

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32  
File Number: NSD745/2022  
File Title: HESTON RUSSELL v AUSTRALIAN BROADCASTING CORPORATION & ORS  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*Sia Lagos*

Dated: 7/10/2022 5:04:56 PM AEDT

Registrar

### Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form 33  
Rule 16.32

## Defence

No. NSD745/2022

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

### HESTON RUSSELL

Applicant

**AUSTRALIAN BROADCASTING CORPORATION** and ors  
Respondents

The Respondents (Australian Broadcasting Corporation (**ABC**), Joshua Robertson (**Robertson**) and Mark Willacy (**Willacy**)) rely on the following facts and assertions in answer to the Statement of Claim filed by the Applicant (Heston Russell (**Russell**)), on 9 September 2022 (**SOC**):

1. In answer to paragraph 1 of the SOC the ABC, Robertson and Willacy:
  - a. admit that Russell was a member of the Australian Defence Force;
  - b. admit that Russell was an officer within the 2nd Commando Regiment;
  - c. admit that from about 2011 to 2012 Russell was the Platoon Commander of the November Platoon within the 2nd Commando Regiment;
  - d. admit that Russell was deployed to Afghanistan as part of Special Operations Task Group rotation XVIII; and
  - e. otherwise do not know and therefore cannot admit the allegations made in the paragraph.
2. In answer to paragraph 2 of the SOC the ABC, Robertson and Willacy:
  - a. deny the allegation in sub-paragraph 2.4 of the SOC;

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Filed on behalf of (name & role of party)	Australian Broadcasting Corporation, Joshua Robertson and Mark Willacy, Respondents		
Prepared by (name of person/lawyer)	Alessandra Steele		
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[Form approved 01/08/2011]

- b. deny that the ABC website is a digital platform; and
  - c. otherwise admit the allegations made in the paragraph.
- 3. In answer to paragraph 3 of the SOC, the ABC, Robertson and Willacy:
  - a. admit the allegations in sub-paragraphs 3.1 and 3.3;
  - b. admit that the ABC is vicariously liable for the conduct of Robertson acting in the course of his employment by the ABC; and
  - c. otherwise deny the allegations in the paragraph.
- 4. In answer to paragraph 4 of the SOC, the ABC, Robertson and Willacy:
  - a. admit the allegations in sub-paragraphs 4.1 and 4.3;
  - b. admit that the ABC is vicariously liable for the conduct of Willacy acting in the course of his employment by the ABC; and
  - c. otherwise deny the allegations in the paragraph.
- 5. The ABC, Robertson and Willacy admit the allegations contained in paragraph 5 of the SOC.
- 6. In response to paragraph 6 of the SOC, the ABC, Robertson and Willacy:
  - a. admit that from about 19 November 2021 to about 23 November 2021 the ABC and Robertson published on the ABC website an article entitled “*Defence confirms criminal investigation into conduct of Australian commando platoon in Afghanistan*”, in the form set out in Schedule A of the SOC (**November Article**);
  - b. admit that from about 23 November 2021 to about 19 January 2022 the ABC and Robertson published on the ABC website an article substantially in the form of the November Article save that the paragraph commencing “ABC investigations lodged a Freedom of Information...” was amended to better reflect to the terms of the ABC’s application under the *Freedom of Information Act 1982 (Cth)* (**FOI Application**);
  - c. admit that from about 19 January 2022 to about 11 March 2022 the ABC and Robertson published on the ABC website an article substantially in the form of the November Article save for the amendment referred to in (b) above and that the second dot point under the heading “Key Points” and the paragraph stating “Former November platoon commander Heston Russell later said he was present on operations and denied that his soldiers had ever harmed a prisoner, calling on the ABC to retract the story and apologise” was amended to “Heston Russell, the former platoon commander, has said he was present on operations and denied

that the alleged incident occurred, calling on the ABC to retract the story and apologise”, in order to address Russell’s concern that he had only denied the specific allegation made by a US marine;

- d. admit that from about 11 March 2022 and continuing the ABC and Robertson published on the ABC website an article substantially in the form of the November Article save for the amendments referred to in (b) and (c) above and that the first dot point under the heading “Key Points” was amended to reflect that the US marine’s allegation did not identify a particular platoon;
- e. admit the allegations in sub-paragraphs 6.2, 6.3 and 6.4 of the SOC;
- f. admit that at about 4:29pm on 19 November 2021 Willacy published a tweet on his Twitter account which included a link to the November Article on the ABC website (**Willacy Tweet**);
- g. admit that Willacy has over 20,000 followers on his Twitter account;
- h. admit that the Willacy Tweet was retweeted by 68 accounts, liked by 143 accounts and commented on by 12 accounts;
- i. admit that the November Article, as amended as set out in (b) to (d) above remains available for download from the URL set out in sub-paragraph 6.7 of the SOC;
- j. admit the allegations in sub-paragraph 6.8 of the SOC;
- k. admit that on 19 November 2021 the ABC published a tweet on its Twitter account which included a link to the November Article on the ABC website (**ABC Tweet**);
- l. admit that the ABC Tweet was retweeted by 15 accounts, liked by 30 accounts and commented on by 7 accounts;
- m. admit that at about 3:27pm on 19 November 2021 Robertson published a tweet on his Twitter account which included a link to the November Article on the ABC website (**November Robertson Tweet**);
- n. admit that the November Robertson Tweet was retweeted by 19 accounts, liked by 24 accounts and commented on by 8 accounts (including Russell and Robertson);
- o. admit that at about 11:09am on 30 March 2022 Robertson published a tweet on his Twitter account which included a link to the November Article on the ABC website (**March Robertson Tweet**);

- p. admit that the March Robertson Tweet was retweeted by 3 accounts and liked by 6 accounts;
  - q. admit that at about 4:34pm on 19 November 2021, Rachel Mealey, an ABC journalist, published a tweet on her Twitter account which included a link to the November Article on the ABC website (**Mealey Tweet**);
  - r. admit that the Mealey Tweet was liked by 2 accounts;
  - s. admit that at about 3:27pm on 19 November 2021, Dan Harrison, an ABC digital journalist, published a tweet on his Twitter account which included a link to the November Article on the ABC website (**Harrison Tweet**);
  - t. admit that the Harrison Tweet was retweeted by 2 accounts and liked by 2 accounts;
  - u. deny that any of the tweets pleaded in paragraph 6 of the SOC constituted republications of the November Article;
  - v. rely upon the ABC, Robertson and Willacy's Statement as to Extent of Publication filed on 7 October 2022; and
  - w. otherwise deny the allegations contained in that paragraph.
7. In response to paragraph 7 of the SOC, the ABC, Robertson and Willacy:
- a. admit that Russell is named in the November Article in the context of his denial on behalf of November Platoon; and
  - b. otherwise deny the allegations contained in that paragraph.
8. The ABC, Robertson and Willacy deny the allegations contained in paragraph 8.
9. In response to paragraph 9 of the SOC, the ABC, Robertson and Willacy:
- a. admit that from on or about 19 November 2021 the ABC published on the ABC website a composite article comprising the November Article (as amended from time to time as pleaded in paragraphs 6(b) to (d) above) together with the October Article (**Linked Article**), substantially in the form set out in Schedule B;
  - b. admit the allegations in sub-paragraphs 9.2, 9.3, 9.4 and 9.6 of the SOC;
  - c. repeat paragraphs 6(f) to (h) above;
  - d. admit that the Linked Article was amended as set out in paragraphs 6(b) to (d) above;
  - e. admit that on about 18 March 2022 the Linked Article was amended to include a clarification in the October Article;

