Federal Court of Australia

NSD745/2022

HESTON RUSSELL
Applicant

AUSTRALIAN BROADCASTING CORPORATION & ORS
Respondents

APPLICANT'S CLOSING SUBMISSIONS INCLUDING REPLY

INTRODUCTION

1A. The unchallenged evidence is that, prior to the defamatory publications in November 2021, Heston Russell had an outstanding reputation including amongst Australian and American armed forces. He is a fifth-generation veteran who joined the Army straight out of high school in 2003 and served in the Australian Defence Force until 2019, including deployments to Afghanistan in 2011 and again in 2012. After leaving the ADF, he became well known for his advocacy for veterans, and in particular for speaking about veteran suicide. That reputation was destroyed by the defamatory publications.

1B. It has already been found (CA.13) that the November Article, the Linked Article, and the TV Broadcast conveyed the following seriously defamatory imputations about Mr Russell:

(a) November Article:

(i) Mr Russell was the subject of an active criminal investigation by the relevant investigatory defence authority into his conduct as a commando in Afghanistan in June or July 2012 as part of November Platoon (**November Imputation 1**);

(ii) Mr Russell was reasonably suspected by the relevant investigatory defence authority of committing a crime or crimes when he was a commando in Afghanistan in June or July 2012 as part of November Platoon (**November Imputation 2**);

(b) Linked Article:

(i) Mr Russell was the subject of an active criminal investigation by the relevant investigatory defence authority into his conduct as a commando in

Afghanistan in June or July 2012 as part of November Platoon (**Linked Imputation 1**)

(ii) Mr Russell was reasonably suspected by the relevant investigatory defence authority of committing a crime or crimes when he was a commando in Afghanistan in June or July 2012 as part of November Platoon (**Linked Imputation 2**);

(iii) Mr Russell, as commander of November Platoon, was involved in shooting and killing an Afghan prisoner during an operation in Helmand province in mid-2012 (**Linked Imputation 3**);

(iv) Mr Russell, as the commander of November Platoon, habitually left "fire and bodies" in his wake when deployed in Afghanistan (**Linked Imputation 4**);

(v) Mr Russell, as a commando in Afghanistan, habitually and knowingly crossed the line of ethical conduct when he was deployed there (**Linked Imputation 5**);

(vi) Mr Russell, as a commando in November Platoon, had behaved so immorally when deployed in Afghanistan, that American forces refused to work with him (**Linked Imputation 6**);

(c) TV Broadcast:

(i) Mr Russell was the subject of an active criminal investigation by the relevant investigatory defence authority into his conduct as a commando in Afghanistan in June or July 2012 as part of November Platoon (**TV Imputation 1**); and

(ii) Mr Russell was reasonably suspected by the relevant investigatory defence authority of committing a crime or crimes when he was a commando in Afghanistan in June or July 2012 as part of November Platoon (**TV Imputation 2**).

1C. The respondents attempted to prove those imputations true, but that attempted defence was abandoned (after all of the justification particulars were struck out), and there is now no longer any suggestion that any of the imputations carried by the publications are true. Their only defence is under s 29A of the *Defamation Act* 2005 (NSW), which requires them to

prove that they reasonably believed that the publication of the matters in question was "*in the public interest*".

1D. The submissions served by the respondents on 18 August 2023 (**RS**) are inaccurate as to the facts established by the evidence and fail to offer any cogent explanation for why the respondents' conduct in publishing, and continuing to publish, matters carrying seriously defamatory imputations of suspected and actual criminality should be excused by this Court: *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 317-318.

1E. The purpose of the s 29A defence is to excuse responsible journalism about issues of public interest, even if the matter published is not substantially true or a fair comment on true facts. It is a defence of confession and avoidance. Once the Court has come to consider the defence, it will have already found that the defendant's publication carried defamatory imputations about the plaintiff which caused serious harm to his or her reputation. The respondents' approach to the defence fails to account for the "*confession*" element.

1F. The protection of the defence is not lost simply because facts asserted in the publications happen not to be true. The fact that the publications carry seriously defamatory imputations which are not demonstrated to be true, however, informs the assessment of whether the respondents' belief that it was in the public interest to publish *these publications* was reasonable in all of the circumstances. Moreover, the respondents' knowledge and state of mind is important. If they knew that facts stated in the publications were false, it is difficult to see how there could be any conclusion other than that the defence must fail.

1G. The respondents also fail to grapple with the absence of any evidence from the person at the ABC ultimately responsible for the decision to publish, John Lyons. The uncontradicted evidence is that Ms Puccini referred the editorial decision as to whether to publish the November Article to Mr Lyons. There is no evidence before the Court as to his knowledge or state of mind at the time he made that decision on 19 November 2021, and moreover, the failure by the ABC to call him as a witness gives rise to an inference that his evidence could not have assisted the ABC. These matters are fatal to the s29A defence in so far as the ABC is concerned.

A. FACTS

Heston Russell and his rotations

1. The following derives from the evidence of Mr Russell (CC.1, pp1-6, [2]-[33]) unless otherwise stated.

2. Mr Russell was born in 1985 in Sydney. His father was an Army officer and his mother a waitress and aerobics instructor. He has an older brother (Jile Russell) and a younger sister (Tarlee Russell), both of whom gave evidence in these proceedings: CC.26-27. Mr Russell is also a fifth-generation veteran. His father served in the Army in Iraq and Afghanistan, his grandfather served in the Korean War and the Vietnam War, his grandmother served in the Army during the Korean War, both of his great-grandfathers served during the Second World War, and his great-great grandfather served on the Western Front during the First World War.

3. Mr Russell joined the Army straight out of high school in 2003 at the age of 17 and studied at the Australian Defence Force Academy (**ADFA**) in Canberra. In 2005 he graduated from ADFA with a Bachelor of Arts majoring in History and Indonesian and in 2006 graduated from the Royal Military College, Duntroon.

4. He was commissioned as a Lieutenant and posted to Lavarack Barracks in Townsville as the commander of 5 Platoon, Bravo Company in the 2nd Battalion, Royal Australian Regiment (**2 RAR**). In 2007 and 2008, he was deployed to Timor-Leste as the commander of 5 Platoon, carrying out peacekeeping operations as part of Operation Astute. He worked alongside the US Marine Corp Expeditionary Unit during this deployment and also with UN peacekeeping forces.

5. In February 2010 he attended the commando selection and training course. He was one of 120 candidates who commenced the course and one of only 30 who passed. For the remainder of 2010, he completed commando training at various locations around Australia, which included qualification courses in heavy weapons, explosives, parachuting, advanced marksmanship, urban and amphibious operations, and other skills.

6. In November 2010, Mr Russell became the commander of November Platoon within the 2nd Commando Regiment (**2 CDO REGT**). For the next year he was based in Sydney but travelled around Australia with the Tactical Assault Group – East, deployed on domestic

counter-terrorism response training and preparations. In October 2011, while still commander of November Platoon, Mr Russell was deployed to Afghanistan for the first time and he served as the personal security officer for Prime Minister Julia Gillard when she visited Afghanistan in November 2011. His responsibilities included coordinating security with United States and other international military forces and agencies. On the return flight from Afghanistan to Dubai, the Prime Minister gifted him a challenge coin, which had been given to her by the US Marine Corps four-star general commanding all NATO forces in Afghanistan, as a token of her appreciation for his work with her. In November 2011, immediately after returning from Afghanistan, he deployed to Sydney for counter-terrorism support during President Barack Obama's visit to Australia. This role required him to coordinate with US agencies.

7. On 6 March 2012, he was deployed to Afghanistan again until 26 March 2012. During this deployment he was embedded on operations with a different platoon of 2 CDO REGT to observe and learn tactics in preparation for a deployment later in the year which included visits with and briefings from US support assets and agencies.

8. On 14 July 2012, he arrived with the November Platoon leadership team at Al Minhad Air Base near Dubai. Later that week, the platoon was deployed to Tarin Kowt in Uruzgan Province, Afghanistan to commence a handover from the platoon that he had been embedded with during his second deployment in March. One week later, the rest of November Platoon arrived and commenced a series of training exercises within the confines and immediate surrounds of the Tarin Kowt base, before receiving certification of Full Operational Capability in August 2012.

9. Between August and December 2012, Mr Russell led November Platoon on a variety of counter-insurgency operations in Uruzgan and Kandahar Provinces and from September 2012, counter-narcotics operations in Helmand Province, and key insurgent leadership targeting operations in all three provinces. During this period, he completed 67 missions ranging from a few hours to a few days in duration which involved daily interaction and cooperation with US forces at all levels.

10. In 2013, Mr Russell became Company Executive Officer of Alpha Company, 2 CDO REGT. In this role, he was responsible for operational preparation activities and advanced force operations in the Asia-Pacific Region and was sent on a variety of consular planning and support activities to countries including the Solomon Islands and Papua New Guinea.

This involved being at the Australian Embassy in the Solomon Islands ahead of their election to conduct planning and assessment activities with consular staff, testing their business continuity plans and emergency response plans.

11. In 2014, he was appointed Adjutant and Senior Captain within 2 CDO REGT. In November that year, the unit provided counter terrorism support during the G20 Summit in Brisbane, in addition to preparing and deploying forces to combat ISIL/ISIS in Iraq. Also in 2014, he completed the Grade 2 promotion course for Major and received the Student of Merit Award, as the most outstanding student in the course.

12. In 2015, he was posted on a year-long exchange to the United States Special Operations Command at the rank of Captain and in the role of Plans and Operations Officer at Fort Benning in Columbus, Georgia. During that posting he travelled throughout the US and worked alongside US special operations units and special forces, and also US government agencies. He also completed a further combat deployment to Afghanistan as part of a classified United States taskforce. He was the first Australian deployed under Operation Freedom's Sentinel, and his deployment on this mission was specifically approved by the Minister of Defence. For his service within the US Special Operations Command in 2015, Mr Russell was awarded the:

    (d) United States Army Commendation Medal;

    (e) United States Joint Service Commendation Medal; and

    (f) Order of Saint Maurice-Peregrinus, from the President of the National Infantry Association and the Chief of the Infantry, United States Army.

13. In 2016, Mr Russell was promoted to Major and appointed as the Officer Commanding the Commando Selection and Training Continuum at the Special Forces Training Centre. He was the chief instructor, with about 40 staff conducting that training for over 100 trainees throughout the year.

14. From late 2016 until April 2017, Mr Russell was deployed to Iraq as the Special Operations Lead Planner within the Special Operations Joint Task Force, responsible for operations against ISIL/ISIS in Iraq and Syria. During that deployment, he reported directly to the Commander of the Special Operations Joint Task Force, a US two-star general, and the Deputy Commander, an Australian brigadier.

15. In January 2019, Mr Russell elected to discharge from the ADF.

16. During Mr Russell's 16 years of service, he received the following awards and commendations:

(a) Australian Defence Medal (2007);

(b) Australian Service Medal with clasps "Timor-Leste" (2007) and "CT/SR" (2011);

(c) Commander 1st Division Commendation (2008);

(d) Medalha Solidariedade de Timor-Leste (Timor-Leste) (2008);

(e) Afghanistan Medal (2011);

(f) Australian Active Service Medal with clasp "ICAT" (2011);

(g) Infantry Combat Badge (2012);

(h) Meritorious Unit Citation – Task Force 66 (2012);

(i) NATO Non-Article 5 Medal with clasps "Afghanistan" (2011) and "ISAF" (2014);

(j) Australian Operational Service Medal – Greater Middle East Operation (2014) and second numeral (2015);

(k) Order of Saint Maurice-Peregrinus (United States) (2015);

(l) Army Commendation Medal (United States) (2015);

(m) Joint Service Commendation Medal (United States) (2015);

(n) Defense Meritorious Service Medal (United States) (2017); and

(o) Defence Long Service Medal (2018).

