EXHIBIT LIST

MFI 3 – THE COMMONWEALTH'S SUBMISSIONS IN RELATION TO THE MAKING OF PROTECTIVE ORDERS

PRE-TRIAL DIRECTIONS HEARING VIA TELECONFERENCE

MONDAY 29 AUGUST 2011

COL P.J. MORRISON, Judge Advocate

ACCUSED: Army LTCOL M

MFI 3.
Bc.

IN THE MATTER OF AN APPLICATION FOR PROTECTIVE ORDERS IN THE TRIAL OF LTCOL M

THE COMMONWEALTH'S SUBMISSIONS IN RELATION TO THE MAKING OF PROTECTIVE ORDERS

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PART I INTRODUCTION

1. The Commonwealth seeks the following orders to protect from public disclosure the identity of LTCOL M:

   1.1. an order that, for the purposes of the proceedings, the accused be referred to as 'LTCOL M'; and

   1.2. an order that there be no publication of any information in the proceedings which:

      1.2.1. reveals the name or contact details of LTCOL M, or

      1.2.2. may otherwise permit the identification of LTCOL M.

2. The Commonwealth relies upon the affidavit of Air Marshal Mark Donald Binskin, Vice Chief of the Defence Force (the **VCDF**) sworn on 23 August 2011.

PART II POWER TO MAKE THE PROTECTIVE ORDERS

3. The sources of power for making the orders sought by the Commonwealth are:

   3.1. section 140 of the *Defence Force Discipline Act 1982* (**DFD Act**)

   3.2. section 148 of the DFD Act and

   3.3. the court martial's implied power.

Section 140 of the DFD Act

4. Section 140 relevantly provides:

> **140 Public hearings**
>
> (1) Subject to this section, the hearing of proceedings before a court martial or a Defence Force magistrate shall be in public.
>
> (2) In proceedings before a court martial or a Defence Force magistrate, the President of the court martial or the Defence Force magistrate may, if the President considers it necessary in the interests of the security or defence of Australia, the proper administration of justice or public morals:
>
> (a) order that some or all of the members of the public shall be excluded during the whole or a specified part of the proceedings; or
>
> (b) order that no report of, or relating to, the whole or a specified part of the proceedings shall be published.
>
> (3) The President of a court martial shall not make an order under subsection (2) unless the President has first consulted the judge advocate.

5. This provision clearly allows the President of the court martial (or, where the Judge Advocate is sitting alone, the Judge Advocate: s 134(5)) to make orders to close the

court if he or she considers it 'necessary', in the interests of the security or defence of Australia. It also allows the President (or Judge Advocate) to make non-publication orders in respect of any report 'of' the proceedings (such as a transcript) as well as any report 'relating to' the proceedings (such as a media article).

6. In *Hogan v Australian Crime Commission*[1] the High Court considered the operation of s 50 of the *Federal Court of Australia Act 1976* (FCA Act). That provision (as it then stood) was in broadly equivalent terms to s 140 of the DFD Act, providing:

> The Court *may*, at any time during or after the hearing of a proceedings in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be *necessary* in order to prevent prejudice to the administration of justice or the security of the Commonwealth. (emphasis added)

7. The Court held at [30] - [33] that:

   7.1. 'Necessary' was a 'strong word', such that it was insufficient that it appear to the Federal Court that a non-publication order was merely 'convenient, reasonable or sensible, or to serve some notion of the public interest'

   7.2. The word 'may' did not mean that the Court had a discretion to refuse such an order once it was found to be necessary - once the requisite satisfaction was reached, the Federal Court was to make the order under s 50.

8. While the High Court indicated that 'necessary' in this context means something more than 'convenient' etc, it did not suggest that it meant 'essential' or 'unavoidable' or 'indispensable'. It is well recognised that 'necessary' may be used to mean something falling considerably short of so strict a standard.[2]

9. In the present context it should be understood as having a meaning similar to that used when considering whether an implied power to make a particular order arises (ie not meaning 'essential' but rather 'reasonably necessary with reference to the circumstances of the case'). The authorities on this are discussed below.

10. The proper approach to s 140 is also informed by the reasoning of the NSW Court of Criminal Appeal in *R v Lodhi*.[3] In that case a person accused of terrorism offences appealed from a decision of the trial judge to make certain orders to protect the operational capacity of the Australia Security Intelligence Organisation (**ASIO**). The orders made by the trial judge (set out in full at [4]) included orders that there be no disclosure or publication (except in closed court) of certain identified types of information including information which might lead to the identification of an ASIO witness.