- f. admit that the Linked Article, as amended on about 18 March 2022 is still available for download from the ABC website at the URLs set out in sub-paragraph 9.9 of the SOC;
  - g. admit the allegation in sub-paragraph 9.10 of the SOC;
  - h. repeat paragraphs 6(k) to (t) above;
  - i. deny that any of the tweets pleaded in paragraph 9 of the SOC constituted republications of the Linked Article;
  - j. rely upon the ABC, Robertson and Willacy's Statement as to Extent of Publication filed on 7 October 2022; and
  - k. otherwise deny the allegations contained in that paragraph.
10. In response to paragraph 10 of the SOC, the ABC, Robertson and Willacy:
- a. admit that Russell is named in the Linked Article in the context of his denial on behalf of November Platoon being published; and
  - b. otherwise deny the allegations contained in that paragraph.
11. The ABC, Robertson and Willacy deny the allegations contained in paragraph 11.
12. In response to paragraph 12 of the SOC, the ABC, Robertson and Willacy:
- a. deny that the November Article caused, or is likely to cause, serious harm to Russell's reputation;
  - b. admit the allegation contained in sub-paragraph 12.1 of the SOC;
  - c. repeat paragraphs 6(f) to (h) and (k) to (t) above;
  - d. admit that on 19 November 2021 the ABC published segments on ABC radio and television, including segments which named Russell in the context of publishing his denial;
  - e. admit that the November Article reported that the November Platoon was the subject of a criminal investigation;
  - f. admit that Russell is named and pictured in the November Article in the context of publishing his denial and response to the allegations made against the November Platoon;
  - g. admit that he is the only Commando named in the November Article;
  - h. repeat paragraph 6(i) above;
  - i. do not know, and therefore cannot admit, the allegations contained in sub-paragraphs 12.14 to 12.17 of the SOC;

- j. say that paragraph 12 is embarrassing in that it contains submissions;
  - k. decline to plead to paragraph 12 to the extent it amounts to submissions; and
  - l. otherwise deny the allegations contained in the paragraph.
13. In response to paragraph 13 of the SOC, the ABC, Robertson and Willacy:
- a. deny that the Linked Article caused, or is likely to cause, serious harm to Russell's reputation;
  - b. repeat paragraph 12 above;
  - c. admit that Willacy has a reputation of being a careful investigative reporter;
  - d. admit that in 2020 Willacy, together with the ABC Investigations-Four Corners Team won the Gold Walkley for Investigative Journalism for his story entitled "Killing Field", which reported allegations of war crimes by Australian Special Air Service Regiment soldiers in Afghanistan;
  - e. say that paragraph 13 is embarrassing in that it contains submissions;
  - f. decline to plead to paragraph 13 to the extent it amounts to submissions; and
  - g. otherwise deny the allegations contained in the paragraph.
14. The ABC, Robertson and Willacy admit the allegations contained in paragraph 14 of the SOC.
15. The ABC, Robertson and Willacy admit the allegations contained in paragraph 15 of the SOC.
16. In response to paragraph 16 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on the evening of 24 August 2022 the ABC, Robertson and Willacy sent a letter to Russell's solicitor;
  - b. admit that the letter did not make any offer to make amends under the *Defamation Act* or otherwise;
  - c. say that Russell has failed to adequately particularise this allegation despite a request for particulars; and
  - d. otherwise deny the allegations contained in the paragraph.
17. In response to paragraph 17 of the SOC, the ABC, Robertson and Willacy:
- a. say that at approximately 12:20pm on 19 November 2021, Robertson telephoned Russell and indicated he was researching a story and wished to put some questions to him. In the course of the discussion Robertson asked Russell in substance if he was aware of a criminal investigation into November Platoon, if

he was aware of any of the members of his former platoon being contacted by investigators, or if he had been contacted by investigators. Russell responded in substance that he wasn't aware of a criminal investigation, he hadn't been contacted, and that he wasn't aware of any other former platoon members being contacted; and

b. otherwise deny the allegations contained in the paragraph.

18. In response to paragraph 18 of the SOC, the ABC, Robertson and Willacy:
  - a. admit that on about 23 November 2021 the November Article was amended as set out in paragraph 6(b) above; and
  - b. otherwise deny the allegations contained in the paragraph.
19. The ABC, Robertson and Willacy deny the allegations contained in paragraph 19 of the SOC.
20. The ABC, Robertson and Willacy admit the allegations contained in paragraph 20 of the SOC.
21. In response to paragraph 21 of the SOC, the ABC, Robertson and Willacy:
  - a. admit that on 24 November 2021 the *Daily Telegraph* published an article entitled "Defence fires back at ABC over war crimes probe" which included quotes which purported to come from the Department of Defence that stated "Defence has not confirmed there is a current criminal investigation involving November Platoon in Afghanistan in 2012" and "Defence is not currently conducting an investigation into this matter"; and
  - b. otherwise deny the allegations contained in the paragraph.
22. The ABC, Robertson and Willacy deny the allegations contained in paragraph 22 of the SOC.
23. The ABC, Robertson and Willacy deny the allegations contained in paragraph 23 of the SOC.
24. The ABC, Robertson and Willacy deny the allegations contained in paragraph 24 of the SOC.
25. In response to paragraph 25 of the SOC, the ABC, Robertson and Willacy:
  - a. say that paragraph 25 is embarrassing in that it contains submissions; and
  - b. otherwise deny the allegations contained in the paragraph.

26. In response to paragraph 26 of the SOC, the ABC, Robertson and Willacy:
  - a. admit that on about 19 January 2022 the November Article was amended as set out in paragraph 6(c) above; and
  - b. otherwise deny the allegations contained in the paragraph.
27. The ABC, Robertson and Willacy admit the allegations contained in paragraph 27 of the SOC.
28. In response to paragraph 28 of the SOC, the ABC, Robertson and Willacy:
  - a. admit that on about 11 March 2022 the November Article was amended as set out in paragraph 6(d) above;
  - b. admit that in about March 2022 the ABC's Audience and Consumer Affairs found that the November Article was in breach of standard 2.1 of the ABC's accuracy standards in that reasonable efforts were not made to ensure that the US marine's allegation was correctly reported in the November Article; and
  - c. otherwise deny the allegations contained in the paragraph.
29. The ABC, Robertson and Willacy admit the allegations contained in paragraph 29.
30. In response to paragraph 30 of the SOC, the ABC, Robertson and Willacy:
  - a. admit that on about 18 March 2022 the October Article/Linked Article was amended as set out in paragraph 9(e) above;
  - b. repeat paragraph 28(b) above; and
  - c. otherwise deny the allegations contained in the paragraph.
31. The ABC, Robertson and Willacy deny the allegations contained in paragraph 31.
32. The ABC, Robertson and Willacy admit the allegations contained in paragraph 32.
33. In answer to paragraph 33 of the SOC, the ABC, Robertson and Willacy:
  - a. deny that November Article and/or the Linked Article make any defamatory allegations about Russell;
  - b. say that on 29 March 2022 the ABC apologised to Russell for the breach referred to in paragraph 28(b) above;
  - c. repeat paragraphs 6(a) to (d) and 9(e) above; and
  - d. otherwise deny the allegations contained in that paragraph.
34. In answer to paragraph 34 of the SOC, the ABC, Robertson and Willacy:
  - a. repeat paragraphs 6(f) to (h) and (k) to (t) above;