Afghanistan 2012

17. 2 CDO REGT was made up of Alpha Company, Bravo Company, Charlie Company and Delta Company. Each company was made up of two or three platoons. Alpha Company, also known as Vikings, consisted of Oscar Platoon and November Platoon.

18. Task Force 66 in Afghanistan in 2012 included FE-Alpha (deployed SAS) and FE-Bravo (deployed Commandos).

19. Rotation XVIII (Squadron 2, SAS and Alpha Company) deployed on missions at the end of July/August 2012: Russell CC.1, p 3; Ch 23 Masters, CB.11.

20. Before that, Rotation XVII (Squadron 3, SAS and Delta Company) deployed from February/March 2012 until the end of July 2012: Ch 22 Masters, Ex.H.

ABC Investigations

21. 'ABC Investigations' is a part of the ABC's news division, with the apparent purpose of focusing on more in-depth reporting. At the relevant time:

    (a) John Lyons, Head of Investigative Journalism (Puccini CC.36, [40]);

    (b) Joanne Puccini, the Investigations Editor (Sydney) (Puccini CC.36, [14]);

    (c) Mark Willacy, a senior reporter in ABC Investigations (Brisbane) (Willacy CC.40, [6(e)]);

    (d) Joshua Robertson, reporter and producer in ABC Investigations (Brisbane) (Robertson CC.38, [5(b)]);

    (e) Dan Oakes, senior reporter in ABC Investigations (Melbourne) (Oakes CC.35, [4]);

    (f) Alexandra Blucher, journalist and producer in ABC Investigations who worked on the October Article (Brisbane) (Blucher CC.30, [9]-[10], [19]);

    (g) Claire Blumer, journalist and digital producer in ABC Investigations who worked on the October Article (Blucher CC.30, [20(a)]); and

    (h) Dan Harrison, digital producer November Article (Sydney) (Harrison CC.32, [14]).

22. The following propositions about investigative journalism were accepted by the witnesses:

    (a) The purpose of ABC Investigations is systematically and thoroughly to collect information, review it, analyse it, and check and verify it before publishing, and it is not an investigation unless a process of verification and corroboration takes place (Robertson T490.39-44).

    (b) Part of a journalist's role is to learn the facts and uncover the truth (Willacy T195.24-29) and bring to light true facts (Puccini T693.46-47).

    (c) A journalist has an obligation "*to get things right*" (Willacy T196.28-34).

(d) The public should be informed of the truth (Blucher T590.25-45).

(e) A journalist's task is not to only seek to obtain facts and bolster a story that he or she wishes to write (Willacy T195.31-33).

(f) When a story is published on the ABC website by ABC Investigations, a representation is made to readers of the story that there has been an investigation, that the allegations made have been "*investigated, examined, assessed*", and that "*more time and resources have gone into*" the story. It carries extra weight with readers (Willacy T197.25-32; Robertson T499.34-37).

(g) ABC Investigations tends to write negative stories and not positive stories (Willacy T269.36 – T270.12).

(h) Editorial processes rely on journalists telling those above them in the editorial hierarchy the information they have, and if they do not do so, the process becomes unstuck (Willacy T195.35-39).

(i) Journalists should be careful and responsible when publishing serious allegations about people (Puccini T689.26-27).

(j) If an allegation is very serious, a journalist should take whatever steps he or she thinks are available to try to verify the allegation (Blucher T593.44-46).

(k) It is important to test information from confidential sources. This can occur by asking them lots of questions to see whether they are consistent, or by asking them their motivations, or speaking to other people who can confirm or dispute the information (Robertson T486.23-30).

(l) Each of these steps is desirable as part of an investigation (Robertson T486.35-37).

(m) Sometimes, having attempted those inquiries and not succeeded, the journalist has to "*bin the story*" (Robertson T486.45-47).

(n) When given information, an investigative journalist needs to check it, no matter who gave them the information (Robertson T506.44 - T507.1).

(o) Journalists should ensure to the extent possible that allegations made by sources are correct, even when they form the belief that a source is being honest (Blucher

T590.25-45).

(p) Journalists should consider and investigate the motives of their sources, and question sources about their motives (Blucher T590-25-45; Oakes T648.33-36; Puccini T694.20-24).

(q) During a journalistic investigation, journalists should not just obtain information to support the allegation made by a source, but also see if there is information which contradicts it (Oakes T649.32-35).

(r) If a journalist only has an anonymous or confidential source for a serious allegation of fact, it is incumbent on the journalist to corroborate the allegation, and if it is not possible to corroborate the journalist should not publish (Oakes T649.23-30).

(s) Journalists publishing serious allegations should adhere to ethical standards to ensure that what is published is accurate, fair, honest, and not misleading (Oakes T64.1-12).

(t) A journalist's investigation is shaped by the questions they choose to ask, and a journalist can choose to avoid an entire topic just by failing to make inquiries down a certain line. It is the job of an investigator not just to obtain information to support the allegation made by a source, but to ask questions to see if there is information that might contradict it (Oakes T649.37-46).

(u) If a journalist only asks questions that might corroborate the source, the journalist would be acting in a manner wilfully blind to the truth (Oakes T650.1-3).

(v) As a general rule, journalists should not publish uncorroborated allegations made by confidential sources (Robertson T649.29-30).

(w) Attention to detail is important. The detail is often the smoking gun of the story (Puccini T694.1-6).

(x) Journalists need to be sceptical about information given to them (Puccini T694.13).

(y) Journalists need to check and double-check allegations (Puccini T694.18).

(z) It is relevant to the publication of serious allegations to take into account the harm that the publication can cause to people (Puccini T739.1-4).

23. At all relevant times, each journalist at the ABC was (and still is) bound by the ABC editorial policies, which are informed by guidelines and guidance notes (Puccini T693.10-14). These policies require adherence to the standards of:

(a) independence, integrity and responsibility (CB.2, p3);

(b) accuracy (CB.3, p5);

(c) fair and honest dealing (CB.4, p6);

(d) appropriate attribution and provision of anonymity of sources (CB.5, p9); and

(e) impartiality (CB.8, p31).

24. ABC journalists also subscribe to a code of ethics published by the Media, Entertainment and Arts Alliance (**MEAA**), a union and advocacy organisation: T196.27-31.

25. The ABC's processes provided for upwards editorial referrals. This means that when a decision was made that an upward referral was appropriate, the next senior editor would review the publication and make the decision as to whether or not to publish: CB.1, p1; Puccini CC.36, p228 [18] and [19].

26. The ABC editorial guidelines and policies which are in evidence are at CB.1-6, 8, 458-459 and Ex W.

27. The ABC Code of Practice (**ABC Code**) (Ex.W.pp1-21) includes the following relevant material:

(a) The principles and standards in the ABC Code "*uphold the fundamental journalistic principles of accuracy and impartiality*". By holding to these principles and standards, the ABC "*seeks to be accountable to the Australian people who fund us*" (p5).

(b) Under the heading 'Accuracy' (on p6 (but see also the editorial policy at CB.3)):

(i) "*The ABC has a statutory duty to ensure that the gathering and presentation of news and information is accurate according to the recognised standards of objective journalism*".

(ii) "*Credibility depends heavily on factual accuracy*".

(iii) "*The ABC should make reasonable efforts, appropriate in the context, to signal to audiences gradations in accuracy, for example by querying interviewees, qualifying bald assertions, supplementing the partly right and correcting the plainly wrong*".

(iv) The relevant standards as to accuracy are as follows:

> *2.1. Make reasonable efforts to ensure that material facts are accurate and presented in context.*
>
> *2.2. Do not present factual content in a way that will materially mislead the audience. In some cases, this may require appropriate labels or other explanatory information.*

(c) Under the heading 'Corrections and clarifications' (on p7 (but see also the editorial policy at Ex.W.p24)):

(i) "*A commitment to accuracy includes a willingness to correct errors and clarify ambiguous or otherwise misleading information. Swift correction can reduce harmful reliance on inaccurate information, especially given content can be quickly, widely and permanently disseminated. Corrections and clarifications can contribute to achieving fairness and impartiality*."

(ii) The relevant standards as to corrections and clarifications are as follows:

> *3.1. Acknowledge and correct or clarify, in an appropriate manner as soon as reasonably practicable:*
>
> *a. significant material errors that are readily apparent or have been demonstrated; or*
>
> *b. information that is likely to significantly and materially mislead.*

(d) Under the heading 'Impartiality and diversity of perspectives' (on p7 (but see also the editorial policies at CB.8 and at Ex.W.pp25-26)):

(i) The ABC has an "*obligation to apply its impartiality standard as objectively as possible*" and, in doing so, "*is guided by these hallmarks of*

impartiality": "*a balance that follows the weight of evidence*", "*fair treatment*", "*open-mindedness*", and "*opportunities over time for principal relevant perspectives on matters of contention to be expressed*".

(ii) The relevant standards as to impartiality and diversity of perspectives are as follows:

> *4.1. Gather and present news and information with due impartiality.*
>
> *4.2. Present a diversity of perspectives so that, over time, no significant strand of thought or belief within the community is knowingly excluded or disproportionately represented.*
>
> *4.3. Do not state or imply that any perspective is the editorial opinion of the ABC. The ABC takes no editorial stance other than its commitment to fundamental democratic principles including the rule of law, freedom of speech and religion, parliamentary democracy and equality of opportunity.*
>
> *4.4. Do not misrepresent any perspective.*
>
> *4.5. Do not unduly favour one perspective over another.*

(e) Under the heading 'Fair and honest dealing' (on p8 (but see also the editorial policy at CB.4)):

(i) "*Fair and honest dealing is essential to maintaining trust with audiences and with those who participate in or are otherwise directly affected by ABC content*".

(ii) The relevant standards as to fair and honest dealing include the following:

> *5.3. Where allegations are made about a person or organisation, make reasonable effort in the circumstances to provide a fair opportunity to respond.*
>
> *5.4. Aim to attribute information to its source.*
>
> *5.5. Where a source seeks anonymity, do not agree without first considering the source's motive and any alternative attributable sources.*
>
> *5.6. Do not misrepresent another's work as your own.*

> *5.8. Secret recording…must not be used by the ABC…to obtain or seek information…except where: (a) justified in the public interest and the material cannot reasonably be obtained by any other means; or (b) consent is obtained from the subject or identities are effectively obscured; or (c) the deception is integral to an artistic work.*

28. The MEAA Journalist Code of Ethics (**MEAA Code**) (at CB.459) relevantly provides that:

(a) "*Respect for truth and the public's right to information are fundamental principles of journalism*".

(b) Journalists are to educate themselves about ethics and apply the following standards:

> *1. Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis. Do your utmost to give a fair opportunity for reply.*
>
> *…*
>
> *3. 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.*
>
> *4. Do not allow personal interest, or any belief, commitment, payment, gift or benefit, to undermine your accuracy, fairness or independence.*
>
> *5. Disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of your journalism…*
>
> *…*
>
> *12. Do your utmost to achieve fair correction for errors.*

"Josh" the US marine

29. On 15 July 2020, Mr Willacy received an email from a person identifying himself as a former US marine. He is known in these proceedings as "Josh": CB.57, p460.

