



Federal Court of Australia
District Registry: New South Wales
Division: General

No: NSD1908/2016

GAVIN SMITH and another/others named in the schedule
Applicant

DEPARTMENT OF DEFENCE and another/others named in the schedule
Respondent

ORDER

REGISTRAR: REGISTRAR CHUAN NG

DATE OF ORDER: 15 November 2017

WHERE MADE: Sydney

THE COURT ORDERS THAT:

The Westpac Subpoena

1. The bundle of documents produced in response to the subpoena addressed to The Proper Officer, Westpac Banking Corporation ACN 007 457 141 (the **Westpac Subpoena**) be assigned the following packet number S-27, being the bundle marked "Westpac Banking Corporation documents over which a claim of confidentiality is made" (the **Westpac Packet**).
2. Until further order or agreement between the parties (including Westpac Banking Corporation), leave be granted to the solicitors for the parties to access and uplift, for the purposes of inspection and copying, the Westpac Packet (S-27) on the following conditions:
 - 2.1. access to the documents in the packet be restricted to the solicitors for the Respondent and their instructing officers, the solicitors for the Applicants and their instructing officers at IMF Bentham Limited, counsel and/or experts engaged by the parties, and/or any document management firm instructed by the parties' solicitors
 - 2.2. any individual that proposes to inspect or review any documents within the Westpac Packet (S-27) be required to complete and execute a copy of the Confidentiality Undertaking annexed to these orders and marked "A" and provide a copy to the legal representatives for Westpac, HWL Ebsworth, by way of email



to Mr Greg Lewis (glewis@hwle.com.au) and Mr Alex Johnson (anjohnson@hwle.com.au) prior to inspection

- 2.3. the Westpac Packet (S-27) not leave the custody of the solicitors for the Respondent and their instructing officers, the solicitors for the Applicants and their instructing officers at IMF Bentham Limited, or counsel and/or experts engaged by the parties, and/or any document management firm instructed by the parties' solicitors, and
- 2.4. the Westpac Packet (S-27) be returned to the Registry in the same condition and packaging as when uplifted no later than 7 days after the documents are uplifted.

The First AECOM Subpoena

3. The subpoena addressed to The Proper Officer, AECOM Services Pty Ltd ACN 000 691 690 and issued by the Court on 9 June 2017 (the **First AECOM Subpoena**) be adjourned to 9.30am on Wednesday, 22 November 2017 at the Law Courts Building, Queens Square, Sydney.
4. The date by which any notice of objection in relation to any further documents produced in response to the First AECOM Subpoena, or any application to set aside those subpoenas be filed, be extended to 22 November 2017.

The Second AECOM Subpoena

5. Leave is granted to AECOM Services Pty Ltd ACN 000 691 690 to uplift the original hard drive produced to the Court by AECOM Services Pty Ltd on 18 October 2017, in response to a subpoena issued to AECOM Services Pty Ltd on 4 September 2017, (the **Second AECOM Subpoena**) and identified as S-19 and to replace the hard drive with another hard drive.
6. The Second AECOM Subpoena be stood over for a period of one week to 22 November 2017.
7. Order 8 of the Orders made on 18 October 2017 be vacated.

The GHD Subpoena

8. The subpoena addressed to The Proper Officer, GHD Pty Ltd ACN 008 488 373 (the **GHD Subpoena**) be adjourned to 9.30am on Wednesday, 22 November 2017 at the Law Courts Building, Queens Square, Sydney.



9. The date by which any notice of objection in relation to any further documents produced in response to the GHD Subpoena, or any application to set aside those subpoenas be filed, be extended to 22 November 2017.