- b. say that Russell has failed to adequately particularise this allegation despite a request for particulars; and
  - c. otherwise deny the allegations contained in that paragraph.
35. In answer to paragraph 35 of the SOC, the ABC, Robertson and Willacy:
- a. say that Russell has failed to adequately particularise this allegation despite a request for particulars;
  - b. deny that November Article and/or the Linked Article make any defamatory allegations about Russell;
  - c. say that on 29 March 2022 the ABC apologised to Russell for the breach referred to in paragraph 28(b) above;
  - d. repeat paragraphs 6(a) to (d) and 9(e) above; and
  - e. otherwise deny the allegations contained in that paragraph.
36. In answer to paragraph 36 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 17 October 2021 Russell sent a letter addressed to the ABC and Willacy, amongst others, which requested an independent review of the October Article (**October letter**); and
  - b. otherwise deny the allegations contained in that paragraph.
37. In answer to paragraph 37 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 5 November 2021 Russell sent an email to ABC Corporate Affairs which attached a copy of the October letter;
  - b. admit that the 5 November 2021 email was copied to the ABC's Managing Director, David Anderson; and
  - c. otherwise deny the allegations contained in that paragraph.
38. In answer to paragraph 38 of the SOC, the ABC, Robertson and Willacy:
- a. admit that the October letter referred to an alleged conversation between Russell and Willacy on 28 September 2021;
  - b. rely upon the terms of the October letter as to what is referred to in it;
  - c. deny Russell's account of the conversation between Willacy and Russell; and
  - d. otherwise deny the allegations contained in that paragraph.
39. In answer to paragraph 39 of the SOC, the ABC, Robertson and Willacy:
- a. repeat paragraphs 6(a) to (d), 9(a), (e) and (f) and 36(a) above; and

- b. otherwise deny the allegations contained in that paragraph.
40. In answer to paragraph 40 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 5 December 2021 the ABC published on the ABC website an article entitled “Former soldier and Values Party founder Heston Russell lied about selling porn online while fundraising for veterans charity” which concerned conduct Russell engaged in in April 2020 (**December Article**); and
  - b. otherwise deny the allegations contained in that paragraph.
41. In answer to paragraph 41 of the SOC, the ABC, Robertson and Willacy:
- a. admit that the December Article contained a link to each of the October Article and the November Article; and
  - b. otherwise deny the allegations contained in that paragraph.
42. In answer to paragraph 42 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 16 December 2021 Russell made a complaint to ABC Audience & Consumer Affairs in relation to the November Article; and
  - b. otherwise deny the allegations contained in that paragraph.
43. In answer to paragraph 43 of the SOC, the ABC, Robertson and Willacy:
- a. repeat paragraph 28(b) above; and
  - b. otherwise deny the allegations contained in that paragraph.
44. In answer to paragraph 44 of the SOC, the ABC, Robertson and Willacy:
- a. repeat paragraphs 6(d), 9(e) and 28(b) above;
  - b. deny that November Article and/or the Linked Article make any defamatory allegations about Russell;
  - c. say that on 29 March 2022 the ABC apologised to Russell for the breach referred to in paragraph 28(b) above;
  - d. admit that the ABC has not publicly apologised to Russell or the November Platoon;
  - e. admit that the ABC has not withdrawn the allegations it has made about the November Platoon; and
  - f. otherwise deny the allegations contained in that paragraph.
45. In answer to paragraph 45 of the SOC, the ABC, Robertson and Willacy:
- a. say that paragraph 45 is embarrassing in that it contains submissions; and

- b. otherwise deny the allegations contained in that paragraph.
46. In answer to paragraph 46 of the SOC, the ABC, Robertson and Willacy:
- a. say that paragraph 46 is embarrassing in that it contains submissions; and
  - b. otherwise deny the allegations contained in that paragraph.
47. In answer to paragraph 47 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 26 July 2022 Russell issued a concerns notice to the ABC, Robertson and Willacy;
  - b. rely upon the terms of the concerns notice; and
  - c. otherwise deny the allegations contained in that paragraph.
48. In answer to paragraph 48 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 24 August 2022 the ABC, Robertson and Willacy sent a letter to Russell's solicitor;
  - b. rely upon the terms of the ABC, Robertson and Willacy's letter;
  - c. say that paragraph 48 is embarrassing in that it contains submissions;
  - d. say that Russell has failed to adequately particularise this allegation despite a request for particulars; and
  - e. otherwise deny the allegations contained in that paragraph.
49. In answer to paragraph 49 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 31 August 2022 the ABC, Robertson and Willacy sent a letter to Russell's solicitor;
  - b. rely upon the terms of the ABC, Robertson and Willacy's letter; and
  - c. otherwise deny the allegations contained in that paragraph.
50. In answer to paragraph 50 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 6 September 2022 Willacy sent an email to Russell seeking an interview in relation to a story about the 2nd Commando Regiment's 2012 rotation in Afghanistan;
  - b. admit that on 8 September 2022 Willacy sent Russell an email including a series of detailed questions concerning November Platoon that were the subject of an upcoming story;
  - c. admit that Willacy had been investigating the matters concerning November Platoon for about eight months; and

- d. otherwise deny the allegations contained in that paragraph.
51. In answer to paragraph 51 of the SOC, the ABC, Robertson and Willacy:
- a. admit that on 7 September 2022 the ABC, Robertson and Willacy sent an email to Russell's solicitor;
  - b. rely upon the terms of the ABC, Robertson and Willacy's email; and
  - c. otherwise deny the allegations contained in that paragraph.
52. The ABC, Robertson and Willacy deny the allegations in paragraph 52 of the SOC.
53. The ABC, Robertson and Willacy deny the allegations in paragraph 53 of the SOC.
54. In answer to paragraph 54 of the SOC, the ABC, Robertson and Willacy:
- a. repeat paragraphs 6 to 13 above; and
  - b. otherwise deny the allegations contained in that paragraph.
55. In answer to paragraph 55 of the SOC, the ABC, Robertson and Willacy:
- a. admit that the November Article, as amended on 11 March 2022 remains available for download from the ABC website;
  - b. admit that the Linked Article, as amended on 18 March 2022 remains available for download from the ABC website; and
  - c. otherwise deny the allegations contained in that paragraph.
56. In answer to paragraph 56 of the SOC, the ABC, Robertson and Willacy:
- a. admit that it has not removed the November Article or the Linked Article;
  - b. say that the publication of the November Article and the Linked Article is defensible in accordance with the matters set out in this Defence; and
  - c. otherwise deny the allegations contained in that paragraph.
57. In answer to paragraph 57 of the SOC, the ABC, Robertson and Willacy:
- a. say that paragraph 57 is embarrassing in that it contains submissions; and
  - b. otherwise deny the allegations contained in that paragraph.
58. In answer to paragraph 58 of the SOC, the ABC, Robertson and Willacy:
- a. say that the publication of the November Article and the Linked Article is defensible in accordance with the matters set out in this Defence;
  - b. say that in the event that the Court finds against the ABC, Robertson and Willacy in relation to either or both of the November Article or the Linked Article, the

ABC, Robertson and Willacy will take down the November Articles from all websites under their control within a reasonable time following judgment; and

c. otherwise deny the allegations contained in that paragraph.

59. The ABC, Robertson and Willacy deny that Russell is entitled to the relief claimed in the Originating Application, or to any relief at all.

60. In further or alternative answer to the SOC, the ABC, Robertson and Willacy say as follows.

**Truth – section 25 of the *Defamation Act* and/or mitigation of damages**

61. Each of the imputations set out in paragraphs 8.1, 8.2, 8.3, 8.13, 11.1, 11.2, 11.3 and 11.14 is substantially true such that:

a. in the event that no other imputation is found to be conveyed – the ABC, Robertson and Willacy have a complete defence pursuant to section 25 of the *Defamation Act 2005* (NSW); or

b. in the event that one or more other imputations are found to be conveyed – the ABC, Robertson and Willacy rely upon the substantial truth of these imputations in mitigation of any damages that Russell may otherwise be entitled to.