30. Josh made a number of allegations against unnamed Australians in Task Force 66 with whom he had worked in Afghanistan in 2012. He prefaced his allegations by stating:

> *My memory is pretty hazy so I can't really give you anything specific enough to follow up with, but I wanted to reinforce the narrative that you're writing about based on my own experiences.*

31. He then went on to make allegations of various murders without any places or dates nominated and again noted (CB.57, p461):

> *…and my memory is fuzzy enough that I would be useless anyways when it comes to giving specific enough details to go on.*

32. In particular, he made an allegation against the "Aussies" which later led to the October Article (CB.57, p460), which we will refer to in these submissions as **the Josh Allegation**:

> *Another night I was providing overwatch as they conducted a drug raid after being dropped off by I believe v-22s but it's possible it was 53s. They had managed to capture a half dozen prisoners or so, and they called in to get picked up and gave the count of themselves and the prisoners for the helicopters coming to pick them up, the helicopter pilots informed them they were 1 person over capacity for the flight back, and seconds later we heard a gunshot over the radios, and they ended up saying they had one less prisoner than they originally reported. The flight back was silent in our aircraft, and nobody acknowledged what we had all heard because our comms were recorded, but it seemed pretty clear to everyone what happened.*

33. Nowhere did Josh say that the Australians he worked with were Commandos.

34. Later on 15 July 2020, Josh agreed to correspond with Mr Willacy further (CB.57, p459):

> *with the obvious caveat being that this all happened a long time ago in the midst of constant combat operations where I had very little sleep and was constantly working with people from different countries and units, so I likely won't be able to provide you with actionable information that could go anywhere useful in any specific investigations, only the bits and pieces I remember.*

35. In relation to the Josh Allegation, he said it was "*way up north somewhere…but I couldn't tell you exactly where it was. It was a night time mission early in our deployment, probably sometime in June, but again everything is kind of a blur as far as the timelines, and they were inserted to do I believe a raid on a drug operation*": CB.57, p459.

36. Josh did not know which unit it was (CB.57, p457). He said, *"I couldn't say for sure because all I was ever told when we worked with the Aussies is that we were working with Taskforce 66… Almost all of them had long wild hair, some of them had gauged ear piercings and most wore baseball style hats and tennis shoes instead of boots."* He

recognised an air crash in a news article involving Australian Commandos (referred to as 'SMH Article' at RS [213(e)]) but then stated *"I have no idea if we were working with different units within the task force for the missions we were on"*: CB.57, p458.

36A. Josh's reference to the SMH Article ("*I also know that the people killed in the crash from this news article were flying with us and the article lists them as Aussie commandos*") was not, as suggested by the respondents (for example, at RS [218]-[219]), a reliable statement by Josh that he worked with 2 Commando. It is clear from Josh's communications taken as a whole that he had 'no idea' who he was working with. Mr Willacy has never said – in his affidavit or in Court – that he understood Josh's reference to the 'Aussie commandos' referred to in the SMH Article as indicating that he worked with the commandos.

36B. The respondents' submissions appear to be the first time this point has been raised. In Mr Willacy's affidavit, he says, in relation to that email, only that Josh had informed him: A) that he did not know which specific units from Australia he worked with and that his unit was only ever told they were working with Australians from 'Taskforce 66'; and B) that he 'knew the Australian commandos referred to' in the SMH Article: CC.40, pp323-324 at [62(c), (f)]. Under cross-examination, Mr Willacy accepted on at least ten occasions that Josh never told him he worked with 2 Commando or the commandos generally: T275.12-32; T275.44-46; T276.22-40; T277.44-45: T421.10-17. This submission is an "*after the fact*" distortion of the evidence.

37. In reply the same day, Mr Willacy told Josh, "*It does sound like you did operations with 2 Commando. They did a lot of anti-drug work with DEA in Afghanistan*": CB.57, p458. It is important to recognise that the involvement of 2 Commando was suggested to Josh by Mr Willacy. That idea did not come from Josh himself.

38. On or about 15 July 2020, it is said that Mr Willacy informed Ms Blucher, a producer at the ABC, of the email from Josh. Ms Blucher originally gave evidence that Mr Willacy told her he had received an email from a US marine making serious allegations against Australian Commandos he had interacted with in Afghanistan: Blucher CC.30, p14. In the witness box, she sought to amend that evidence to instead say that Mr Willacy simply told her he had received an email from a US marine: T585.11-18. She was unable to give any plausible explanation as to why she had specifically recalled that the allegations were against Commandos when she made her affidavit, but then, at the time of the trial, could not recall to whom the allegations related. The only explanation she could offer was that she

he had had a conference with her legal representatives: T586.31 – T587.38.

39. Later in July 2020, Mr Willacy also apparently told Mr Oakes, a journalist at the ABC who had written a number of articles on alleged war crimes, that he had received an email from a US marine making serious allegations against Australian Commandos he had interacted with in Afghanistan: CC.35, p215, [16].

40. Sometime in July 2020, Mr Willacy also told Ms Puccini that he had been approached by a US marine who said that while he was working with Australian Commandos in Afghanistan, the Australian Commandos had shot a prisoner because he could not fit on a helicopter: CC.36, p235, [65].

41. It is unclear why Mr Willacy had these discussions at that time, given that, at least until September 2020, he intended to include Josh's story in his book, and not as an ABC article. Even more curious is Ms Puccini's evidence that, at this time in July 2020, she thought that the "*explosive allegation*" from Josh "*clearly met the public interest threshold*": Puccini CC.36, p235, [67].

42. At about this time, Mr Willacy claims that he spoke to a confidential source who gave him Mr Russell's mobile phone number. This source also criticised Confidential Source B, calling him a "*bottom of the list, wanker, signaller, show pony*", who had a "*way with words*": CB.42, p291; T252.11-15. Mr Willacy did not disclose this description of Confidential Source B in his affidavit when he gave evidence that he regarded Confidential Source B as credible: Willacy CC.40, p354, [224]. Mr Willacy's explanation for neglecting to do so was unsatisfactory and is an example of the unreliability of his account of his dealings with sources.

43. Also at about this time, Mr Willacy claims, he reread Chapter 23 of Chris Masters' book (T174.28-31; CB.11), which concerned Rotation XVIII in Afghanistan in 2012. He refers to two page references in that chapter which were largely irrelevant: Willacy, CC.40, p324, [63(a)]. Despite having previously read the entire book, he apparently ignored Chapter 22 of that same work (Ex.H) which concerned Rotation XVII and detailed a bloody campaign in Helmand Province involving Delta Company: T188.

44. On 21 July 2020, Mr Willacy had a video call with Josh which lasted nearly an hour (CB.56). During that call:

(a) Josh again did not say the Australians were Commandos, although Mr Willacy suggested to him that they were a number of time.

(b) Josh could not remember the number of prisoners. He said there were "*close to half a dozen. So we'll just say seven for the sake of explaining*" (CB.56, p432).

(c) He said the alleged incident happened "*somewhere up north, I don't remember exactly where and I want to say it was probably late June or early July, if I had to guess*" (CB.56, p419).

(d) In response to a question from Mr Willacy about whether he could see anything down below or whether his witnessing of the incident was all through comms, Josh responded "*it was all comms*" (CB.56, p419).

(e) Josh again claimed that "*most of them had very long hair, pretty wild usually. Quite a few that had like gauged ears or some kind of ear piercings. They always wore like some kind of tennis shoes instead of boots. Definitely huge beards*" (CB.56, p422).

(f) In relation to the claim about leaving "*fire and bodies*", Josh said "*I don't know how much of that is them crossing the lines or if that's just the factor of they were getting pushed into areas where we didn't have a big presence*" (CB.56, p426).

45. Mr Willacy went on extended leave at this time in order to write his book: T164.36-43. He wrote no articles for the ABC from 22 July 2020 until the October Article: Ex.N.

46. In August 2020, Mr Willacy claims that he spoke to Confidential Source A, who was allegedly someone in a senior position in Defence. This source told him about Mr Russell, and that he had heard that the Inspector-General of the Australian Defence Force (**IGADF**) wanted to speak to Mr Russell and three others, who were said to have been in November Platoon with dates of deployment from July to November 2012: Willacy CC.40, p332-333 [94] and [97]. Mr Willacy said in his affidavit that Confidential Source A had said they were Commandos in November Platoon, but gave evidence in Court he was only told they were Commandos: T270.35-36; T271.3-16.

47. On 31 August 2020, Mr Willacy suggested again to Josh that it was Commando teams working with him and asked for more details about the Josh Allegation: CB.68, p512.

48. On 2 September 2020, Josh responded. Once again, he specifically did not confirm that the "*Aussies*" were Commandos, and said (CB.68, pp510-511):

> *The night the prisoner was shot, we were somewhere pretty far up north of Bastion, not sure exactly where, but it was close enough that we didn't need to leave the ground forces to go refuel, we were there for the entire process from insertion to extraction. I would guess it was something around 1-3AM since it was our first mission of the night shift but couldn't say specifically, and I couldn't be certain of the date, only that it was likely somewhere between mid June-July and still pretty early in our deployment since it was one of the first drug raids I was involved in.*

He said that the person who gave the modified prisoner numbers was the *"Aussie ground commander"*. He again reiterated, *"Wish I could be more specific with the details, but those were some extremely hectic times where we worked with a ton of different units on a variety of missions with not much sleep to be had in between, so most of it is pretty fuzzy."*

49. Josh also said that "*I never actually saw any DEA guys with the Aussies in the time I worked with them, the only time I saw the DEA operating that I'm aware of is when they were working with a blended unit of British SAS and Afghan special forces in some remote town off the grid. No idea how many of each the unit was made of, we just came in to provide support when they were pinned down and it was a pretty chaotic situation so we didn't get much information about them, only enemy fighting positions*": CB.68, p511.

50. It was at about this time that Mr Willacy decided he no longer wished to include the Josh Allegation in his book: Willacy CC.40, p334, [109]; see also T231. Despite that, he wrote to Josh on 1 October 2020 and told him that he would "*of course*" still feature his story in his book: CB.68, pp509-510.

51. Mr Willacy filmed another video call with Josh on 5 October 2020. This one was about 20 minutes long: CB.69; CB.71. In it:

    (a) Mr Willacy said, "*so you start doing joint missions with the Australian commandos ...*". Josh began his answer by saying, "*so it was almost exclusively drug raids with the Australian commandos*". It is to be noted again that the notion that the Australians were Commandos was suggested to Mr Willacy by Josh and never

originated with him.

(b) A technical glitch required the question again, "*Just tell me what the missions were that you did with the Australians and what your roles were with the commandos*". Josh replied, "*So the Australians were almost exclusively we worked with them almost exclusively in a drug raid context*", not mentioning Commandos.

(c) Later in the interview when he described the incident, he described them as "*Australians*" and "*Aussies*". He said he guessed it happened in early August or late July in that version.

(d) Josh recounted another event near ANZAC Day, despite allegedly having been deployed in mid-May until November 2012.

(e) Josh said he "*watched*" them "*hogtie and tackle them*", contradicting his earlier statements that it was '*all through comms*".