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1 (2010) 240 CLR 651 (***Hogan v ACC***).

2 See *Thomas v Mowbray* (2007) 233 CLR 307 per Gleeson CJ at [20] - [27] and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [39].

3 (2006) 65 NSWLR 573 (***Lodhi CCA***).

11. The source of power relied upon for making those orders was s 85B of the *Crimes Act 1914* and s 93.2 of the *Criminal Code 1995*. The paragraphs of those sections which permit the closure of the court and the making of non-publication orders in respect of evidence or information canvassed in the hearing of proceedings are expressed in relevantly similar terms to paragraphs (a) and (b) of s 140(2) of the DFD Act.

Section 148 of the DFD Act

12. Section 148 relevantly provides:

> **148 Record of proceedings to be kept**
>
> (1) A service tribunal shall keep a record of its proceedings and shall include in that record such particulars as are provided for by the rules of procedure.
>
> (2) The President of a court martial ... may order that the whole or a specified part of a record under subsection (1) that relates to proceedings before the court martial ... is not to be published if the court martial ... considers that such a publication would be inappropriate, taking account of the interests of the security or defence of Australia, the proper administration of justice, public morals or any other matter it considers relevant.

13. This would permit the President of the court martial (or, where the Judge Advocate is sitting alone, the Judge Advocate: s 134(5)) to make an order that the record of the present proceeding, or specified parts of that record, not be disclosed if such disclosure would be 'inappropriate', taking into account the matters referred to in s 148(2).

Implied powers

14. In addition to the express power in ss 140 and 148 of the DFD Act, courts martial have an implied power to make such protective orders as are necessary to secure the proper administration of justice.[4] In the context of the present application this involves ensuring that the court martial's ordinary processes are not used in a way which is to the ultimate prejudice of Australia's national security.

15. The relevant authorities with respect to the test of 'necessity' in the context of implied powers have been helpfully summarised in the recent decision of a 5 member bench of the NSW Court of Criminal Appeal in *BUSB* at [24]-[33]. In short, the term 'necessary' does not mean 'essential' or 'absolutely necessary' but rather what is reasonably necessary in the circumstances of the particular case.

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[4] See *John Fairfax & Sons v Police Tribunal of NSW* (1986) 5 NSWLR 465 (***Fairfax v Police Tribunal***) at 476-477 per McHugh JA, Glass JA agreeing at 467; *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at 15-17; *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131 (***Fairfax v Local Court of NSW***); and *John Fairfax v District Court (NSW)* (2004) 61 NSWLR 344 (***Fairfax v District Court***); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 (***Fairfax v Ryde Local Court***) at [27]-[47]. These authorities and basic propositions have been cited with consistent approval. See *Lodhi CCA, BUSB v R* [2011] NSWCCA 39 (***BUSB***) at [25] - [33] per Spigelman CJ (with whom Allsop P, Hodgson JA, McClellan CJ at CL and Johnson J agreed) and, most recently, *Hogan v Hinch* [2011] HCA 4 (***Hogan v Hinch***) at [21] per French CJ.

16. Courts have recognised that the implied jurisdiction can extend to the making of protective orders to protect sensitive information, including the making of non-publication orders, orders permitting witnesses to give evidence using a pseudonym and orders permitting witnesses to give evidence from behind a screen.[5]

PART III THE PROPER EXERCISE OF THE POWER

17. Despite the slightly different ways in which the above powers are expressed, they each require a consideration of two fundamental issues:

    17.1. whether protection of information is necessary in the interests of Australia's defence and security; and

    17.2. the principle of open justice.

18. Clearly, the Commonwealth's application does not seek to prevent the disclosure of information as between the parties and the court martial. Importantly, therefore, the protective orders do not impact upon the ability of the parties to have a fair hearing (in fact, if the prosecutions' application to withdraw the charges against the accused is successful, there will be no hearing). As such, the 'fair trial' considerations which are prominent in much of the relevant case law are not relevant to the present application.

Special weight to be given to protection of national security

19. When considering the public interest in favour of non-disclosure, the Courts have repeatedly emphasised the special importance which attaches to protection of national security and defence.