**Particulars**

The ABC, Robertson and Willacy rely upon the particulars set out in Schedule 1.

**Contextual truth – section 26 of the *Defamation Act***

62. The November Article and the Linked Article each carried the following other imputations in addition to Russell's Imputations (**Contextual Imputations**):

a. Heston Russell was the Platoon Commander of November Platoon, some of whose members were reasonably suspected by the Office of the Special Investigator of committing a crime or crimes in Afghanistan.

b. Heston Russell was the Platoon Commander of November Platoon, some of whose members warranted investigation by the Office of the Special Investigator as to whether they had committed any crimes in Afghanistan.

c. Heston Russell was the Platoon Commander of November Platoon, some of whose members were the subject of a criminal investigation by the Office of the Special Investigator in relation to their conduct in Afghanistan.

63. Each of the Contextual Imputations is substantially true.

64. By reason of the substantial truth of the Contextual Imputations, publication of so many of Russell's Imputations as are found to be conveyed and not substantially true did not further harm the reputation of Russell.
65. Accordingly, the ABC, Robertson and Willacy have a complete defence pursuant to section 26 of the *Defamation Act*.

#### **Particulars**

The ABC, Robertson and Willacy rely upon the particulars set out in Schedule 1.

#### **Public interest – section 29A of the *Defamation Act***

66. The November Article and the Linked Article each concerns an issue of public interest.
67. The ABC, Robertson and Willacy reasonably believed that the publication of each of the November Article and the Linked Article was in the public interest.

#### **Particulars**

The ABC, Robertson and Willacy rely upon the particulars set out in Schedule 2.

#### **Mitigation of damages**

68. The ABC, Robertson and Willacy rely in mitigation of damages on:
- a. the substantial truth of such of Russell's Imputations 8.1, 8.2, 8.3, 8.13, 11.1, 11.2, 11.3 and 11.14 as are found to be substantially true;
  - b. the substantial truth of such of the Contextual Imputations as are found to be substantially true;
  - c. Russell's conduct in self-identifying himself and/or the November Platoon as being the subject of the October Article (which he/it was not) in an interview with Jonathon Moran, the *Daily Telegraph's* Chief Entertainment Writer, on about 28 October 2020 and various other media publications including those particularised in paragraph (27) of Schedule 2 below;
  - d. the facts, matters and circumstances proven by the ABC, Robertson and Willacy in evidence in support of the defences pleaded in this defence, including the background context in which the matters complained of were published.

- e. the dishonest conduct of Russell, including his conduct in lying to Veteran Charity 'Swiss 8' regarding his unauthorised fundraising initiative of selling nude photos via OnlyFans by reason of:
- i. creating an OnlyFans account which purported to raise funds for the Swiss 8 charity without seeking agreement from Swiss 8;
  - ii. on 3 April 2020 assuring Swiss 8 that the content on OnlyFans would not involve nudity of any kind;
  - iii. during April 2020 posting nude content and selling at least one image of his erect penis to a member of the public and continuing to post and sell pornographic images of himself thereafter; and
  - iv. on 5 December 2021 admitting he had lied to Swiss 8 in a video posted on YouTube titled 'ABC Update – 05 December 2021 – Errors and Omissions', only after the ABC had published a story regarding the conduct particularised in (i)-(iii) above.

Date: 7 October 2022



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Signed by Alessandra Steele  
Lawyer for the Respondents

This pleading was settled by Nicholas Owens SC and Lyndelle Barnett of counsel.

### **Certificate of lawyer**

I, Alessandra Steele, certify to the Court that, in relation to the defence filed on behalf of the Respondents, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 7 October 2022

A handwritten signature in black ink, appearing to be 'AS', is written over a faint, dotted rectangular area.

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Signed by Alessandra Steele  
Lawyer for the Respondents

## SCHEDULE 1

### PARTICULARS OF TRUTH AND CONTEXTUAL TRUTH

#### Russell

- (1) Russell was formerly a member of the 2nd Commando Regiment, a special forces unit within the Australian Defence Force.
- (2) From about 2011 to 2012 Russell was the Platoon Commander of the November Platoon within the 2nd Commando Regiment.
- (3) From about July to December 2012, Russell was deployed to Afghanistan as the Platoon Commander of the November Platoon with Special Operations Task Group (**SOTG**) rotation XVIII.

#### The Geneva Conventions and the Commonwealth Criminal Code

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
  - (a) "Convention relative to the Treatment of Prisoners of War" (**Third Geneva Convention**); and
  - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (**Fourth Geneva Convention**).
- (5) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (6) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
  - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
  - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial

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Filed on behalf of (name & role of party)	Australian Broadcasting Corporation, Joshua Robertson and Mark Willacy, Respondents		
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[Form approved 01/08/2011]

guarantees which are recognised as indispensable by civilised peoples.

- (7) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (8) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
  - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (9) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*, which includes:
- (a) Section 268.70 – an offence for the war crime of murder committed in the context of, and is associated with, an armed conflict that is not an international armed conflict;
  - (b) Section 268.77 – an offence for the war crime of attacking civilians in in the context of, and is associated with, an armed conflict that is not an international armed conflict; and
  - (c) Section 268.115 – a provision providing for a criminal responsibility of a military commander for offences committed by forces under his or her effective command and control in certain circumstances.

### **Rules of Engagement**

- (10) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth.
- (11) The ROE define, *inter alia*, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (**Common Article 3**).

### **The IGADF Afghanistan Inquiry**

- (12) In about 2016 the then Chief of Army, General Angus Campbell AO DSC, asked the

Inspector General of the Australian Defence Force, Mr James Gaynor CSC (**IGADF**) to inquire into rumours of serious misconduct by Australia's special forces in Afghanistan. The IGADF appointed Major General the Honourable Paul Breton AM RFD as an Assistant IGADF to conduct the inquiry (**IGADF Afghanistan Inquiry**).

- (13) In or about November 2020 the IGADF Afghanistan Inquiry finalised its report.
- (14) The IGADF Afghanistan Inquiry found:
- (a) that there was credible information of 23 incidents in which one or more non-combatants or persons *hors-de-combat* were unlawfully killed by or at the direction of members of the SOTG in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors-de-combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment;
  - (b) that these incidents involved a total of 39 individuals killed, and a further two cruelly treated; and a total of 25 current or former Australian Defence Force personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions; and
  - (c) that there is credible information that some members of the SOTG carried 'throwdowns' – foreign weapons or equipment, typically though not invariably easily concealable such as pistols, small hand held radios ('ICOMs'), weapon magazines and grenades – to be placed with the bodies of 'enemy killed in action' for the purposes of site exploitation photography, in order to portray that the person killed had been carrying the weapon or other military equipment when engaged and was a legitimate target (**throwdowns**).

#### **Office of the Special Investigator**

- (15) In or about late 2020 the Commonwealth Government established the Office of the Special Investigator (**OSI**). The purpose of the OSI is to:
- (a) review the findings of the IGADF Afghanistan Inquiry;
  - (b) work with the Australian Federal Police (**AFP**) to investigate the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016;
  - (c) develop briefs of evidence in respect of any offences that are established, for referral to the Commonwealth Director of Public Prosecutions; and
  - (d) undertake other relevant tasks the Prime Minister and the Minister require from time to time.