51A. At RS [289], the respondents contend that too much has been made of the deficiencies in Josh's recollection, arguing that Josh's admissions about the limitations of his memory of the alleged events did not mean that his recollection of those events which he did purport to recall were deficient. The respondents refer to Proust's narrator by way of illustration, but the literary analogy proves rather too much. Prior to tasting the madeleine, Marcel's memory of the "*theatre and drama of… going to bed*" was an isolated island in a sea of darkness, no more "*than a kind of luminous panel… like those which a flare or an electric sign illuminate and detach from the front a building, the other parts of which remain submerged in darkness*", as though Combray consisted of nothing but two floors and a staircase and the time was always 7pm. At best, on the respondents' argument, Josh's purported memory was little more than this kind of isolated, decontextualised snapshot, and it clearly ought to have been foreseeable to Mr Willacy that in the context of Josh's general lack of recollection, this one island of memory might well not be reliable.

51B. But more broadly, of course, Proust's novel is an extended meditation on the ways in which our habits of thought constrain and ossify our perception of the world, just as the dozing narrator ponders at the beginning of *Du côté de chez Swann* whether "*the immobility of the things that surround us is forced upon them… by the immobility of our conceptions of them*". The fact that a source has convinced himself that he remembers a particular event clearly or

vividly does not mean that he actually does. A source's assurance that his memory on a particular point is vivid does not absolve the journalist from the responsibility of bringing an independent mind to the matter and testing the source's account.

51C. In any event, the point in relation to Josh's warnings as to his recollection is not limited to a submission that Mr Willacy should have been wary of him as a source. It extends to the manner in which Mr Willacy thereafter presented Josh's account in the publications. He presented it forcefully, as fact, without disclosing to readers the fact that his source was far from confident about the adequacy of his own recollection. That, together with the absence of any caveat in the publications to the effect that the ABC had not been able to verify the allegations, renders the respondents' conduct irresponsible, unreasonable and unethical.

52. All Mr Willacy did in a half-hearted attempt to test Josh's account was:

(a) satisfy himself that Josh was who he claimed to be – that is, that he did in fact serve as a marine crew chief in Afghanistan at the relevant time alongside Australian soldiers;

(b) make limp requests of Josh to ask his crew mates to speak to him, which Josh rebuffed and Mr Willacy made no real attempt to pursue; and

(c) asked a "*senior military source*", Confidential Source A ([97], [100], Willacy CA.40), who was not present in Afghanistan at the relevant time, about the allegation. He was told that Confidential Source A believed that the allegation was "*credible*" and "*worth pursuing*": particular 35(o); Willacy CC.40, pp339-340, [140]-[141].

53. Mr Willacy made no attempt to:

(a) speak to any Australian soldier from Task Force 66, Rotation XVIII (or indeed Rotation XVII which also coincided with Josh's deployment);

(b) find the names of any of Josh's crew mates to speak to directly;

(c) speak to any commando deployed in Afghanistan in 2012 (despite apparently suspecting the commandos of 2 CDO REGT, in particular Rotation XVIII);

(d) speak to Mr Russell or any other members of November Platoon at the relevant

time, despite knowing who they were (Willacy CC.40, p332, [94]; CB.42, p292);

(e) check the unusual and memorable description that Josh had given on two occasions of the Australians' physical appearance: CB.56, p422; CB.57, p457;

(f) check whether twenty was the correct number of persons in a commando mission; or

(g) speak to any people with on-the-ground military experience to see if various components of Josh's allegations (in particular the ear-witness over the radio aspect) were plausible.

54. The last item warrants elaboration. Many former soldiers gave unchallenged evidence that components of the Josh Allegation were not plausible:

(a) Andrew Cullen, a former soldier deployed to Afghanistan in 2008 and 2011, gave evidence that the allegation was "*ridiculous*", having regard to his experience: CC.10, p77, [14].

(b) Stephen Dennis, a former Blackhawk Helicopter Pilot with the United States Army who was deployed to Iraq and Afghanistan, and who had worked with November Platoon there and had been awarded numerous medals, said he was "*highly sceptical*" about the allegation. He said that (CC.11, p86, [14]-[15]):

> *Anytime an aircrew was to assist in an evacuation, the number of passengers, including any prisoners, was discussed before we would approach the landing zone, most times even before taking off. The number of passengers determined whether a particular helicopter crew could attend the pick-up at all or how many turns may need to be made between the pickup zone and home base. This was not something that was decided when we were near the pick-up zone.*
>
> *Whilst I do not know precisely where 'Josh' was on the helicopter at the time of the alleged incident, based on my experience, all helicopter crewmen wear two layers of ear protection – first, a set of foam earplugs; and second, earmuffs which cover the entire ear. Crewman cannot hear any gun shots due to the double hearing protection. My own helicopter crew would not be aware that we were being engaged by enemy forces on the ground unless the door gunner would fire back. I recall a particular instance in which we landed to pick up ground troops who started waving us to "go-around" because we were being shot at by enemy forces. We would not have known otherwise. The "pop" Josh alleges he heard could have been anything; the signature of a rifle with*

a suppressor going off is even harder to detect on board an aircraft.

(c) Mark Henneberry, who was a Warrant Officer in the Australian Army from 1988 to 2011, wondered "*how could someone distinguish one single shot over the roar of the helicopter engine at least 2000ft, wearing hearing helmets fitted with radio communications but importantly having the ability to differentiate 'sounds' as Operators use weapons fitted with suppressors at night*": CC.17, p113, [18].

(d) Cameron Niven, who joined the ADF in 2012, said that the allegation was inconsistent with his experience, including because (CC, p131, [27]):

> *The door gunner indicates he heard a shot. However, as the door gunner, who was apparently speaking with members of 2CDO, he would not have simply been in a position to 'hear' the shot. The incident likely ought to have happened directly in front of him…*
>
> *The 'pilot said there were too many'. Generally, it is not the pilot of an aircraft who determines weights, balance, loadings and fuel requirements. Instead, this is overseen by a Loadmaster, who often acts as a door gunner during troop loading. While this inconsistency may come about from differing roles in the US Air Force, I still would not expect a pilot to directly involve themselves in issues regarding loading;*
>
> *Everyone was 'quiet on their comms'. Having worked with US Marines and other elements, they are not quiet about anything ever.*

(e) Scott McConnell, who was deployed to Afghanistan in 2012 with Mr Russell, said he did not see truth in the articles "*for many reasons including that the story didn't represent how loud helicopters were able to hear a 'pop', the helicopter he was in was about 1000 feet into the air which made the visual witness account claims outrageous and even the fact that 'Josh' said he heard it over the radio appeared unbelievable*": CC.21, p136, [19]-[20].

(f) Brendan Paterson, who was a member of the ADF between 1989 and 1995, thought the allegation was sensational, by reason of the near-impossibility of hearing a gunshot over a radio communications network with the sound of a helicopter and the use of suppressed weapons: CC.22, p141, [14].

(g) John 'Bret' Hamilton, whom Mr Willacy interviewed for 30 minutes the day before the November Article, and was employed by the DEA and served as a United States

Marine including as a team leader in Afghanistan in 2012 with November and Oscar Platoons, said he thought (CC.15, p103, [5]):

> *…the account from "Josh" was highly implausible as it would be impossible for anyone to hear a suppressed weapon upon the ground discharge from a helicopter circling above. Even if the helicopter had landed and "Josh" had been standing next to it, he still would be unable to hear a suppressed weapon discharge. Furthermore, if there were an audio recording of such an event (as "Josh suggests in the article), the Marine Corps would be legally obligated to release the recording to the Australian Defence Force*

55. This evidence was unchallenged and essentially uncontradicted. The point of it is twofold:

(a) First, it illustrates what Mr Willacy is likely to have been told if he had made a meaningful attempt to test and verify the Josh Allegation by seeking information from a wider range of people with on-the-ground experience in Afghanistan in 2012.

(b) Second, Mr Russell himself repeatedly raised these concerns in media interviews in 2020, directly to Mr Willacy at the bookshop in September 2021 (CC.1, p8, [52]) and in the editorial complaint lodged on 17 October 2021. Mr Willacy seemingly took no step whatsoever to consider and further investigate these matters before publishing the November Article.

56. The only evidence from the respondents that could be deployed to the contrary is Mr Willacy's claim that he asked Confidential Source A if the allegation was possible: Willacy CC.40,p349, [140]. There is no evidence that Confidential Source A has any practical military experience. Indeed, Mr Willacy conceded that Confidential Source A was not in the platoon, not on the ground, and had not even been in Afghanistan in 2012: Willacy T210.7-13; T291.6; Puccini T704.11-19.

57. It would also appear that, in disclosing some material to Mr Willacy, Confidential Source A may well have been breaking the law: T171.28-172.27. It does not seem that Mr Willacy stopped to consider his motives for doing so. It is difficult to see how a person in the position of this source, who has engaged in such a serious breach of trust and the law, could possibly be regarded as a "*source of integrity*".

58. Furthermore, Confidential Source A apparently said the allegation was "*credible and consistent with information I have heard about the treatment of prisoners*". On this account,

it seems he only turned his mind to the broad issue of treatment of prisoners, not any of the important details of the allegation. Notably, the note taken by Mr Willacy of that conversation does not record this part of the conversation (CB.42, p313):

- *Heston Russell → no more*
  V. little on Cdo. Got a smell.

- *US Marine Josh → will be a* [redacted]
  Issue → speak.
  November Platoon → heard those guys had problem. Nothing sticks, no weakness.
  hopes these issues are to be investigated.

59. The Court cannot be confident that words to that effect were spoken by Confidential Source A in the circumstances. This is another of many inconsistencies between Mr Willacy's evidence and the notes. Mr Willacy does not mention in his affidavit what was allegedly said about Mr Russell in this conversation, as recorded by his note: pp339-341, [140]-[146].

60. When Mr Oakes spoke to commandos from Oscar Platoon, he did not explain the "ear witness" nature of the allegation, but only that a prisoner was killed because he could not fit onto a helicopter: Oakes, pp217-219, [35], [54].

61. Ultimately, Mr Willacy did not find any witness or document to corroborate Josh's allegations about the murder of the hogtied prisoner who could not fit onto the helicopter, nor his allegation about the Afghan murdered on the wall. That is unsurprising, given the complete lack of any effort to do so.

62. Mr Willacy admitted the lack of any corroboration of Josh's allegation to the OSI when he met with them a year later on 13 November 2021: CB.358.

63. Having regard to the evidence, including about his time off in August and September to work on his book about the SAS, Mr Willacy's repeated assertions that he investigated the Josh Allegation for months were false. His evidence initially was that he investigated the the allegations for three months, including sending "*dozens of emails*" over 24 separate dates (T209.8-12), then it was that the work occurred "*over three months*" (T304.25-28), and then it was accepted that he did not spend even close to 40 days on it but "*was working on it over the period*" (T349.30 – T350.11).