    19.1. In *Alister v R*, Wilson and Dawson JJ stated that 'National security undoubtedly forms a category of public interest of special importance'.[6]

    19.2. Documents concerning defence secrets (and diplomatic relationships with foreign governments) are regarded as 'archetypes' of public interest immunity claims: see *Sankey v Whitlam*.[7]

    19.3. In *Regina v Mallah*, Wood CJ at CL stated that the 'interests of national security and effective intelligence operations, in an age of heightened terrorist activity, are of very great importance.'[8]

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5 See *Jarvie v The Magistrate's Court of Victoria at Brunswick* [1995] 1 VR 84 (***Jarvie***); *Fairfax v Local Court of NSW*; *Fairfax v District Court*; *R v Kwok* (2005) 64 NSWLR 335 (***Kwok***) at 340; *O'Shane v Burwood Local Court (NSW)* [2007] NSWSC 1300 from paragraph [30] and *R v BUSB*.

6 (1984) 154 CLR 404 at 436 (***Alister***).

7 (1978) 142 CLR 1 at 57 (***Sankey v Whitlam***).

8 NSW Supreme Court, unreported, 11 February 2005 at [23]. This passage was quoted by Whealy J in *R v Khazaal* [2006] NSWSC 1061 (***Khazaal***) at [32].

19.4. In *Church of Scientology v Woodward*, Mason J stated 'No one could doubt that the revelation of security intelligence in legal proceedings would be detrimental to national security'.[9]

19.5. In the same case, Brennan J said (at 76): '... the public interest in national security will seldom yield to the public interest in the administration of civil justice'.

19.6. In *R v Khazaal*, Whealy J referred to the above passage and said: 'These statements, made nearly 25 years ago, have a more emphatic content in the present world climate'.[10]

19.7. In *R (Roberts) v Parole Board*, the House of Lords noted that 'national security concerns are likely to be especially compelling'.[11]

Public interest in proceedings being conducted in public

20. As 'fair trial' considerations do not arise, the predominant countervailing public interest which must be weighed against the national security concerns is the principle of open justice. Open justice requirements will generally not weigh as heavily as the fundamental requirement that an accused be given as fair a trial as possible.[12]

21. The open justice principle is well recognised as being 'one of the most fundamental aspects of the system of justice in Australia'.[13] However, it is also well recognised that this important public interest is a 'principle and not a right';[14] a 'means to an end, and not an end in itself'.[15]

22. It is well recognised that the public interest may require that the open justice requirement be modified to accommodate the need to protect national security. This was helpfully summarised in *Lodhi* by McClellan CJ (with whom Spigelman CJ and Sully J agreed) at [24]-[28]. At [25]-[26] his Honour stated:

> [25] ...Those principles must of necessity give way or accept modification to ensure that the proceedings are conducted in a manner which serves the overall interests of society. In *John Fairfax Group v Local Court (NSW)* (at 141) Kirby P said:
>
> " ... If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of the particular case."

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9 (1982) 154 CLR 25 at 59.

10 [2006] NSWSC 1061 at [32].

11 [2005] WLR 152 (***Roberts***) at [73].

12 See *Alister* at 456; *R v Lodhi* (2006) 163 A Crim R 508 (***Lodhi NSWSC***) per Whealy J at [38] and *Jarvie* at 89.

13 *Fairfax v District Court* at [18] and *Fairfax v Ryde Local Court* at [60]. See also *Hogan v Hinch* at [20] and [22] per French CJ.

14 *Fairfax v Ryde Local Court* at [29].

15 *Hogan v Hinch* at [20].

[26] I do not believe Kirby P's remarks should be given a confined operation but are of general application. As his Honour makes plain the common law will, in appropriate circumstances, protect the identity of informers and the interests of national security. Just as the rule of openness has in appropriate circumstances been modified by the courts it may also be modified by the Parliament. In this respect the Commonwealth Parliament has legislated to protect the security and defence interests of the Commonwealth. To this end, s 85B and s 93.2 authorise a court to exclude some or all of the members of the public, prohibit publication of part or all of the proceedings or prohibit any person from having access, inter alia, to information or other documents used in the proceedings.

23. It is also important to consider in each case how significant the actual derogation from the principle of open justice will be. In *Australian Broadcasting Commission v Parish*[16] the Full Court of the Federal Court made the following observation in the context of s 50 of the FCA Act:

> Although the principle of open justice is of great importance in exercising the discretion under s 50, it is not necessarily the whole weight of that principle which must be placed in the scales. The derogation from the principle, which is involved in making any order under s 50, may be very great; or it may not be great; it may be very small. In placing that principle in the scales, the degree of derogation involved in the proposed order is an important matter to be considered.

24. The above 'open justice' considerations apply with equal force to the making of protective orders under ss 140 and 148 of the DFD Act and the implied power.

Weight to be given to deponents' views

25. The Court is required to attach significant weight to the views of a senior deponent who adduces evidence in support of an application for protection of confidential government information.