## Conduct of Russell

### Indiscriminate shooting from a Blackhawk helicopter

- (16) During rotation XVIII, on a date or dates presently unknown to the ABC, Robertson and Willacy, Russell fired multiple shots from the door of a Blackhawk helicopter towards Afghan nationals on the ground below as the helicopter was ascending away from the target.
- (17) The incident was recorded on helmet cam and parts of the footage is contained in a video prepared after the rotation which compiles footage of the 2nd Commando regiment during rotation XVIII.
- (18) In the footage the Afghan nationals appear to be running, do not appear to be armed and do not appear to be posing any threat to the force element.
- (19) In the circumstances, Russell may be reasonably suspected by the Department of Defence and the OSI of:
- (a) the war crime of attacking civilians; and/or
  - (b) breaching the ROE.
- (20) Alternatively to (19), Russell warranted investigation as to whether he has committed:
- (a) the war crime of attacking civilians; and/or
  - (b) breached the ROE.
- (21) Russell's conduct in shooting from a Blackhawk helicopter was the subject of investigation by the IGADF Afghanistan Inquiry.

### Authorising warning shots

- (22) On about 20 November 2020 Russell authored an article which was published on the *Daily Telegraph* website which purported to be his response to the IGADF Afghanistan Inquiry (**Telegraph article**).
- (23) In the Telegraph article Russell admitted:
- (a) that he authorised troops under his command to fire "warning shots";
  - (b) that warning shots constituted a breach of the ROE; and
  - (c) that Major General Brereton questioned him about his authorising his troops to fire warning shots in the IGADF Afghanistan Inquiry.
- (24) In the circumstances, Russell may be reasonably suspected by the Department of Defence and the OSI of breaching the ROE.

- (25) Alternatively to (24), Russell warranted investigation as to whether he has breached the ROE.
- (26) Russell's conduct in authorising his troops to fire warning shots was the subject of investigation by the IGADF Afghanistan Inquiry.

### **Conduct of members of the November Platoon**

#### Qarabagh mission

- (27) On about 3 October 2012 the November Platoon took part in a mission in Qarabagh, together with the October Platoon (also known as Oscar Platoon), the Afghan National Interdiction Unit and Drug Enforcement Administration (**Qarabagh mission**).
- (28) The purpose of the Qarabagh mission was to target the insurgency by disrupting its funding through drug operations.
- (29) The November Platoon was the clearing force for the mission, whilst the Oscar Platoon provided a blocking force around the village and on nearby mountains.
- (30) During the Qarabagh mission about 20 to 25 Afghan nationals were detained and placed under control.
- (31) Once a person has been placed under control, referred to as a "PUC", it is unlawful for that person to be harmed or killed.
- (32) At a time between about 4:00-5:00pm, Commando S and at least one other soldier whose identity is not currently known to the ABC, Robertson and Willacy, took two PUCs away, whilst they remained under control and were unarmed. Commando S shot and killed one PUC, and the other soldier shot and killed the other PUC.
- (33) After they had been killed, throwdowns were placed on the body of each PUC and photographs were taken in order to make it appear that they were armed when they were killed and that the killing was legitimate.
- (34) Each of Commando S and the other soldier/s were members of November Platoon and under Russell's effective command and control, or effective authority and control.
- (35) After the Qarabagh mission, a senior Drug Enforcement Administration agent, DEA Agent 1, said he would never work with November Platoon again.
- (36) On about 19 February 2013, after he had returned to Australia, Commando S admitted to a pastor, in substance, that he shot and killed a PUC.
- (37) In these circumstances, it may be reasonably suspected by the OSI that Commando S and the other soldier/s had committed the war crime of murder.
- (38) Alternatively to (37), Commando S and the other soldier/s warranted investigation by

the OSI as to whether they committed the war crime of murder.

- (39) The Qarabagh mission, and in particular the conduct of Commando S and the other soldier/s, are the subject of an investigation by the OSI.

Discussion of quota

- (40) In or about early December 2012, before the final mission of rotation XVIII, a number of members of the November Platoon were filmed having a discussion in their accommodation block during which the following exchange took place (names/nicknames of operators spoken included in the video have been excluded):

*Moving to the last job. Any final thoughts?*

*Should be a good one.*

*[Name], final thoughts? Last job. While we rock out pre-job.*

*I believe we're going to get the quota.*

*The quota! The quota must be met.*

*The quota will be met*

*[Name]!*

*Quota's a lazy 24 tonight.*

*[Name]'s ready for action. [Name]*

*See what the illustrious (?) has to say about it. What's going to go tonight [name]?*

*Ready for operation final job?*

*There's going to be some fucking killing going on.*

*Straight up, straight up!*

*We need Team 5, primary kill team, what's going to go down tonight?*

*We've got a quota of 10.*

*The quota is 10?*

*Will we be able to meet the quota?*

*Will we meet the quota?*

*Yes.*

*Quota?*

*Yes.*

*Are we going to hit it?*

*Definitely.*

*Hit the targets?*

*Yes.*

*Where's [name]? Ha ha*

*There's another five on my ring*

*[Name] straight to the face. Are we going to hit the quota tonight big guy?*

*Fuck yeah. I'm going to kill a few dogs too.*

*Dog killer from way back.*

*Final job. Signing out. We're going to hit the quota.*

- (41) It may be reasonably suspected that "quota" refers to a kill count.
- (42) In these circumstances, it may be reasonably suspected by the OSI that members of the November Platoon engaged Afghan nationals in order to achieve a "quota" rather than because they had identified a legitimate target in accordance with the ROE.
- (43) Alternatively to (42), the conduct of the members of November Platoon engaged in the discussion warranted investigation.

#### Allegations by United States Marine Corps helicopter crew chief "Josh"

- (44) In about July to September 2020, a United States Marine Corps helicopter crew chief, "Josh"<sup>1</sup>, made allegations to the ABC to the effect that members of a Commando unit unlawfully killed PUCs. In particular, amongst other things, "Josh":
  - (a) stated that he was a helicopter crew chief with HMLA-469 on deployment in Afghanistan from May to November 2012;
  - (b) stated that he was awarded five air medals and combat aircrew wings with three silver stars for the deployment;
  - (c) stated that he worked with Australian soldiers from Task Force 66 on drug raids, including the Commandos;
  - (d) alleged:
    - (i) that on a night mission towards the start of the deployment, they accompanied the Australians on a mission towards the north of Afghanistan;

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<sup>1</sup> The ABC and Willacy assert journalist privilege in relation to the name of "Josh" pursuant to section 126K of the *Evidence Act 1995* (Cth).

- (ii) the purpose of the mission was a raid on a drug operation;
  - (iii) that during the mission the Australian soldiers detained squirters (Afghan nationals fleeing the target area), including one soldier who tackled an Afghan national and brought him up from the ground and hog tied him in almost one fluid motion, which he found to be impressive;
  - (iv) that after about 30 minutes the Australian soldiers called for extraction and indicated a PUC count to be brought back to base;
  - (v) that after the Australians were told there was not enough room on the helicopter for the indicated number of PUCs to be brought back, he heard a “pop” sound over the radio which he recognised as a suppressed gun shot; and
  - (vi) that the Australians then provided an amended PUC count of one less than had previously been provided;
- (e) alleged:
- (i) that a colleague of his had told him of another incident when he witnessed an Australian soldier shoot and kill an Afghan national who had been sitting on a wall as the helicopter came in to land;
  - (ii) that the colleague said he later had a conversation with the soldier as follows:
    - US marine: Hey, why did you shoot that dude?*
    - Australian soldier: Oh, he was posing a threat to your helicopter mate.*
    - US marine: No, he wasn't armed.*
    - Australian soldier: Oh, he was when we were through with him.*
- (f) stated that if anyone conducting an investigation had questions and thought what he had to say was important enough that it needed to be on the record to strengthen their case he would go on the record with his allegation.
- (45) It may be reasonably suspected that the alleged statement by the Australian soldier that the Afghan national was armed when they were through with him was a reference to a throwdown being placed on his body to make the killing appear legitimate.
- (46) “Josh” was a person of integrity who served alongside Australian forces and was awarded for his conduct.
- (47) The time period of “Josh’s” deployment to Afghanistan coincided with the period of deployment of November Platoon on rotation XVIII.