Preparation of the October Article

64. In October 2020, Ms Puccini sought editorial guidance from John Maley, who told her that:

> *We run single person accounts occasionally - Kevin Frost was a similar type of allegation which was not corroborated. In those cases, you check the scaffolding of the story to make very sure it stacks up. If you've done your homework on the source's bona fides, and we're not blaming any specific person, I think this is an important allegation to publish.*
>
> (Puccini, CC.36, p235, [71])

65. As she recounts the conversation, Ms Puccini then counselled Mr Willacy as follows:

> *Look it sounds like a good story. Can we find another witness? Would any of the other people in the chopper speak to us? Can you and Dan [Oakes] get your heads together and see if we can track down any other commandos who were there? We might be able to get an Australian to verify it.*
>
> *Failing that, can we get a Commando to talk about the missions generally, and how they worked and whether they matched "Josh's" characterisation of them.*
>
> *I also think you need to talk to Defence and see if they'll talk to you, although they probably won't say anything useful.*
>
> *Can you thoroughly check out this guy's bona fides - you'll need to check he was there when he said he was, did they fly on those kinds of missions, were the prisoners tied in that kind of way, that he is who he says he is. We need to ensure that sources are credible and the circumstances they describe are accurate, especially because we don't yet have anyone to corroborate the allegation.*
>
> (CC.36, p236, [72])

66. Ms Puccini considered that a single person account could be published depending on the circumstances: [73]. When she explained this in evidence, she referred to two previous ABC stories which she claimed were single person accounts: T696.38-44. Those articles are in evidence and disclose the following circumstances, which bear no comparison at all with Josh's "*ear witness*" allegation:

(a) Dusty Miller was a medic who saw an injured Afghan being taken away by an SAS soldier. The following day the son of the man found his dead body with boot prints on his chest (CB.136; T700.24-27). The ABC had the account of Mr Miller and the account of the deceased's son.

(b) Braydon Chapman saw a fellow SAS soldier shoot an Afghan with his arms in the air. The ABC had helmet-cam video in which members of the squadron discussed the killing days after it was said to have occurred (CB.46; T700.45 - T701.16).

67. Mr Willacy spoke to Mr Oakes and told him about the Josh Allegation: Willacy CC.41, p337, [128]. He asked him to "*do a ring around*" with sources: T233.39-45.

68. On 10 October 2020, Mr Willacy prepared the first draft of the October Article: CB.72. It did not include the DEA reference in the sixth paragraph of the final article: CA.2, [33].

69. On 11 October 2020, Mr Oakes phoned his Confidential Source 1, a former Oscar Platoon member whom Mr Oakes had spoken to before and who had deployed on a number of rotations in Afghanistan including Rotation XVIII: Oakes CC.35, p217, [35]. Mr Oakes told him that:

> *Mark's got this story from this US pilot. He's talking about Australian soldiers shooting an unarmed civilian and then planting a weapon and killing an entire family in their home and killing an Afghani prisoner because there wasn't enough room on a chopper for him. Do you remember anything like that happening?*

70. Confidential Source 1 replied:

> *No - not that specifically. But I did hear other stuff. It was certainly at a high level. Our platoon commander pulled our platoon together and said that the [Drug Enforcement Agency] have said in no uncertain terms have said they won't operate with November platoon any more due to their behaviour in the field, and us at Oscar would have to take the burden of all counter narcotic operations as a result, but we must not relay these concerns to November platoon.*
>
> *At the same time, a JTAC who was a captain in the [Royal Australian] Air Force was assigned to our rotation and he said the aircrews are at the point of not wanting to support FE-Bravo operations any more, and this had political and operational consequences.*

71. The phone call was very brief: CC.35, [39]. Mr Oakes did not ask Confidential Source 1 any questions or seek any information of any sort. He did not ask if the source had ill will towards November Platoon or make enquiries to ascertain the source's motive. Mr Oakes did not seek to speak to the commander of Oscar Platoon referred to in the quote, even though his identity was ascertainable: Puccini T738.29. This quote was not verified in any way by Mr Oakes or Mr Willacy before it was published.

72. Mr Oakes emailed the quote to Mr Willacy the same day: CB.75. He also spoke to Mr Willacy and told him about November Platoon: Willacy; CB.321, [133]. Despite recording information about Mr Russell from three different sources in July, August and then October, Mr Willacy claims he did not know who Mr Russell was until 28 October 2020, when *The Daily Telegraph* published an article criticising the October Article: Willacy CC.40, p347, [180]-[181]. This evidence should be rejected.

73. On 12 October 2020, Mr Oakes spoke to Confidential Source 2. He told him the same thing he had told Confidential Source 1, and was told in response:

> *Not specifically that, but I remember talking to [DEA agent] afterwards, and he said 'we're not going out with those fucking guys ever again'. Every DEA team that went through there loved working with us and had no problem, but November platoon was the first platoon that the DEA said they wouldn't work with. They didn't give any specifics, but it was just a look. Something obviously went down.*

74. The phone call was very brief: [57]. Mr Oakes did not ask Confidential Source 2 any questions, or seek any information of any sort. Mr Oakes did not speak to the DEA agent referred to in the quote, even though he knew his name was Bret and presumably his details were ascertainable: T665.45-47. Mr Oakes emailed the quote to Mr Willacy the same day and told him that he was chasing the name of the DEA guy "*Bret*": CB.76, p531. Despite that email, there is no evidence of any attempt by Mr Oakes or Mr Willacy to verify the information in this quote before the October Article was published.

75. On 12 October 2020, Mr Willacy produced another draft of the October Article which included the quotes obtained by Mr Oakes and which added the following into the early part of the article detailing the Josh Allegation (CB.80):

> *It was part of a wider joint Australian Special Forces-US Drug Enforcement Agency campaign targeting illicit drug operations that were financing the Taliban insurgency.*
>
> *We had done the drug raid, the Aussies actually did a pretty impressive job, wrangling all the prisoners up," Thomas said. "We just watched them tackle and hog tie these guys and we knew their hands were tied behind their backs.*

76. That addition had the effect of tying the Josh Allegation to the quotes about the DEA refusing to work with November Platoon. It was plainly added deliberately for the purpose of linking these two, in fact unrelated, allegations. Mr Willacy's denial of that purpose

should not be accepted: T284.3-13.

77. Also on 12 October 2020, Ms Puccini sent questions to Mr Willacy about the draft. She was confused about whether Josh actually saw the murder. Importantly, she is the one who suggested that Josh did not wish to be named because he "*fears retribution*": CB.81, p542. This made its way into the October Article, even though Josh did not say that.

78. Also on about 12 or 13 October 2020, after she saw the draft article with the quotes about the DEA, Ms Puccini had the following conversation with Mr Willacy (Puccini CC.36, p238, [85]):

> *Puccini:* *Do you think November Platoon is responsible?*
>
> *Willacy:* *We don't know; Josh doesn't know which platoon it was because he was American and wasn't familiar with the Australians.*
>
> *Puccini:* *Should we be saying that these are separate allegations about Commandos?*
>
> *Willacy:* *I don 't think so. There's no suggestion that the other platoon did it and we don't have any evidence of bad behaviour from that platoon. If we* say *they're separate, it might point the finger at the other platoon. We do have that context of bad behaviour with the November Platoon.*

79. Mr Willacy accepted that this conversation occurred: T285.35 – T286.16. It is damning for him and Ms Puccini, and destructive of their credit on the question of the intended meaning of the October Article. Contrary to their evidence and assertions made by them in documents after the editorial complaint was lodged in 2021, it was plain to them that the finger was being pointed at November Platoon (see paragraph 184 below).

80. The introduction of a separate header did nothing to diminish that accusation, having regard to the content and structure of the article: CC.36, [86]. The two headers were merely quotations in bold, and do not read as the introduction to a separate topic. The Key Points saw to this, as did the references to Josh in each of the three "sections".

81. Ms Blucher claims to have fact checked one of the many versions of the draft article on 13 October 2020, but she could not say which one: T598.16. On its own, this lapse of memory made her evidence on the issue rather unhelpful, but that was not the end of the problems

with her evidence about "*fact checking*".

82. Ms Blucher says she had access to the 5 October 2020 transcript and was aware of the 21 July 2020 transcript. She was not given any other material from Josh. When asked what material she was shown to back up the "*line by line*" in the draft, she could not remember: T601.25-27. RS [269] does not fairly reflect Ms Blucher's evidence when it says that Mr Willacy "*provided Ms Blucher with various documents to evidence different aspects of the article*". Neither Mr Willacy nor Ms Blucher gave that evidence - a *Fercom* inference arises in those circumstances. When asked what she knew generally about the Josh Allegation, Ms Blucher could give little to no detail other than it "*was going to be allegations against the commandos*": T594.25-31. She said she sat next to Mr Willacy and spoke to him every day throughout the week and was "*probably just told*" that information, even though Mr Willacy was on leave in August and September: T594.33 - T595.10.

83. Neither Mr Willacy nor Mr Oakes corroborated her evidence of fact checking. Mr Oakes could not recall it occurring, but assumed it did as it was standard procedure for "*a publication of this nature*": T671.31-32; CC.35, p222, [92]. Mr Willacy was silent on the issue. There being no adequate explanation for that silence, the Court should infer that whatever evidence Mr Willacy might have given about this issue would not have assisted him or the ABC: *Commercial Union Insurance Company of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389 at 418E; *Stambolziovski v Nestorovic and Camanaro Prestige Properties Pty Ltd t/as Sydneyhome Real Estate* [2015] NSWCA 332 at [51] (Ward JA; Beazley P and Emmett AJA agreeing).

84. Given the unsatisfactory state of the evidence, the Court should infer that fact checking did not occur. Ms Blucher's evidence on the issue should be disregarded, other than as evidence of what ought to have happened prior to publication, but did not.

85. Mr Oakes made no attempt to renew his previous attempts to contact anyone from November Platoon, having had no success in 2018 and 2019: Oakes CC.35, p222, [90]; T672.43-45. He did not tell Mr Willacy that he made any such attempt for the October Article: T673.9-11. Mr Willacy's evidence that Mr Oakes said that he did so should not be accepted: T434.32-36.

86. Mr Oakes admitted that he was mistaken about "October" platoon and realised that on the day of publication of the October Article: T646.10-15. Mr Willacy claimed that he also

realised his error at that time (T273.1-19), which is inconsistent with his own defences filed in this proceeding on 7 October 2022 and thereafter (CB.377, p2217):

> *(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)…*

87. In evidence, Mr Willacy accepted that Josh never told him that it was the Commandos he was working with that night: T276.33-35. He said he deduced that it was because of his information that it was the Commandos who were working with the DEA: T284.20-21. This ignored the fact that Josh had expressly told him on 2 September 2020 that he never saw the DEA with the Australians he worked with.

88. Mr Willacy's focus on Rotation XVIII ignored the fact that Josh believed that the incident had happened in June or July, early in his deployment (which started in May). Further, Ch 22 of the Masters book was rife with references to Delta Company carrying out missions with the DEA in Helmand during Rotation XVII: Ex.H, pp451, 459-466. That included missions with the Marine Air Wing, of which Josh's unit HMLA-469 was part. One of those missions was on 18 May 2012, being the date that Mr Willacy knew that Josh had his first mission: T182.4-5, Ex.H, p466. Mr Willacy instead relied on the information from Confidential Source A that Rotation XVIII was being looked at by the IGADF: Willacy CB.40, p332, [94]. It was dishonest, or at least wilfully blind, to prefer that information to everything else he had been told or had read.

89. Considering the evidence as a whole, it seems likely that Mr Willacy wanted to publish a story ahead of the release of the IGADF report, in the hope that he was credited with breaking a story about Rotation XVIII commandos, and in particular November Platoon. In fact, he indicated this as a timing factor to Josh when suggesting the article in early October: CB.68, p510. He was intent on doing a story about the Commandos because the SAS had already been covered. He therefore focused his attention on November Platoon, ignoring other evidence and only recording and publishing the negative information he was provided.

