghan National Army soldier who was alleged to have murdered three and wounded two Australian soldiers in what may be described as a "green on blue" attack in Afghanistan.

34. Volume 1, Tab 24 is a "Ministerial Submission" dated 5 October 2012 with a subject line "Possible apprehension and prosecution of OBJECTIVE JUNGLE EFFECT". OBJECTIVE JUNGLE EFFECT was the codename for Sergeant Hekmatullah. The body of the note contains 21 paragraphs. Most of one whole paragraph and approximately four other lines are redacted.

35. Volume 1, Tab 25 is a "Ministerial Submission" dated 12 October 2012 entitled "Update on the apprehension and deportation of OBJECTIVE JUNGLE EFFECT". The submission contains 15 paragraphs. Most of five paragraphs are redacted along with approximately three other lines.

36. Volume 1, Tab 26 is a “Ministerial Submission” dated 24 October 2012 entitled “Update 2 on the apprehension and deportation of OBJECTIVE JUNGLE EFFECT”. There are modest redactions on five lines of the submission. It annexes a copy of the earlier submission, the equivalent of Tab 25, which has reductions corresponding to those in Tab 25.

37. The affidavit of the Agency Head indicates that the reason for the redactions are that they would reveal the nature and extent of the Australian government’s engagement [redacted] in the apprehension of Sergeant Hekmatullah.

38. Having regard to the matters described in the Agency Head’s affidavit, which it is inappropriate to refer to in these reasons, I infer that the limited redactions proposed are those which are considered necessary to protect the relationship interests disclosed in the affidavit.

39. The apprehension of Sergeant Hekmatullah is not a matter which is addressed in the IGADF submission. I can see no apparent link between the complaints made in the IGADF submission and the subject matter of the “Ministerial Submissions”. The specific extent of [redacted] is even more remote from any issue which might assist the accused in his defence of the criminal charges.

40. I accept the evidence that the Agency Head gives concerning intelligence relationships with other countries and other actors [redacted] and the adverse consequences that would arise from further disclosure of material.

41. The accused had unredacted copies of these documents. The accused’s first submission was that a full exposure of the documents’ contents was necessary in order to understand why they were released by the accused. That submission was rather obscure given that this was one of the documents given to the third journalist which was not provided to the Inspector General of the Australian Defence Force with the IGADF submission. However, no attempt was made to point to evidence consistent with a motivation for releasing the document which was distinct from the motivation associated with the release of the IGADF submission. Nor was there any attempt to otherwise articulate such a motivation.

42. The second submission was as to the breadth of the redactions. The submission was that the redactions were “sweeping”, “heavy-handed” and “overzealous”. The submission was that “The appropriate course would have been to direct attention, with laser-like focus, on just enough masking to cover the names of countries, entities and personal names (as well as incidental changes).”

43. As already pointed out, the submissions of the accused did not identify any significance of the redacted material for his defence of the proceedings. Further, I do not accept his submission that the redactions are too broad. Much material dealing with the subject matter is disclosed in the unredacted portions of the documents. I do not accept the submission that the extent of redaction is somehow unreasonable or overly broad. The extent of the unredacted material allows very significant disclosure and that tends against that submission. Further, although I have not taken the further step of examining the unredacted documents, I am conscious of the need to take care in an area like this before too readily drawing a conclusion that information is less harmful than contended or even innocuous. Security and intelligence cooperation with foreign governments and organisations is a subject matter where there is very particular expertise that exists in those operating in the area, and caution needs to be exercised against the possibility of lawyerly overconfidence in circumstances where lawyers lack that relevant expertise.

44. The balancing exercise required by s 130 clearly favours the nondisclosure of each of those documents by their redaction in the manner in which they appear in the evidence.

Volume 3, Tab 35 ("[Redacted] message client")

45. This document is Annexure A to the affidavit of Ms Littlehales. It is a five-page document. It has a heading "[Redacted] message client". Apart from some information on the first page of the printout indicating to whom it was sent and a "SECRET" marking, most of the balance of the document is redacted.

46. The affidavit of Ms Littlehales indicates that the redactions are made so as to not disclose the identity of a foreign intelligence partner or the content of the message.

47. Australia is subject to a treaty obligation with the government of that country obliging it to protect from use classified material originating from that government without prior written approval. The government of that country has supported the making of a claim for public interest immunity with respect to the document.

48. I accept the evidence of Ms Littlehales in relation to the importance of compliance with obligations such as those in the relevant treaty in the circumstances that exist and the adverse consequences for Australia's relations with its intelligence partners that would flow from departure from those obligations.

49. The accused objected to the redactions to the document. He did not currently have access to the unredacted portions. Although he had the unredacted document in his possession previously, he submitted that the court should carefully scrutinise the claim to ensure that the redactions are necessary. No submissions were addressed to the

significance of the document for the purposes of his defence. It is not apparent how the contents of the document could be significant for his defence given:

(a) the limited unredacted content;

(b) its location within the Classified Brief of Evidence; and

(c) that it is not identified as one of the additional documents given to the third journalist.