- (48) On or about 25 October 2021, Willacy made the FOI Application seeking access to certain documents, namely:
- (a) Audio copies of recorded mission communications including radio communications) for November Platoon, 2 Commando Regiment, during missions in Afghanistan between 1 June 2012 and 31 July 2012;
  - (b) Mission summary reporting by and/or about November Platoon, including numbers of detainees taken off target and Enemy Killed in Action data, between 1 June 2012 and 31 July 2012;
  - (c) Communications, including emails and reports, between the Australian Defence Force and the United States Drug Enforcement Administration (DEA) between 1 January 2012 and 31 August 2012; and
  - (d) Any complaints and/or disciplinary action taken against members of November Platoon in the calendar year 2012.
- (49) On about 19 November 2021, the Department of Defence responded to the FOI Application (in a letter dated 10 November 2021) (**FOI Response**) denying access to all documents under section 37 of the *Freedom of Information Act*, stating the documents requested contained information which, if disclosed, could reasonably be expected to prejudice the conduct of a current investigation of a possible breach of the law. The letter set out the terms of section 37(1)(a) of the *Freedom of Information Act*, and also paragraph 5.86 of the FOI Guidelines, as follows:
- Section 37(1) (a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase 'in a particular instance', it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.*
- (50) In these circumstances, it may be reasonably suspected by the OSI that members of November Platoon had committed the war crime of murder.
- (51) Alternatively to (50), members of November Platoon warranted investigation by the OSI as to whether they committed the war crime of murder.
- (52) The allegations made by “Josh” are the subject of an investigation by the OSI.

#### Russell's suspected criminal responsibility

- (53) In the circumstances set out above, Russell may be reasonably suspected by the OSI of being criminally responsible for the conduct of members of November Platoon, within the terms of section 268.115 of the *Commonwealth Criminal Code*.
- (54) Alternatively to (53), the responsibility of Russell for the conduct of some members of

the November Platoon warrants investigation by the OSI.

(55) Russell is the subject of an investigation by the OSI.

### **Imputations**

(56) In relation to the substantial truth of imputations 8.1 and 11.1, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (13), (16) to (19), (21) to (24) and (26) above.

(57) In relation to the substantial truth of imputations 8.2 and 11.2, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (13), (16) to (19), (21) to (24) and (26) above.

(58) In relation to the substantial truth of imputations 8.3 and 11.3, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (19), (21) to (24), (26) to (37), (39), (40) to (42), (44) to (50), (52), (53) and (55) above.

(59) In relation to the substantial truth of imputations 8.13 and 11.14, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (11) and (16) to (19), (21) to (23) above.

(60) In relation to the Contextual Imputation set out in 62(a) above, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (19), (21) to (24), (26) to (37), (39) to (42), (44) to (50), (52), (53) and (55) above.

(61) In relation to the Contextual Imputation set out in 62(b) above, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (18), (20) to (23), (25) to (36), (38) to (41), (43) to (50), (51), (52), (54) and (55) above.

(62) In relation to the Contextual Imputation set out in 62(c) above, the ABC, Robertson and Willacy rely upon the particulars set out in (1) to (19), (21) to (24), (26) to (37), (39) to (42), (44) to (50), (52), (53) and (55) above.

## SCHEDULE 2

### PARTICULARS OF PUBLIC INTEREST

#### Background

- (1) From in or about October 2001 to in or about August 2021 the Commonwealth of Australia contributed troops to the war in Afghanistan.
- (2) The Afghanistan war was Australia's longest military campaign.
- (3) The Special Forces component of the troops deployed to Afghanistan was the SOTG and included elements drawn from the Special Air Services Regiment (**SASR**) and the 2nd Commando Regiment, two of Australia's most elite military units.
- (4) Russell was formerly a member of the 2nd Commando Regiment.
- (5) From about 2011 to 2012 Russell was the Platoon Commander of the November Platoon within the 2nd Commando Regiment.

#### The IGADF Afghanistan Inquiry

- (6) In about 2016 the then Chief of Army, General Angus Campbell AO DSC, asked the IGADF to inquire into rumours of serious misconduct by Australia's special forces in Afghanistan. The IGADF appointed Major General the Honourable Paul Brereton AM RFD as an Assistant IGADF to conduct the IGADF Afghanistan Inquiry.
- (7) In or about November 2020 the IGADF Afghanistan Inquiry finalised its report.
- (8) The IGADF Afghanistan Inquiry found:
  - (a) that there was credible information of 23 incidents in which one or more non-combatants or persons *hors-de-combat* were unlawfully killed by or at the direction of members of the SOTG in circumstances which, if accepted by a jury, would be the war crime of murder, and a further two incidents in which a non-combatant or person *hors-de-combat* was mistreated in circumstances which, if so accepted, would be the war crime of cruel treatment;
  - (b) that these incidents involved a total of 39 individuals killed, and a further two cruelly treated; and a total of 25 current or former Australian Defence Force personnel who were perpetrators, either as principals or accessories, some of them on a single occasion and a few on multiple occasions; and
  - (c) that there is credible information that some members of the SOTG carried

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throwdowns.

- (9) In the report of the IGADF Afghanistan Inquiry it was stated that “the Inquiry does not doubt that it has failed to uncover everything that fell within its terms of reference. The Inquiry also does not doubt that, like some of the contemporaneous inquiries and investigations conducted during the Afghanistan era, there are probably cases in which it has been deceived. Reports, rumours and allegations of war crimes in Afghanistan will continue to emerge, following the release of the Inquiry’s findings, and potentially for many years”.
- (10) One way in which such allegations are brought to light is through media reporting which may tend to encourage other witnesses to come forward.

### **Office of the Special Investigator**

- (11) In or about late 2020 the Commonwealth Government established the OSI. The purpose of the OSI is to:
- (a) review the findings of the IGADF Afghanistan Inquiry;
  - (b) work with the AFP to investigate the commission of criminal offences under Australian law arising from or related to any breaches of the Laws of Armed Conflict by members of the Australian Defence Force in Afghanistan from 2005 to 2016;
  - (c) develop briefs of evidence in respect of any offences that are established, for referral to the Commonwealth Director of Public Prosecutions; and
  - (d) undertake other relevant tasks the Prime Minister and the Minister require from time to time.
- (12) In the period March 2021 to March 2022 the Director-General of the OSI appeared before Senate Committee hearings on five occasions.

### **Russell and the Australian Values Party**

- (13) From time to time Russell launched, led and supported campaigns supporting veterans, including a campaign to retain the Meritorious Unit Citation award for Special Forces personnel following the report of the IGADF Afghanistan Inquiry, and a campaign for a Royal Commission into Defence and Veteran Suicide.
- (14) Russell frequently appeared in the media and on social media as a spokesperson on behalf of Veterans and Veterans’ issues, including as a critic of the IGADF Afghanistan Inquiry.
- (15) On or about 4 September 2021, Russell announced on his Instagram page that he intends to start his own political party, pending obtaining sufficient members.
- (16) On about 17 September 2021 the Australian Values Party (**AVP**) applied for

registration as a political party with the Australian Electoral Commission.