NSW EPA Subpoena

10. Leave be granted to the solicitors for the Respondent to have first access to (and to uplift) the documents produced in response to the Subpoena addressed to The Proper Officer, New South Wales Environment Protection Authority (the **NSW EPA Subpoena**) packet S-25 until 4.30pm on 22 November 2017.
11. By 4.30pm on 22 November 2017:
 - 11.1. The solicitors for the Respondent are to notify the solicitors for the Applicants in writing of any confidentiality or privilege claims made over the documents produced in response to the NSW EPA Subpoena (S-25) with such notification to identify:
 - 11.1.1. each document in relation to which a full claim of confidentiality or privilege is made;
 - 11.1.2. each document in relation to which a partial claim of confidentiality or privilege is made; and
 - 11.1.3. in respect of each document in relation to which a full or partial claim of confidentiality or privilege is made, the basis upon which that claim is made.
 - 11.2. The solicitors for the Respondent must provide the Court with:
 - 11.2.1. a redacted copy of each document produced in response to the NSW EPA Subpoena (S-25) in relation to which a partial claim for confidentiality or privilege is made with only those parts of the document over which confidentiality or privilege is claimed to be redacted, and
 - 11.2.2. a separate envelope containing all documents produced in response to the NSW EPA Subpoena (S-25) in relation to which a full claim of confidentiality or privilege is made.
12. The solicitors for the Respondent are to return the documents produced in response to the NSW EPA Subpoena (S-25) to the Registry by 4.30pm on 22 November 2017.
13. Leave be granted to the solicitors for the Applicants to access and uplift for the purposes of inspection and copying:



- 13.1. the documents produced in response to the NSW EPA Subpoena (S-25) in respect of which no confidentiality / privilege claims have been made in accordance with Order 11, and
- 13.2. any redacted copies of documents produced in response to the NSW EPA Subpoena (S-25) in respect of which partial claims of confidentiality and/or privilege have been made in accordance with Order 11,

from 9am on 23 November 2017.

Access Macquarie Subpoena

14. Leave be granted to the solicitors for the Respondent to have first access to (and to uplift) the documents produced in response to the Subpoena addressed to The Proper Officer, Access Macquarie Limited (the **Access Macquarie Subpoena**) packet S-26 until 4.30pm on 22 November 2017.
15. By 4.30pm on 22 November 2017:
 - 15.1. The solicitors for the Respondent are to notify the solicitors for the Applicants in writing of any confidentiality or privilege claims made over the documents produced in response to the Access Macquarie Subpoena (S-26) with such notification to identify:
 - 15.1.1. each document in relation to which a full claim of confidentiality or privilege is made;
 - 15.1.2. each document in relation to which a partial claim of confidentiality or privilege is made; and
 - 15.1.3. in respect of each document in relation to which a full or partial claim of confidentiality or privilege is made, the basis upon which that claim is made.
 - 15.2. The solicitors for the Respondent must provide the Court with:
 - 15.2.1. a redacted copy of each document produced in response to the Access Macquarie Subpoena (S-26) in relation to which a partial claim for confidentiality or privilege is made with only those parts of the document over which confidentiality or privilege is claimed to be redacted, and
 - 15.2.2. a separate envelope containing all documents produced in response to the Access Macquarie Subpoena (S-26) in relation to which a full claim of confidentiality or privilege is made.
16. The solicitors for the Respondent return the documents produced in response to the Access Macquarie Subpoena (S-26) to the Registry by 4.30pm on 22 November 2017.



17. Leave be granted to the solicitors for the Applicants to access and uplift for the purposes of inspection and copying:
 - 17.1. the documents produced in response to the Access Macquarie Subpoena (S-26) in respect of which no confidentiality / privilege claims have been made in accordance with Order 15, and
 - 17.2. any redacted copies of documents produced in response to the Access Macquarie Subpoena (S-26) in respect of which partial claims of confidentiality and/or privilege have been made in accordance with Order 15,
- from 9am on 23 November 2017.

General

18. Leave pursuant to Orders 2, 10, 13, 14 and 17 to access and uplift documents produced in response to the Westpac Subpoena (S-27), NSW EPA Subpoena (S-25) and the Access Macquarie Subpoena (S-26) is granted on the following conditions:
 - 18.1. If original documents rather than copies have been produced, the solicitor provides to the Registry a letter of consent from the person to whom the subpoena is addressed.
 - 18.2. Documents be returned to the Registry in the same condition as when uplifted.
 - 18.3. Documents be returned promptly and, in any event, when an officer of the Registry so requests.