50. Having regard to the evidence of Ms Littlehales and the specific treaty obligation binding upon Australia, I consider that the balancing exercise required by s 130 indicates that the redacted material is not to be adduced as evidence.

Volume 4, Tab 50 [Redacted]

51. This material is contained in the exhibit to the affidavit of Mr Jeffrey at pages 2 to 26. The first page of the document is unredacted. The balance of the pages are fully redacted. The title of the document is [redacted]. It has [redacted] and [redacted] logos at the top. The document appears to be the product of the [redacted]. Part of the table of contents appears on the unredacted page. It includes headings such as [redacted].

52. Australia has an agreement with the [redacted] concerning the sharing of security information. This includes an obligation to protect and safeguard information of the other party and not disclose it without the other party's consent.

53. The redacted material is material which [redacted] has not consented to use in the proceedings. It has consented to use of the unredacted page subject to it bearing the annotation that it does: [redacted]: see exhibit HJ1 at 134.

54. I accept the detailed evidence of Mr Jeffrey about the harm that would flow to Australia's relationship with [redacted] and its [redacted] if Australia was unable to protect [redacted] information in accordance with the agreement that is in place.

55. The accused had access to the documents as part of the Classified Brief of Evidence from May 2020 until August 2021 subject to protective orders made under the NSI Act.

56. The submission made on behalf of the accused was that the document was significant because it identifies on its face that it was last updated on [redacted], which was shortly after one of the incidents referred to in the IGADF complaint. That was an incident on 28 April 2013. The incident is described in the complaint as "the incident where the dead insurgent's hands were removed in order to identify whether any one of them were a key bomb-maker who had likely caused or contributed to the deaths of a number of Australian soldiers". The submission was that the contents of the [redacted] document would [redacted].

57. I do not consider that the content of the [redacted] document would be of any material assistance to the accused in this case. There are a number of reasons for this:

    (a) The incident is addressed at length in the IGADF submission (from [22]-[65]). The issues canvassed do not relate to the process of investigation or technical issues of the sort indicated on the cover page of the [redacted] document.

    (b) The IGADF submission does not make any reference to the [redacted] document or any other version of that document.

    (c) The likelihood of the document of [redacted] having been revised as a result of an incident involving Australian soldiers, some [redacted] days previously, is low having regard to the institutional nature of the document and the likely bureaucratic processes involved in settling on its terms.

    (d) More fundamentally, even if there was a connection between the IGADF submission and the [redacted] document that could be shown to reflect upon the merits of that submission, the merits or otherwise of the IGADF submission are unlikely to be issues of significance at the trial. Even the reasonableness of the accused's belief in the merits of the submission are unlikely to be significant issues at the trial. That is because the duties of nondisclosure asserted by the Crown are not susceptible to an exemption based upon the merits of the submission. The position may have been otherwise if the duty of the accused was subject to a public interest override or exemption.

    (e) Insofar as there may be a contention that the accused may have believed that there was a possible entitlement to disclose under the *Public Interest Disclosure Act 2013* (Cth) and hence that the prosecution had failed to demonstrate recklessness as to breach of duty, counsel for the Crown indicated that evidence would be called that in a military context such as the activities in Afghanistan, [redacted] involve matters of intelligence which are generally excluded from the scope of lawful disclosure under *the Public Interest Disclosure Act*.

58. On my present understanding I would assess the potential value of the [redacted] document as falling into the speculative category rather than any category which could be more definitely seen as assisting the accused in his defence.

59. The balancing exercise required by s 130 clearly favours the exclusion of the evidence.

Volume 6, Tab 7 (Operations against ISIL)

60. This is a document which is Annexure B to the affidavit of Ms Littlehales. It is a "Ministerial Advice" dated 16 October 2014 entitled "Defence Update: Operation OKRA (6:00am 15 October 2014 – 6:00am 16 October 2014)". The body of the document is 14 paragraphs. It has annexed to it a document relating to "Key Policy Considerations", some "Talking Points" and a map. One paragraph of the "Key Policy Considerations" document has been redacted. The balance is unredacted.

61. The reason for the redaction, disclosed in the affidavit of Ms Littlehales, is in order to not disclose the foreign intelligence partner from whom the information in that paragraph was obtained.

62. There is a treaty with the government of that country. The Australian government agreed not to use classified material originating from that country for any purpose other than stated without its permission. There has been no specific request made to the relevant country for permission to use the information given its limited scope and apparently tangential nature to the proceedings.

63. I accept that the disclosure of the redacted material without the consent of the relevant foreign government would create a risk of damage in the way outlined in Ms Littlehales' affidavit.

64. The accused does not currently have access to the unredacted parts of the documents. He maintained the submission that it is necessary to have unredacted versions to provide instructions on his defence. The submission was that the court should carefully scrutinise the claim in order to ensure that the Commonwealth has limited the redactions to the essential matters necessary to maintain the claim.

65. Having regard to the subject matter of the document it is very unlikely that the redacted paragraph would have any bearing on the accused's defence of the criminal charges. On the other hand there is a clear public interest in Australia complying with its obligations to other countries and a risk of adverse consequences if it does not. The balancing exercise required by s 130(1) compels the conclusion that the evidence not be adduced.