- (17) At all material times, Russell was the leader of the AVP.
- (18) As at the date of publication of the November Article and the Linked Article, it was generally and widely understood that by virtue of the requirements set by section 28 of the *Commonwealth of Australia Constitution Act*, a Federal election would be called in the first half of 2022.
- (19) It was further believed that Russell and the AVP would field candidates in the Federal election.

### **Allegations by United States Marine Corps helicopter crew chief “Josh”**

- (20) In about July 2020, a United States Marine Corps helicopter crew chief, “Josh”, contacted the ABC and agreed to provide information on the condition that he would not be named in any publication on the basis that he feared for his safety if it became known he had spoken out against Special Forces operatives.
- (21) Between July and September 2020, “Josh” made allegations to the ABC to the effect that members of a Commando unit unlawfully killed PUCs. In particular, amongst other things, “Josh”:
  - (a) stated that he was a helicopter crew chief with HMLA-469 on deployment in Afghanistan from May to November 2012;
  - (b) stated that he was awarded five air medals and combat aircrew wings with three silver stars for the deployment;
  - (c) stated that he worked with Australian soldiers from Task Force 66 on drug raids, including the Commandos;
  - (d) alleged:
    - (i) that on a night mission towards the start of the deployment, they accompanied the Australians on a mission towards the north of Afghanistan;
    - (ii) the purpose of the mission was a raid on a drug operation;
    - (iii) that during the mission the Australian soldiers detained squirters (Afghan nationals fleeing the target area), including one soldier who tackled an Afghan national and brought him up from the ground and hog tied him in almost one fluid motion, which he found to be impressive;
    - (iv) that after about 30 minutes the Australian soldiers called for extraction and indicated a PUC count to be brought back to base;
    - (v) that after the Australians were told there was not enough room on the helicopter for the indicated number of PUCs to be brought back, he heard

a “pop” sound over the radio which he recognised as a suppressed gun shot; and

(vi) that the Australians then provided an amended PUC count of one less than had previously been provided;

(e) alleged:

(i) that a colleague of his had told him of another incident when he witnessed an Australian soldier shoot and kill an Afghan national who had been sitting on a wall as the helicopter came in to land;

(ii) that the colleague said he later had a conversation with the soldier as follows:

*US marine: Hey, why did you shoot that dude?*

*Australian soldier: Oh, he was posing a threat to your helicopter mate.*

*US marine: No, he wasn't armed.*

*Australian soldier: Oh, he was when we were through with him.*

(f) stated that if anyone conducting an investigation had questions and thought what he had to say was important enough that it needed to be on the record to strengthen their case he would go on the record with his allegation.

(22) It may be reasonably suspected that the alleged statement by the Australian soldier that the Afghan national was armed when they were through with him was a reference to a throwdown being placed on his body to make the killing appear legitimate.

(23) Willacy conducted extensive research and checks to determine whether “Josh” was a reliable source and determined that:

(a) “Josh” was a person of integrity who served alongside Australian forces and was awarded for his conduct; and

(b) the time period of “Josh’s” deployment to Afghanistan coincided with the period of deployment of November Platoon on rotation XVIII.

### **The October Article, Russell’s response and FOI application to the Department of Defence**

(24) On 21 October 2020 the ABC published the October Article, which reported the allegations made by “Josh”.

(25) The October Article did not indicate that “Josh’s” allegations were about any particular platoon, and did not name or refer to Russell.

- (26) On about 28 October 2020, Russell gave an interview to Jonathon Moran, the *Daily Telegraph's* Chief Entertainment Writer, in which he self-identified himself and the November Platoon as being the subject of the October Article (which he/it was not), said he was present on operations at the time of the allegations and denied the alleged incident occurred.
- (27) In the period following, Russell's denial was published widely in the media in the period 28 October 2020 to 1 November 2020, including in the News Corp press, and interviews on *Radio 2GB*, *Sky News* and on the *Sunday Project*.
- (28) On 17 October 2021, almost one year after first publication of the October Article, Russell sent a letter to the ABC and Willacy, amongst others, about the October Article. In the letter Russell called for a review of the October Article and suggested that the review consult the Department of Defence and seek access to certain documents.
- (29) On about 25 October 2021, Willacy made the FOI Application seeking access to certain documents.
- (30) On about 19 November 2021, the Department of Defence sent Willacy the FOI Response denying access to all documents under section 37 of the *Freedom of Information Act 1982 (Cth)*. The Department of Defence's letter set out the terms of section 37(1)(a) of the *Freedom of Information Act*, and also paragraph 5.86 of the FOI Guidelines, as follows:
- Section 37(1) (a) applies to documents only where there is a current or pending investigation and release of the document would, or could reasonably be expected to, prejudice the conduct of that investigation. Because of the phrase 'in a particular instance', it is not sufficient that prejudice will occur to other or future investigations: it must relate to the particular investigation at hand. In other words, the exemption does not apply if the prejudice is about investigations in general.*
- (31) The letter stated that the Accredited Decision Maker had decided that the documents contained information, if disclosed, could reasonably be expected to prejudice the conduct of a current investigation of a possible breach of the law.

### **Public interest**

- (32) In the circumstances set out above the following were and are matters of public interest:
- (a) the conduct of Australia's special forces in Afghanistan, particularly the conduct of the SASR and the 2nd Commando Regiment;
  - (b) the IGADF Afghanistan Inquiry;
  - (c) the report and findings of the IGADF Afghanistan Inquiry;
  - (d) the activities of the OSI;

- (e) the conduct of Russell as a senior member of the Australian Defence Force and a public figure;
  - (f) the allegations made by “Josh”;
  - (g) whether or not the allegations made by “Josh” were the subject of an investigation; and
  - (h) whether or not the 2nd Commando Regiment was the subject of an investigation by the OSI.
- (33) The November Article and the Linked Article concerned the above topics of public interest.

### **Reasonable belief**

- (34) At the time of publication of the November Article and the Linked Article, the ABC, Robertson and Willacy reasonably believed the publication of the November Article and the Linked Article was in the public interest.
- (35) The ABC, Robertson and Willacy rely upon the following circumstances:
- (a) each of the ABC, Robertson and Willacy were aware of each of the matters in (1) to (31) above;
  - (b) each of the ABC, Robertson and Willacy believed the matters in (32) above were matters of public interest;
  - (c) each of the ABC, Robertson and Willacy were aware of an article published in *the Age* on 20 September 2019 entitled ‘*Get rid of the prisoners by shooting them: Australian Commandos tell of war crimes*’, in which it was reported that a summary execution had been carried out by a member of the Commandos’ November Platoon during an operation in southern Afghanistan on 3 October 2012, who confessed to shooting a detained Afghan man;
  - (d) Robertson wrote the November Article;
  - (e) Robertson was and is an experienced journalist, having been a journalist since 2005;
  - (f) on about 19 November 2021 when Robertson saw the Department of Defence’s response to the FOI Application (**FOI Response**), and particularly the extract of paragraph 5.86 of the FOI Guidelines, he reasonably believed the Department of Defence to be confirming that there was a current criminal investigation into the particular matters the subject of the FOI Application;
  - (g) in addition to (f) above, Robertson was aware of other matters which corroborated his belief that the OSI was investigating the November Platoon. In particular, Robertson was aware:

- (i) that earlier in November the OSI had contacted the ABC and sought access to video footage and interviews held by the ABC relating to the October Article; and
  - (ii) that earlier in November the OSI had contacted Willacy and interviewed him;
- (h) Robertson telephoned Russell at approximately 12:20pm on 19 November 2021, and indicated he was researching a story and wished to put some questions to him. In the course of the discussion Robertson asked Russell in substance if he was aware of a criminal investigation into November Platoon, if he was aware of any of the members of his former platoon being contacted by investigators, or if he had been contacted by investigators. Russell responded in substance that he wasn't aware of a criminal investigation, he hadn't been contacted, and that he wasn't aware of any other former platoon members being contacted. Robertson fairly reported Russell's response in the November Article;
- (i) Robertson considered it fair to contact Russell in circumstances where he had previously engaged as a spokesperson on behalf of November Platoon;
- (j) hyperlinks to the IGADF Afghanistan Inquiry Report and the FOI Response were included in the November Article to ensure readers had access to all relevant information;
- (k) Willacy was and is an experienced journalist, having been a journalist with the ABC since 1995;
- (l) Willacy has undertaken significant research into matters relating to the conduct of Australian forces in the Afghanistan war, including for the publication of his book *Rogue Forces*;
- (m) in 2020, Willacy, together with the ABC Investigations-Four Corners Team won the Gold Walkley for Investigative Journalism for his story entitled "Killing Field", which reported allegations of war crimes by Australian Special Air Service Regiment soldiers in Afghanistan;
- (n) Willacy wrote the October Article;
- (o) in the period July to October 2020, Willacy investigated the allegations made by "Josh", including by:
  - (i) twice interviewing "Josh" (by video link and telephone) and corresponding with him by email;
  - (ii) obtaining information from "Josh" to verify the information against other sources/information;
  - (iii) making enquiries with a very senior Defence source, "Confidential

Source A”<sup>2</sup>, who informed Willacy, in substance, that they believed that the allegation was credible and worth reporting;

- (p) Willacy reasonably believed that “Josh” was a source of integrity whose allegations warranted being taken seriously;
- (q) Willacy reasonably believed that Confidential Source A was a source of integrity and whose information could be trusted;
- (r) Willacy made enquiries with another confidential source, Confidential Source B<sup>3</sup>, who confirmed that the OSI were investigating the November Platoon and Russell;
- (s) Willacy reasonably believed that Confidential Source B was a source of integrity and whose information could be trusted;
- (t) Willacy had access to information sourced by Dan Oakes, who co-authored the October Article, and trusted that information to be accurate;
- (u) on 19 November 2021, Willacy contacted the OSI seeking confirmation it was investigating the November Platoon over the incident described in the October Article. The OSI responded that they do not comment on specific allegations or investigations;
- (v) at all relevant times, the ABC has had Editorial Policies in effect;
- (w) Willacy and Robertson are bound by the ABC Values & Standards of Workplace Behaviour which states that a failure to comply with the Editorial Policies may constitute misconduct and may lead to disciplinary action being taken;
- (x) one of the applicable Editorial Policies was Editorial Policy 5, titled ‘Fair and honest dealing’. Amongst other things, Editorial Policy 5 states that “assurances given in relation to conditions of participation, use of content, confidentiality or anonymity must be honoured except in rare cases where justified in the public interest”;
- (y) from time to time, the Managing Director of the ABC authorises guidance notes to assist in the interpretation of the Editorial Policies;
- (z) on or about 11 April 2014, the Managing Director of the ABC authorised a guidance note titled ‘Attribution / Anonymity of Sources’ (**Guidance Note**). The Guidance Note has not been withdrawn.
- (aa) among other things, the Guidance Note:

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<sup>2</sup> The ABC and Willacy assert journalist privilege in relation to “Confidential Source A” pursuant to section 126K of the *Evidence Act*.

<sup>3</sup> The ABC and Willacy assert journalist privilege in relation to “Confidential Source B” pursuant to section 126K of the *Evidence Act*.

- (i) states that a basic rule of journalism is to protect the identity of sources when committed to do so;
  - (ii) states that any failure to uphold the rule can result in serious potential costs in loss of trust and reduced information flow, both from the source affected and from other potential sources who may be deterred; and
  - (iii) sets out ways in which journalists employed by the ABC must strive to maintain the protection of confidential sources;
- (bb) the obligations of journalists relating to the protection of confidential sources are also reflected in like policies of other news organisations and associations of journalists, and the journalist's privilege in s 126K of the *Evidence Act* 1995;
- (cc) in 1944, the Media, Entertainment and Arts Alliance (**MEAA**) adopted a Journalist Code of Ethics. The Journalist Code of Ethics was updated in 1984 and 1999. The version of the Journalist Code of Ethics adopted in 1999 has not been withdrawn.
- (dd) among other things, the current version of the Journalist Code of Ethics:
- (i) requires journalists who are members of the MEAA to apply the following standard: 'Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances'; and
  - (ii) contains a 'Guidance Clause', which states: 'Basic values often need interpretation and sometimes come into conflict. Ethical journalism requires conscientious decision-making in context. Only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden.'
- (ee) the November Article and the Linked Article carefully distinguished between suspicions, allegations and proven facts;
- (ff) the November Article and the Linked Article contained Russell's denial of the allegations;
- (gg) on 17 October 2021, Russell sent a letter to the ABC complaining about the October Article (**First Complaint**);
- (hh) the October Complaint was received after the 90 day period within which a complaint can be made under the ABC Code of Practice;
- (ii) notwithstanding that the complaint was out of time, on 18 November 2021, the ABC agreed to investigate the First Complaint;
- (jj) on 23 November 2021, the ABC amended the November Article to clarify that

the documents sought under the FOI Application relating to complaints and disciplinary action were not restricted to June and July 2012;

- (kk) on 16 December 2021, Russell submitted an editorial complaint about the November Article (**Second Complaint**). The Second Complaint included a concern that the denial attributed to him of the allegations made by “Josh” was not accurately described in the November Article in that he had “never made such a broad denial” and only ever denied the “specific allegation”, being the allegations made by “Josh”;
- (ll) on 19 January 2022, following consideration of the Second Complaint, the ABC amended the text of the denial by Russell in the November Article to clarify that it was restricted to the allegations made by “Josh”, and did not apply more generally. An editor’s note reflecting the change was also added to the November Article on the same day;
- (mm) on 16 February 2022, the ABC sent a letter to Russell stating that aspects of his Second Complaint had been addressed before his complaint was received and otherwise finding there was no breach of the Editorial Policies;
- (nn) on 11 March 2022, the ABC amended a “Key Point” within the November Article to reflect that the allegations made by “Josh” were not directed at a particular platoon and included an editorial note reflecting that edit;
- (oo) on 18 March 2022, the ABC included a clarification on the October Article to the effect that the allegations made by “Josh” did not relate to a particular platoon. The clarification was also added to, and remains on, the ABC’s Corrections and Clarifications webpage. The clarification remains online;
- (pp) on 29 March 2022, the ABC responded to the First Complaint finding no breach of the Editorial Policies but indicating that a clarification had been added on 18 March 2022;
- (qq) On 29 March 2022, the ABC revised its 16 February 2022 decision in relation to the Second Complaint, with respect to a ‘Key Point’ within the October Article. The ABC sent an email apologising to Russell and published a correction on its Corrections and Clarifications webpage. The clarification remains online;
- (rr) The ABC’s conduct described in (ii), (jj) and (ll) to (qq) above demonstrate that it was endeavouring to act fairly towards Russell and was willing to make amendments to address concerns were raised by Russell;
- (ss) the November Article and the Linked Article did not convey the imputations alleged about Russell alleged in the SOC; and
- (tt) the November Article and the Linked Article related to the conduct of the November Platoon, a unit of the Australian Defence Force.