Schedule

No. NSD 1908 of 2016

Federal Court of Australia

District Registry: New South Wales

Division: General

Applicants

Second Applicant: KIM SMITH

Third Applicant ANN AND LINDSAY CLOUT SMSF PTY LIMITED (ACN 154 516 006)

Fourth Applicant ANN CLOUT

Fifth Applicant LINDSAY CLOUT

Sixth Applicant JOHN HEWITT

~~Seventh Applicant CHANTEL WALKER~~

Eighth Applicant MARSHALLS TRANSPORT PTY LTD (ACN 142 745 755)

Ninth Applicant NICHOLAS MARSHALL

Tenth Applicant MELISSA MARSHALL



Annexure A

Westpac Packet Confidentiality Undertaking

Federal Court of Australia
General Division
Proceedings Number: NSD 1908/2016

Gavin Smith and others
Applicant

Commonwealth of Australia (Department of Defence)
Respondent

CONFIDENTIALITY UNDERTAKING

I, _____, of _____,

undertake to the Federal Court of Australia and the subpoenaed party, Westpac Banking Corporation (ACN 007 457 141) in the matter of Gavin Smith & Ors v Commonwealth of Australia (Department of Defence), Federal Court of Australia Proceeding Number NSD 1908/2016 (**Proceedings**), that:

1. Subject to the terms of this undertaking and any order of the Court, I will keep confidential in accordance with the terms of this undertaking the documents produced by Westpac Banking Corporation in answer to the Subpoena issued by the Applicants dated 5 July 2017 (**Produced Documents**).
2. I will not use the Produced Documents or any part of it for any other purpose other than the conduct of the Proceedings.
3. I may only disclose the Produced Documents or any part of it, if the:
 - (a) disclosure is required by law or statutory or portfolio duties; or
 - (b) disclosure is to another legal advisor, an instructing officer of the Applicants/Respondent, barrister or independent expert retained by the [Applicants/Respondent] in relation to the Proceedings who has executed a confidentiality undertaking in this form; or
 - (c) disclosure is to secretaries or word processing support staff who work under my supervision and perform purely administrative tasks in relation to the Proceedings




provided that I use reasonable endeavours to ensure that she or he protects the confidentiality of the Produced Documents in a manner consistent with the intent of this undertaking; or

- (d) disclosure is to a Coram of the Federal Court of Australia, or the Court's administrative staff, in connection with the Proceedings and marked "CONFIDENTIAL".
4. I will promptly notify Westpac Banking Corporation if I become aware of any disclosure in breach of this undertaking and comply with all reasonable requests in relation to such disclosure.
5. If I create or review any document which incorporates the Produced Documents, I acknowledge that the portions of such documents incorporating the Produced Documents are subject to this undertaking.

Dated:

Signed:

Date that entry is stamped:


Registrar

Subsection 35A (5) of the *Federal Court of Australia Act 1976* (the *Act*) provides that a party to proceedings in which a Registrar has exercised any of the powers of the Court under subsection 35A (1) of the Act may, within the time prescribed by the Rules of Court, or within any further time allowed in accordance with the Rules of Court, apply to the Court to review that exercise of power.

Rule 3.11 provides that a party may apply to the Court under subsection 35A (5) of the Act for review of the exercise of a power of the Court by a Registrar and that any application must be made within 21 days after the day on which the power was exercised. A party seeking a review can apply to the Court to dispense with any requirement of the Rules (Rule 1.34).



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Seventh Applicant	CHANTEL WALKER
Eighth Applicant	MARSHALLS TRANSPORT PTY LTD
Ninth Applicant	NICHOLAS MARSHALL
Tenth Applicant	MELISSA MARSHALL
Respondent	COMMONWEALTH OF AUSTRALIA (DEPARTMENT OF DEFENCE)