90. Mr Willacy's discovery, handwritten notes and evidence for both the October Article and the November Article is not reliable, and the Court should not proceed on the basis that what he has disclosed is all of the available information that he had at the time of publication. He admitted that he does not record everything he is told, and only writes down "*stuff that could be newsworthy*" which he agreed was "*the negative stuff*": T268.19-45.

October Article

91. On 21 October 2020, the ABC published an article on its website (www.abc.net.au) entitled "*US marine says Australian special forces soldiers made 'deliberate decision to break the rules of war'*" (**October Article**). In that article, Mr Willacy asserted that Josh:

> *... has told ABC Investigations he was a door gunner providing aerial covering fire for the Australian soldiers of the 2nd Commando Regiment during a night raid in mid-2012.*

That was untrue, and Mr Willacy must have known it was untrue. In fact, Josh had repeatedly pointed out that he did not know which unit of Australians he had worked with.

92. Mr Willacy went on to claim that:

> *He says the commandos then called up the US aircraft to pick them and about seven prisoners up.*

Josh made it clear in his early communications that he worked with Task Force 66, but this included many units, not just Commandos. He never said that the helicopter incident involved the Commandos. Rather, it was Mr Willacy who suggested the involvement of Commandos to him, and on more than one occasion. Josh referred to Commandos only once, in the video filmed in October 2020, and only by picking up on Mr Willacy's reference to them immediately prior. When describing the helicopter incident in that same video, he referred to only "*Aussies*". It is clear from his communications from July 2020 as a whole, and the rest of that video, that he had no idea which unit it was.

93. Next Mr Willacy accused the commandos of another murder:

> *He says on a mission early in his 2012 deployment, one of his USMC comrades was shocked by what he witnessed the commandos do on a joint drug operation.*
>
> *"They go down for a landing. As soon as the Aussies exit, there was somebody just sitting on a wall watching them land. They got off and popped the guy a few times in the chest."*
>
> *Josh says his fellow marine later confronted the commandos about the killing.*
>
> *"My buddy came and asked, 'Hey, what happened to that guy?' And he said, 'Oh, he's dead mate.' And he's like, 'Why? He wasn't even armed. What happened there?' He said, 'Oh, he was armed when we got through with him'."*

Those quotes also come from the 5 October 2020 interview, where Josh described the soldiers involved only as the "*Aussies*".

94. Mr Willacy further claimed in the October Article that:

> *A member of 2nd Commando's Oscar platoon who served on that deployment has confirmed that the Americans were unhappy with the conduct of some of his comrades.*

This claim, again, was wrong. Oscar Platoon did not start missions until August 2012, like November Platoon. Mr Willacy could not know whether the Josh allegations related to something which occurred during Rotation XVIII or the one before it.

95. Mr Willacy ultimately accepted that it was wrong to suggest that Josh had told the ABC that he was working with the Commandos that night: T275.12-32; T275.44-46; T276.22-40; T277.44-45: T421.10-17. Mr Robertson initially refused to accept the error, but ultimately conceded it: T493.30-47; T494.1-494. Ms Puccini refused to make the same concession, to her discredit: T707.32-40; T708.40-46; T709.2 – T710.19; T711.42-44.

96. Mr Willacy compounded matters by associating these allegations about the Commandos with the quotes obtained by Mr Oakes from his confidential sources.

97. The first source (said to be from Oscar Platoon) claimed:

> *Our platoon commander pulled our platoon together and said that the [DEA] has said in no uncertain terms that they won't operate with [2nd Commando] November platoon any more due to their behaviour in the field.*

The words "*It was certainly at a high level*" at the beginning of the quote did not make it into the article: CB.454.

98. Nobody made any attempt to speak to the "*platoon commander*" who was alleged to have said those words: T278.16-30 (Willacy); T658.23-38 (Oakes). That was the Oscar Platoon commander, who spoke to Mr Russell on or around the day the October Article was published and said the statement attributed to him was an 'absolute lie': Russell CC.2, p29, [28(d)]. No other investigation or questioning occurred in relation to that claim. Mr Willacy accepted it would have been "*helpful*" for Mr Oakes to have contacted the Oscar Platoon commander (T278.37-40), and that this would have been a necessary step to take for the purposes of verification (T279.3-7). Ms Puccini did not ask whether the Oscar Platoon

commander had been spoken to, despite accepting they "*could have done that*" and that it was "*perhaps*" an obvious thing to have done, and that his name was plainly ascertainable: T717.22 – T718.29.

99. The next source, said to be from Oscar Platoon, said:

> *"I remember talking to [DEA agent] afterwards, and he said, 'We're not going out with those f***ing guys ever again'. Every DEA team that went through there loved working with us and had no problem, but November platoon was the first platoon that the DEA said they wouldn't work with," the former commando said. "Something obviously went down."*

The words "*they didn't give any specifics but it was just a look*" also did not make it into the article: CB.454.

100. Nobody made any attempt to speak to the "*DEA agent*" – Bret Hamilton – who they claimed said those words. No other investigation or questioning occurred in relation to that claim.

101. The Key Points of the October Article tied it all together at the top:

> *Key points:*
>
> - *A US marine says Australians were known to leave "fire and bodies" in their wake in Afghanistan*
> - *Australian soldiers from 2nd Commando Regiment told the ABC the US Drug Enforcement Administration refused to work with the November platoon in Afghanistan*
> - *It is unclear if the alleged killing is covered in the Inspector-General of the Australian Defence Force's inquiry*

102. The reader could not have been left in any doubt that November Platoon was being accused of the murders. Numerous people at the ABC, including Mr Robertson, the ABC's PR Department, and the digital editor Daniel Harrison, read it that way. Mr Willacy and Ms Puccini's evidence about this issue should be rejected as false.

102A. No document produced by the respondents corroborates what they claim was their belief at that time – that the October Article did not direct the Josh allegation to November Platoon. Indeed all of the documents, discussed below, contradict that contention. The Court should find that it was concocted shortly after the publication of the November Article when Mr Russell publicly pointed out the clear issue in relation to the timing of the alleged incident.

Reaction to October Article

103. Mr Russell saw the October Article as an attack on November Platoon on the day they were commemorating the death of a fallen comrade, Scott Smith. As the former commander, he took steps to publicly correct the record, which escalated to an editorial complaint lodged in October 2021: CC.1, pp6-8, [40]-[45], [56]-[57].

104. He telephoned the ABC on the day of publication to speak to someone about the October Article, but his voice messages were never responded to: CC.1, p6, [40]-[41].

105. On 27 October 2020, Jonathan Moran from *The Daily Telegraph* telephoned Nick Leys to ask some questions about the October Article. Mr Willacy was alerted to this inquiry and in response he contacted Josh immediately by email seeking to speak to him: CB.151, pp1300-1301. Josh eventually agreed to a short telephone call.

106. Mr Willacy's version of that call should not be accepted: CC.40 at [174]. He concocted a story that he received "*chatter*" from Confidential Source C that people were looking for Josh and that is why he called him: CC.40 at [164]-[173]. However, no written record of his communications with Confidential Source C in this period have been produced: T291.21-23.

107. The note of the call does not bear out Mr Willacy's account of the conversation, and nor do the contemporaneous emails. The note says (CB.42, p319):

JOSH → pulled down his social media

→ Stand by the story. ←

It is what it is.

→ One of buddies → few of them.

Quite a few. (T293.20-294.9)

108. After the phone call, Mr Willacy wrote to Josh (CB.151, p1299):

> *Let me know if you hear from any Aussie journos! But as suggested, I'd just say I stand by my account, read the ABC story, and I won't answer any questions. Murdoch's people are tabloid bottom-feeders.*

Anyway, I'll be in touch again about the book. It's a bit of a slog.

The reference to the book makes no sense given that Mr Willacy claims that he had moved on from including Josh in it at this point.

109. It should be inferred that Mr Willacy telephoned Josh to warn him of the media interest from another news agency, and to "*word him up*" as to what to say and do. The removal of the social media was for that purpose and not for safety reasons as alleged by Mr Willacy: T295.37-41.

110. On 28 October 2020, an interview with Mr Russell appeared on the front page of *The Daily Telegrap*h (CB.116) and that evening there was a television interview on Sky News (CB.119). In response to at least the front page story, the ABC released a public statement which included the claim "*we have no knowledge that [Russell] was even on the raid in question*": CB.127, p708. It is noteworthy that the ABC did not take this opportunity to claim that the Josh allegations in the October Article were not about November Platoon, as they later sought to maintain.

111. On 29 October 2020, Mr Willacy emailed Josh again: CB.151. This email went through redactions which are unusual: Ex.N, MFI-21. The words "*Just checking in. I found out that the Commando who disputed the story*" were previously redacted: CB.151, p1299.

112. On 1 November 2020, Mr Russell appeared on *The Project* on Network 10 pointing out the deficiencies and errors in the October Article: CB.125.

113. In December 2020, Mr Willacy claims that he spoke to Confidential Source B, who appears to be the same person as Mr Oakes's Confidential Source 2. There are no notes of this alleged interaction because, according to Mr Willacy, he was at the pub during the conversation: T264.15-19. The following day, he said he could not take notes during this interaction because he was watering the garden: T390.1-7.

114. Over the next year, Mr Russell became well known for his advocacy for veterans, and in particular for speaking about veteran suicide. He started a podcast in January 2021 called Voice of a Veteran, for which he interviewed Ian Thorpe, Tony Abbott and Julia Gillard. His work earned him a book deal with Pan Macmillan in June 2021: CC.1, p7, [46]-[49].

115. In the meantime, Mr Willacy was upset about Mr Russell's criticisms of the October Article.

116. On 7 May 2021, during a stage interview with Chris Masters at the Walkley Awards, he said (CB.140; Ex.L) (emphasis added):

> *But then there is that, the thing that pisses me off about this story is that, I will give you an example.*
>
> *I spent two months working on a particular story involving, you know, a US helicopter crewman. And it was a story he told me, he contacted me. He was an interesting guy.*
>
> *And he said "You know, we were ferrying the Australian commandos around and you know they were crazy brave but they crossed lines and we always, the crew, my crew we'd talk about it."*
>
> *And he told the story that they were out in an operation. They dropped the commandos then it was time to pick them up. And you know, they radio in and said, You know, we have got six, you know our guys, and six prisoners. And, you know, the chopper pilot he heard it through the communication, he said. "Well, we've only got room for five." And then (popping noise). "Yep, we're good, we got five"*
>
> *Now I check that story with other sources that I couldn't, I couldn't really go into. And I spent two months checking out, going back to this guy, getting more detail, more detail, speaking to other people who were there.*
>
> *We put it out, we went to Defence, you know, and then, you know, a while later you know a newspaper says, it comes out with a headline "ABC's Pop Fiction". You know, there's this idea that we make shit up and we don't. And this same paper, two weeks later, I wrote it down, you know, has front page, heroes in the frame. Australian diggers accused of brutal war crimes.*
>
> *And I found it a bit disappointing that you know, yeah, come after me if I've made a mistake or I've been loose with my journalism, come after me, I welcome it. But this journalist didn't even call me. Didn't ask to speak to the people I've spoken to. And I just found it annoying that in one day someone can pull down reporting or will try to pull it down, that takes two months.*
>
> *Um, and so I found that there was this competition that was healthy and collegiate within our organisation. And there was others that I found, yeah, a bit cheap at times.*

117. Mr Willacy agreed elsewhere that it was incorrect to say that Josh had implicated the Commandos (T275.12-32; T275.44-46; T276.22-40; T277.44-45: T421.10-17), that it was incorrect to say that he spoke to "*other people who were there*" (T309.26), and that it was incorrect to imply that he welcomed people coming after him if he made a mistake with his

journalism (T310.21-25). Nevertheless, he rejected the proposition that he had "*made shit up*", to use the phrase he employed in this interview: T309.36.