Volume 8, Tab 23 [redacted]

66. This material forms part of the document which appears in the annexure to the affidavit of Mr Jeffrey at pages 53-126. The relevant redactions which are disputed by the accused are on pages 107-125. These pages are redacted in full.

67. The document at pages 53-126 was within the two volumes of documents provided to the three journalists. It is in the form of a briefing for the Chief of the Defence Force and

has a number of attachments to it. The first page indicates that it is a document signed on 13 March 2013 and entitled "Noting Brief for CDF: OP Slipper [redacted]". This describes an incident that occurred on [redacted].

68. The attachments to that report were a "Noting Brief" containing a "quick assessment" of the incident as well as a document prepared in relation to the incident by a [redacted]. It is the [redacted] which was wholly redacted.

69. The redaction took place because of the agreement with [redacted] referred to in relation to Volume 4 Tab 50 above. [Redacted] has not consented to the release of the document. The consequences of release of the document in those circumstances are set out in the affidavits of Mr Jeffrey and I accept that evidence.

70. The submission of the accused was that the [redacted] was significant because it supported the correctness of the contentions in the IGADF submission. The IGADF submission itself dealt with the [redacted] at [12]-[17]. It made no express reference to the [redacted] but footnote 14 refers to a tab in Volume 2 of the documents that he provided with the submission and amongst those documents was a copy of the [redacted]. The accused submitted that, given that his IGADF submission contended that the Australian Defence Force had treated complaints inconsistently, then "the jury's acceptance or rejection of the Accused's belief (and the justification for the belief) will be a very important part of their determination". It was not explained in submissions precisely what was said to be the belief that the prosecution would be required to exclude in order to succeed on recklessness as to breach of duty. It appears to be that the accused would contend that there was a reasonable doubt of his recklessness as to breach of his duty because he may have believed it was his duty to leak material to the journalists in order to disclose wrongful conduct on the part of military authorities who were investigating the incidents as possible murders when the accused contended that they should not have been.

71. At this stage I cannot see how the [redacted] document would be of any real significance to the defence of the criminal charges by the accused. Assuming that it is, as the accused contends, consistent with the incident being a dreadful accident arising out of a misunderstanding as to the intended target, it would not be of great significance so far as the accused's position is concerned. Even without the [redacted], having regard to the terms of the other documents in relation to which there are no relevant redactions, the unredacted evidence in Volume 8, Tab 23 would readily support the contention that it was a dreadful accident. Insofar as that might be relevant to the merits of his complaint of inconsistent treatment of different incidents, it would remain a submission available to him. So far as I understand the case at the moment, the Crown will not attempt to

contradict that submission, as it takes the view that the merits or otherwise of his complaint is of very little, if any, relevance to the determination of the question of recklessness as to his breach of duty.

72. That is because the duties that the Crown relies upon are not subject to public interest exemptions. The question of recklessness as to breach of duty is unlikely to be materially affected by the merits of his complaint about this particular action. To the extent that it might be influenced by the merits of his submission, the material that would be available to be used, such as the "Noting Brief for CDF", is consistent with the position as to the accident or otherwise that he had adopted in his IGADF submission.

73. In my view, having regard to the strength of the public interest in nondisclosure and the likely lack of significance of the redacted document for the accused's defence of the charges, the balance in s 130(1) clearly favours exclusion of the evidence.

Should a stay be granted?

74. Having regard to my conclusion that none of the redactions have any significant prospect of being important for the purposes of the accused's defence of the charges, it is not a case in which it would be appropriate to make a direction that, as a condition of exclusion of material from evidence in the case, the prosecution should be stayed: s 130(5)(f).

Orders

75. The rulings that I have made are obviously influenced by my assessment of the lack of significant utility of the documents for the purposes of the accused's defence of the proceedings. There is at least a possibility that my understanding of the way in which the accused puts his defence of the proceedings may be altered once I learn more about the case either by way of an opening or as a result of the course of the evidence. There remains at least a theoretical potential for the position in relation to a claim of public interest immunity to change during the course of the proceedings and therefore for an earlier ruling to be revisited in the light of a change in circumstances.

76. The orders of the Court made on 17 November 2023 were:

    1. Pursuant to s 130(1) of the *Evidence Act 2011* (ACT) the PII Information may not be presented as evidence in this proceeding.

    2. In order 1, "PII Information" means the information redacted from the following documents forming part of the Classified Brief of Evidence in this proceeding:

        (a) Volume 1, Tab 24

        (b) Volume 1, Tab 25

(c) Volume 1, Tab 26

(d) Volume 3, Tab 35

(e) Volume 4, Tab 50

(f) Volume 6, Tab 7

(g) Volume 8, Tab 23.

3. Note that orders 1 and 2 are not made on the condition that prosecution of the accused on any of the charges is stayed.

I certify that the preceding seventy-six [76] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Mossop.

Associate:

Date:

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Amendments

7 December 2023	Where “informa54tion” appears, replace with “information”	Paragraph 52