25.1. In *Sankey v Whitlam,* Gibbs ACJ referred to giving 'full weight' and 'proper respect' to the reasons advanced by the relevant departmental head for preserving secrecy (at 43-44). Stephen J referred to the statement made by Lord Pearson in *Rogers v Home Secretary* to the effect that the Court naturally gives 'great weight' to the opinion of the appropriate Minister (at 59-60).

25.2. In *Alister v R,* Wilson and Dawson JJ stated:

> The outstanding feature of the claim to immunity is the nature of the public interest which the Minister seeks to protect. Questions of national security naturally raise issues of great importance, issues which will seldom be wholly within the competence of a court to evaluate. It goes without saying in these circumstances that very considerable weight must attach to the view of what national security requires as is expressed by the responsible Minister...(at page 435).

25.3. In that same case, Brennan J acknowledged that a court is 'ill-equipped itself to evaluate pieces of intelligence obtained by ASIO' (at page 455).

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[16] (1980) 29 ALR 228 at 236 per Bowen CJ

25.4. In *Traljesic v Attorney-General of the Commonwealth*, Rares J said: 'Necessarily, considerations which are present to the mind of the members of the Executive of the Commonwealth at ministerial level to whom responsibility is confided are difficult to judge in a forensic contest, particularly where an issue of public interest immunity or matters of state immunity arises.'[17]

25.5. In *Lodhi*, Whealy J stated: 'it is clear that considerable respect should be paid to the views expressed by the Director-General of Security. National security forms a category of public interest of special importance. Considerable weight must attach to the view as to what national security requires as expressed by a person holding the office of Director-General of Security.'[18]

25.6. In *SSHD v Rehman*[19] the House of Lords emphasised (at [50]-[57]) that a court should not differ from the opinion of the Secretary of State on matters of national security, provided there is an evidential basis for that opinion.

PART IV THE PRINCIPLES APPLIED

The Commonwealth's evidence

26. In the present case the need for the orders sought is clearly articulated in a detailed affidavit from the VCDF. The VCDF is a very senior and highly experienced member of the ADF. Accordingly, in accordance with the principles discussed in paragraph 25 above, the views of the VCDF must be given great weight.

27. The risks to national security of which the VCDF speak are plainly of the a fundamental kind - they include loss of life and damage to Australia's ability to protect its national security. As is emphasised in the VCDF's affidavit, even if the likelihood of such consequences may be relatively low in some instances, the potential outcomes are so grave that any meaningful risk is an unacceptable one.

28. In those circumstances, absent persuasive countervailing evidence, the court martial ought defer to the views of the VCDF.

Identity protection orders sought

29. The Commonwealth's affidavit explains why it is necessary in the interests of the defence and security of Australia to protect from public disclosure the identity of LTCOL M. Once that fundamental concern is understood, the need for the orders becomes largely self-evident. It is sufficient here to note some specific considerations.

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17 [2006] FCA 125 at [19].

18 *Lodhi NSWSC* at [32]. See also [37] where his Honour referred to the need to attach 'very significant weight' to the views of the Director-General of Security.

19 [2003] 1 AC 153.

30. The need for identity protection orders is well recognised in the context of ASIO officers - fundamental considerations include the need to protect the officers and their families, the need to ensure that the pool of skilled personnel available to ASIO is not reduced and the need to protect the compromise of sensitive information which may arise through the targeting of ASIO officers.[20]

31. Similar concerns are expressed by the VCDF in relation to special forces personnel generally, and LTCOL M in particular. These safety concerns are exacerbated here because the very facts of the present case are likely to cause extremist sympathisers to focus possible retributive action on the specific members involved, and in particular the accused.

32. The non-publication and pseudonym orders sought by the Commonwealth to protect the identity of LTCOL M will not interfere with the public understanding of the facts and circumstances which are the subject of the proceedings. They will however assist in avoiding the potentially significant harms deposed to by the VCDF. Such orders would involve a 'minimalist' interference with open justice.[21]

33. The Commonwealth also seeks the protection of information which could be used to more indirectly identify LTCOL M (ie through something in the nature of mosaic analysis). The need for the protection of such information is well recognised.[22]

34. It is clear that there may be a significant public interest in knowing the identity of an accused.[23] However, it is clear from the authorities that there is no 'rule' that the identity of an accused person must be made known. Each case will turn upon its own facts, and will require the consideration of the circumstances of the particular accused.[24] Importantly, it is well recognised that this public interest is more significant with respect to a person convicted of an offence.[25] In circumstances where the accused will not only never be convicted but, it is now accepted, ought not even face trial, the public interest in his identity must be as the lowest end of the spectrum.