118. From this point, Mr Willacy pursued enquiries about Mr Russell and directed each of them to Mr Robertson.

119. In May 2021, Mr Willacy re-watched a souvenir helicopter video which had been given to him by Mr Oakes a year earlier. He considered that it showed a commando shooting in an unrestrained way: Willacy CC.40, p348, [187]. Mr Robertson said that Mr Willacy gave him the video in mid-2021 and that he was told that it showed Mr Russell shooting at an unarmed civilian: Robertson CC.38, p269, [30]. Mr Oakes also told Mr Robertson that he had a source who "*was told it was Heston Russell shooting out of a helicopter at an unarmed civilian who was fleeing*": Robertson CC.38, p269, [32].

120. In August 2021, Mr Willacy's book *Rogue Forces* was published.

121. In the same month, Mr Robertson investigated the claims that Mr Russell was shooting from the helicopter, even to the point of drafting an article in September 2021. His research, however, uncovered material which conflicted with the information that Mr Russell was the shooter, and he did not proceed with the story. He was "*unable to satisfy* [himself] *that the publication about that allegation at the time would be in the public interest*": Robertson CC.38, p272, [48]-[53]; T506.23-25. In Mr Robertson's words, the draft story was "*rough as guts*" and he "*didn't get anywhere near towards*" publishing it: T506.28-35.

122. Mr Robertson told Mr Willacy of the outcome of his enquiries about the helicopter allegation at that time: T446.5-22 (Willacy). Mr Willacy accepted that Confidential Source A "clearly got it wrong" when he told Mr Willacy that the video showed Mr Russell firing at civilians out of a helicopter: T332.30-39.

123. In mid-late August 2021, Mr Willacy gave Mr Robertson another tipoff about Mr Russell. It concerned "*some kind of fundraising misconduct*": Robertson CC.38, p270, [39].

124. On 28 August 2021, the OSI requested a meeting with Mr Willacy to ask him about allegations in his book and build a relationship of trust: CB.148, p1286. He met with them on 1 and 2 September 2021 for those purposes: T326.28-29. He signed a statement on 2 September 2021 setting out information about those matters. It did not include the Josh Allegation: T326.21-33.

125. Also on 2 September 2021, as part of his investigation of the helicopter shooting allegation, Mr Robertson received from Mr Oakes a list of those he believed were in November Platoon in Afghanistan in 2012, including Mr Russell: Robertson CC.38, p271, [43]; CB.150.

126. On 3 September 2021, having had no communication for nearly a year, Mr Willacy emailed Josh to offer him a copy of his book and an "*update*" on the "*war crimes investigation here*": CB.151, p1298. He received no response and chased him up on 12 September 2021.

127. On 28 September 2021, Mr Russell met Mr Willacy at a bookshop event in Brisbane and asked him about the allegations in the October Article, pointing out problems with it: Russell CC.1, p8, [50]-[55]; Asser CC.5, p52, [9]-[12]; Henneberry CC.17, p113, [13] – [17]; c.f CC.40, pp350-351, [196]-[208]; T334-335.

128. On 13 October 2021, despite not hearing from Josh, Mr Willacy volunteered his emails with him to the OSI "*as background only and not go into your official record at all*", because he had not been given "*specific permission*" by Josh to share them: CB.161, p1233. Mr Willacy claimed in that email that there had been "*potential threats emanating from Heston Russell following the broadcast of my story. I heard from a former ADF officer who was in touch with Heston Russell that Russell had spread the word around that they were trying to find 'Josh'.*": T220.16-21. That claim was false.

129. Mr Russell was prompted by other members of November Platoon to attempt to have the October Article removed in the lead up to the anniversary of Scott Smith's death. On 17 October 2021, he lodged an editorial complaint about the October Article. The complaint was eventually accepted for investigation on 18 November 2021: Russell CC.1, pp8-9, [57]-[63]; CB.163. Mr Willacy and Ms Puccini were notified of it that day: CB.186, p2507. <u>In those circumstances, the respondents' conduct, in 'doubling down' by rushing to publish a further story about Mr Russell and November Platoon, the day after being notified of the acceptance for investigation of his complaint about the October Article, was lacking in good faith, improper and unjustifiable.</u>

130. The complaint prompted Mr Willacy into further action. On 23 October 2021, his wedding anniversary of all days, he lodged an FOI application seeking documents to attempt to prove that November Platoon had committed the murder alleged by Josh: Willacy CC.40, p352, [209]-[211]. He predicted that the request would be denied on the basis that it would compromise an ongoing investigation: T368.27-21.

131. The terms of the FOI application are important (CB.169):

- *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, and;*
- *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, and;*
- *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*
- *Any complaints and/or disciplinary action taken against members of November Platoon in the calendar year 2012.*

132. If Mr Willacy is to be believed about his evidence that he did not allege that November Platoon was the subject of the Josh Allegation, and did not intend to do so, the terms of the application make little sense. It was not an investigative device to find out which platoon might be involved, but plainly drafted to elicit a response for the purpose of creating a pretext to write an article. Mr Willacy effectively admitted as much (T368.23-34):

> *Well, you made the application, so that you could get a non-response, so you could write a story saying there was a criminal investigation into Heston Russell?---I suspected I would get a non-response, Ms Chrysanthou. Yes.*
>
> *You knew it; you said it earlier today. You knew you would get the TPP response, you told us?---Yes. I was reasonably confident. Yes. I was.*
>
> *So the whole thing was just a ruse to generate a story?---Well, if it's a story, it's a story.*
>
> *And you generated it?---Sometimes, we do generate stories, by going to look for them. Yes.*

133. Ms Puccini denied that the FOI application was made merely as a pretext to write a story about it, but she could not recall exactly what Mr Willacy told her about his reason for making the application, and she was otherwise unclear about its purpose: T725.26 – T72.22.

134. Mr Willacy claims he contacted Confidential Source B at about the same time. He was previously a member of 2 CDO REGT and was deployed at the same time as November Platoon in Southern Afghanistan in late 2012. He was plainly a member of Oscar Platoon:

Willacy CC.40, pp352-355, [212]-[230]. He says in one part of his affidavit that the source said to him ([225]):

> *The November Platoon were the worst team. The DEA took their dealings with November Platoon up the chain. [A senior US military source] said to me that 'I only went out with that platoon once and I'm never going out with those mother fuckers ever again.' Heston Russell was in that platoon.*

135. Mr Willacy's handwritten notes reveal that he knew that the senior US military source referred to by the Oscar Platoon commando was Bret Hamilton: CB.42, p297.

136. This quote is very similar to the one which appears at the end of the October Article, which Mr Oakes said came from his Confidential Source 2, from Oscar Platoon, who said: *"I remember talking to [DEA agent] afterwards, and he said, 'We're not going out with those f***ing guys ever again'*: Oakes CC.35, pp218-219, [41]-[59]; CB.77; CB.454.

137. On 27 October 2021, Kristin McLeish informed Ms Puccini that she was minded to accept the editorial complaint late: CB.171, p1372.

138. On 29 October 2021 Puccini wrote to Willacy (CB.173):

> *Is this too provocative a response to a question about Heston?*
>
> *'Liam you'll appreciate that I can't comment about that while there's an abc investigation and other police investigations going on into the matter'*
>
> *Or something like that. Something that might freak Heston out a little*
>
> *Too much?*

138A. Mr Puccini's proposed response was inappropriate. Mr Willacy accepted it reflected that she was frustrated (even 'very frustrated') about the response from Mr Russell and the media to the October Article: T341.22-24; T343.24-25; T344.37-39. He accepted that her proposed response probably was 'too much': T345.4. Ms Puccini accepted the email was an expression of frustration (T44.39-40) and appears to have accepted that it would have been inappropriate to respond to a press enquiry in order to freak Mr Russell out a little (T745.15-16).

138B. Accepting that Ms Puccini was extremely frustrated, particularly about the criticisms by 2GB's Ben Fordham, it is apparent that her reaction was to retaliate. She did so three weeks later by the publication of the November Article accompanied by her tweet demanding an

apology from 2GB. It is apparent from what transpired from the moment of Mr Russell's complaint in October 2021 that the respondents' motivation and priority was to vindicate their own position whilst pointing out that 2GB's criticisms were wrong, in a self-congratulatory "*I told you so*" announcement. They were in no way compelled to publish by a belief that the information was in the public interest.

139. On 1 November 2021, the OSI asked Ms Puccini for the helicopter video and the footage of the interviews with Josh: CB.175.

140. The same day, Mr Willacy sent a text message to Josh offering to show him the helicopter footage. Josh said he was not interested, politely telling Mr Willacy that he wanted to be left alone: Ex.J. This message was not discovered until the morning of the trial.

141. On 3 November 2021, despite her initial view, Ms McLeish required Mr Russell to explain why his complaint was late: CB.177. Mr Russell responded on 5 November 2021: CB.179.

142. On 13 November 2021, Mr Willacy met with the OSI, who asked about the allegation in the October Article that Josh had alleged that November Platoon killed a prisoner: CB.183, pp1401-1402. Mr Willacy's records of this meeting are so different from the note taken by the OSI they should be given no weight: CB.183; CB.42, p304-306. Notably, Mr Willacy also admitted during his conversation with the OSI (twice) that the reason he published the October Article was to "*put it out there*" to see what would come back: T228.18-42. In Court, he disputed that was the only reason it was published but accepted that it would not be in the public interest if the reason he ran the story was to see what came out of it: T351.14-31.

143. It is plain that the OSI were only making these (preliminary) enquiries because they wrongly believed – because of the October Article and Mr Willacy's misrepresentations, including in his email on 13 October 2021 – that Josh had accused November Platoon of the killing. What came out of that meeting was that:

(a) The meeting initially proceeded on the OSI's misapprehension that Josh made an allegation against the November Platoon: CB.358, p1924.

(b) Mr Willacy lied to the OSI when he told it that "*he spent two months checking out "Josh"*: CB.358, p 1924. He was on extended leave after his first video call with Josh and it is clear from his own evidence that he did far less than two months'

work checking him out.

(c) Mr Willacy lied to the OSI when he implied that he had run Josh's allegation past sources in very sensitive positions in the ADF: CB.358, p1924. In truth, he only ran the allegation past Confidential Source A.

(d) Mr Willacy admitted to the OSI that the reason for publishing the October Article was to see what came back in response: CB.358, p1925.

(e) Mr Willacy lied to the OSI in that he said that Josh made his allegation against the Australian Commandos: CB.358, p1925.

(f) By the end of the interview, it is clear that the OSI had been disabused of their previous view that Josh had made his allegation against the November Platoon.

144. Mr Willacy's evidence about his belief in relation to an investigation into November Platoon was as follows:

(a) The November Article was about an investigation into November Platoon: T192.5-6, T254.4-5.

(b) There was an article published by *The Age* called 'Get rid of the prisoners by shooting them' which was about a member of November Platoon, called 'Soldier X', who allegedly had confessed to executing unarmed Afghan prisoners by shooting them whilst undertaking an operation in Southern Afghanistan: Willacy CC.40, [28]-[29].