35. In the present case the Commonwealth seeks the aforementioned protective orders in relation to the accused both for the reasons explained in the VCDF's affidavit and because they would be consistent with authority. In particular:

    35.1. The potential risks to the safety of special forces personnel (and their families) are particularly high in the case of the accused.

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20 See *Lodhi NSWSC* at [20]-[22] and *BUSB* at [57]-[62].

21 *Witness v Marsden* (2000) 49 NSWLR 429 at [144]. See also *ABC v D1* [2007] VSC 480 at [70] where Forest J noted that a court is entitled to take into account the fact that there will still be a reporting of the proceedings and that the hearing itself will be conducted in open court.

22 See *Traljesic v Attorney-General* (2006) 150 FCR 199 at [22]-[23] and *Fandakis* at [49].

23 See *David Syme and Co* (Supreme Court of Victoria, unreported, 23 April 1996) at 10.

24 See *R v C A L* (NSW Court of Criminal Appeal, unreported, 18 February 1993); *ABC v D1* at [45] and [68] and *PPP v QQQ as representative of RRR (dec'd)* [2011] VSC 186.

25 Ibid. See also *R v White* (2007) 17 VR 308 at [23] and [29].

35.2. Not only has the accused not been convicted of an offence, such that the public interest in his identity must be lower than it would be in the case of a convicted person, but the prosecution has indicated that it will seek to withdraw the charges.

35.3. Should the charges be withdrawn, the danger to LTCOL M and his family may in fact be increased if extremists have a sense (wrongful as it may be) that direct retribution is the only remaining way for them to obtain what they perceive to be justice.

35.4. The accused is not otherwise known to, or of significance to, the public. Accordingly there is no particular public interest in him per se (as opposed to a case in which there may be a strong interest in learning what has been alleged by, or against, a previously known public figure).[26]

35.5. Beyond the safety consideration, the disclosure of the identity of the accused carries with it the additional risks to national security and defence described in the VCDF's affidavit - these include the risk of compromise of sensitive information and the loss of ongoing capability.

PART V OPPORTUNITY TO PUT ON FURTHER EVIDENCE OR APPEAL ADVERSE RULING

36. Should the court martial be inclined to rule against the Commonwealth in its application for protective orders, the Commonwealth submits that, consistently with the principles laid down by the High Court, the Commonwealth should be given an opportunity to:

36.1. adduce further evidence if the court martial considers that the evidence filed in support of its claim is deficient in some regard; and

36.2. seek to appeal any adverse decision, before any information which may reveal the identity of LTCOL M is publicly disclosed.

37. In particular, the Commonwealth relies on the following High Court authority in support of the above propositions:

37.1. *Sankey v Whitlam*, in which, Gibbs ACJ stated (at 43) that a decision rejecting a public interest immunity claim should not be enforced until the government concerned has had an opportunity to appeal against it, or test its correctness by some other process, if it wishes to do so.

37.2. *Alister*, in which Gibbs CJ noted that if the trial judge had declined to accept a national security immunity claim it would have been the judge's duty to defer

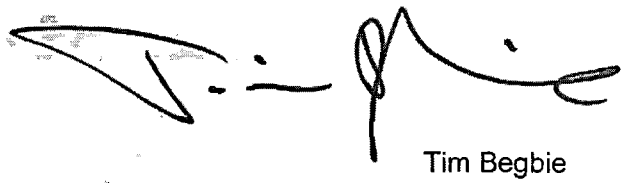
[26] As to the obvious particular interest in cases involving public figures, see for example *Hogan v ACC* concerning the well-known actor; *Anon 2 v XYZ* [2008] VSC 466 concerning 'a prominent sportsman' and *Fairfax v Ryde Local Court* concerning a NSW Magistrate against whom a restraining order had been obtained.

taking the matter further in order to give the Attorney-General an opportunity to test the decision, notwithstanding the inconvenience that would have resulted from interrupting a criminal trial.[27]

PART VI CONCLUSION

38. The protective orders sought by the Commonwealth are clearly necessary in the interests of the defence and security of Australia for the carefully considered and detailed reasons set out in the VCDF's affidavit. The proposed orders seek no more derogation from the principle of open justice than is necessary for the protection of Australia's defence and security. Those orders should be made.

Dated: 26 August 2011



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[27] See also *R v Fandakis* [2002] NSWCCA 5 at [45].