(c) The IGADF did not find credible evidence of war crimes by 2 CDO REGT and did not refer anything regarding the Commandos: T194.11-15.

(d) In his affidavit, he said that he did not recall the OSI informing him specifically that Mr Russell was the subject of a criminal investigation (Willacy CC.40, [239]), and that his conversations with the OSI led him to believe that 2 CDO REGT, but primarily November Platoon, were being investigated for potential war crimes, and that the OSI considered that Josh's allegation of the execution of a PUC "*was a credible lead and they were following it up*": Willacy CC.40, [242], [256].

(e) He understood that the OSI had investigated Mr Russell for the possible unlawful

killing of prisoners under his command, but this related to Soldier X and was not a separate allegation against Mr Russell. He further understood that Mr Russell "*was not near that incident*": T333.1-19.

(f) He seems to have assumed, because (he says) the OSI mentioned "*going to US*", that they were planning a trip to interview Josh and that he thought they were following up, at least, on the Soldier X issue: T355.39-45.

(g) He did not accept that his meeting with the OSI occurred "*because of a huge misunderstanding*", namely that the OSI thought Josh had made allegations against November Platoon: T356.46 – T357.5.

(h) He said that he "*knew*" the OSI was investigating, but did not elaborate: T368.15.

(i) He sent the email to the OSI which is at CB.18, pp1483-1484 because he wanted to know whether the OSI were investigating the November Platoon over Josh's allegation: T377.40-45.

(j) He disagreed that he was never told by the OSI that November Platoon was under investigation, but did not deny that he was never told by the OSI that Mr Russell was under investigation: T403.36-40.

145. Mr Robertson's evidence about his belief in relation to an investigation into November Platoon was as follows:

(a) In his affidavit he says that, prior to 19 November 2021, he believed the OSI was investigating the November Platoon: CB.38, [28], [61]-[64].

(b) He did not form the view that there was an investigation into Mr Russell and he was not aware of any criminal allegations against Mr Russell: T510.26-32; T544.13-18; T569.3-32.

(c) He understood that the allegations about Soldier X would have been part of the investigation and he knew Soldier X was from November Platoon: T510.34-41.

(d) He thought the OSI was investigating the allegations made by Josh, but that view was informed by the fact that he thought Josh had actually accused November Platoon: T511.1-6.

(e) He thought the response from Defence to Mr Willacy's FOI application confirmed that there was a current criminal investigation into November Platoon: T517.1-2; T541.33-37. But he could not exclude other possibilities: T539.

146. Ms Puccini's evidence about her belief in relation to an investigation into November Platoon was as follows:

(a) She knew the OSI was investigating the Josh allegation and that there was an investigation into November Platoon: T722.25-30.

(b) The OSI's interest in speaking to Josh indicated to her that there was a criminal investigation: T723.26-39.

(c) By 19 November 2021, she thought there was an OSI investigation into November Platoon, and this was based on a conversation with Mr Willacy, an email from him, and a letter from the OSI requesting documents including the Josh interview, and the FOI refusal: T753.

(d) Her understanding was that the Josh allegation was being investigated by the OSI and, separately, there was an investigation into Soldier X: T754.6-12.

(e) She did not understand that November Platoon was being investigated over the Josh incident: T754.14-16.

(f) She thought the FOI response confirmed a criminal investigation into November Platoon: T756.26-27.

147. Given the position of the handwritten notes in the notebook, at some point between 13 November and 17 November 2021, Mr Willacy spoke to Confidential Source B: CB.42, p298-300. This was the same conversation that Mr Willacy had previously deposed was in October: T393. Strangely, a very different account of this conversation was given by Mr Willacy in the "confidential exhibit" to his affidavit. The handwritten notes more closely accord with this version, although neither explains his handwritten note "*initially confused about chopper story*": T264.41-45. Mr Willacy rather dishonestly described the Josh Allegation to his source in the following terms (T398.16-24):

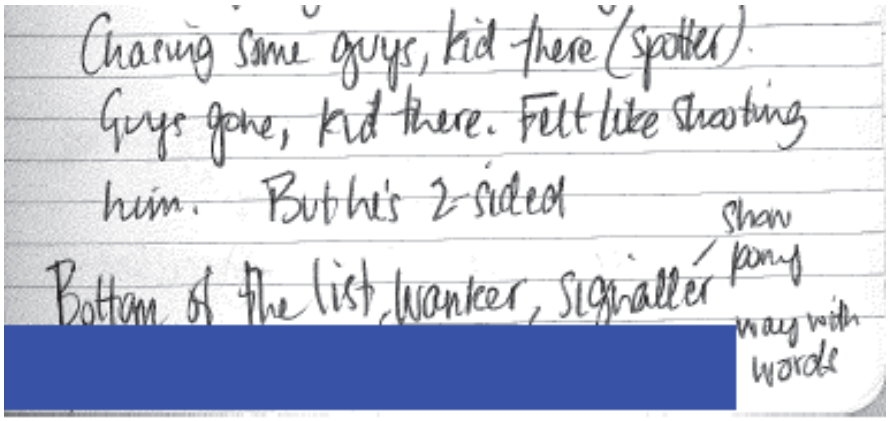
> *You might remember I asked a while ago about the chopper story from the US marine Josh the helicopter crew chief who said that someone on November platoon*

shot a PUC when they had one too many.

148. Mr Willacy accepted this was 'incorrect' and 'false': T399.32-37.

149. As in each other instance where Mr Willacy claims to have relied on a confidential source, no questioning occurred, there was no checking or verification, and no questioning of the source's motives. Mr Willacy could not remember if he had even googled Confidential Source B: T254.39. Mr Willacy even came up with a new confidential source that had not previously been referred to during cross-examination – Confidential Source H, whom he claims told him that November Platoon were in Helmand in August: T423.19 - 424.18.

150. Under cross-examination, Mr Willacy revealed that a name he had redacted under a blue box in his notes (CB.42, p291) was Confidential Source B: T251.1 – T252.11.



151. Mr Willacy said he could not recall why he had made the redaction: T249.34-35. He initially refused to say whose name had been redacted: T251.10-11. Finally he confirmed it was Confidential Source B: T252.11. Mr Willacy talked at length in his affidavit about the credit of Confidential Source B: T252.29-30. He failed to disclose that one of his other trusted sources had used such choice language to describe Confidential Source B. This was plainly potentially relevant to Confidential Source B's credit and integrity as a source, and should have been disclosed.

152. In attempting to explain this, Mr Willacy said he trusted Confidential Source B because he "*had met him many times*": T252.25-26. This, however, was not demonstrably correct. The only evidence is that Mr Willacy had spoken to him once at the end of 2020 and once in October 2021: T253.3-6. His attempt to conceal that the comments on p291 were about Confidential Source B, by unjustifiably redacting Confidential Source B's name, is a further

matter which significantly undermines Mr Willacy's credit. It also serves to underscore the unfairness, in practice and principle, of a publisher seeking to preserve the confidentiality of his or her sources – with the result that the integrity of those sources cannot be tested – while seeking to maintain a defence under s 29A or s 30 of the Act.

153. Obviously prompted by his conversation with Confidential Source B, on 17 November 2021 Mr Willacy emailed Bret Hamilton: CB.185. These emails were not discovered until the week before the trial commenced and only after the first affidavit of Mr Hamilton was served on behalf of Mr Russell. Mr Willacy's approach to Mr Russell gave a quite misleading impression of the purpose of his enquiries:

> *I am getting in touch as I have been speaking to some of the guys from Australia's 2 Commando who were on the 2012 deployment working with DEA on counter-narcotics. These guys are very proud of the work they did and your name came up in conversation with one.*

154. Mr Hamilton replied a few hours later:

> *I'd be happy to speak to you. Especially about the work we did with 2nd Commando. It was the highlight of my professional career.*

155. They spoke on 18 November 2021. According to Mr Willacy's handwritten notes (belatedly produced at 5pm on Friday 21 July 2023), Mr Hamilton explained the joint operations, known as FAST, between the DEA and other forces in Afghanistan in 2011 and 2012. He said that 2 CDO REGT were the "*most professional guys*" who were "*easy to work with*". He had no experiences with "*heavy handedness*". He was an "*old guy*" and there was a "*young guy in charge of November Platoon, Heston Russell*". Mr Hamilton said that the commander of Oscar Platoon was better because "*November didn't understand what we wanted. They moved a little faster than we wanted to.*" Mr Hamilton described Mr Russell as "*very confident, boisterous, stud. Great command presence*" but said that he wanted to work with Oscar Platoon. Mr Hamilton said that he would love to do a positive story.

156. On the first day of the trial, 28 July 2023, a partial transcript of this phone call was produced for the first time: Ex.B. It focused only on the part of the conversation about Mr Russell. Mr Willacy could not explain how this transcript was prepared and why it only recorded a small part of the conversation: T360.22-26.

157. The ABC then miraculously found the audio recording of the call and produced it after court

on the evening of 28 July 2023. The conversation lasted about 30 minutes, and was recorded without Mr Hamilton's knowledge or consent: Ex.B. It is clear that Mr Willacy was deceptively trying to probe Mr Hamilton's views without actually asking him whether the quote which to this day appears in the October Article was correct. Mr Willacy also pretends to have little knowledge of or interest in Mr Russell.

158. Mr Hamilton has sworn two affidavits. His unchallenged evidence is that his experience of the ADF was overwhelmingly positive, and that it was an honour to work alongside the Australian Commandos. They had a reputation of being a professional group of soldiers who conducted themselves admirably. November Platoon were highly professional and motivated, including Mr Russell as their commander. He said that he never witnessed nor was he told of any wrongdoing committed by Mr Russell or any member of November Platoon. He recalls speaking with Mr Willacy and later giving a recorded interview. He told him that he had nothing but positive words for all members of 2 CDO REGT: CC.15; CC.16; Ex.B.

159. These emails and the telephone call, referring to Mr Russell and the Commandos in glowing terms (CB.185 and Ex.B), less than 24 hours before the publication of the November Article, were dishonestly omitted from the November Article, as well as from Mr Willacy's evidence and his initial discovery. As will be seen below, Mr Willacy also dishonestly characterised his communications with Mr Hamilton in the editorial complaint process.

November Article

160. Mr Willacy received a response to his FOI application at about 7am on 19 November 2021. It used standard language and was no different to other responses the ABC had received from Defence before: see CB.215, p1477-1479. It was much longer than the one line repeated by the respondents in their publications and pleadings: CB.215.

161. Mr Willacy emailed Defence's response to Ms Puccini and, incongruously, the ABC's public relations operative Sally Jackson: CB.214, p1476.

162. The evidence given by each of Mr Willacy, Mr Robertson and Ms Puccini about their interpretation of the response to the FOI application was unsatisfactory. It was illogical and strained. The Court should find that each of them was being dishonest about this issue: Willacy T369.31 – T373.43; Robertson T534.29 – 542.22; Puccini T756.6 – T758.35.

162A. Mr Willacy's evidence about how and why he came to make the FOI application was telling (T338.15-23):

> *But at that point why did you issue an FOI?---Because when the October story was in train the Brereton inquiry was also in train, and there was just – it was very difficult, in fact impossible, to get any FOIs processed relating to these allegations out of Afghanistan, because it came back with a blanket refusal because of the Brereton inquiry. And I thought Mr Russell had a good idea, and, why not, we will give it a go, and I doubt anything will come out of it. There's no way they were going to hand over any official onboard communications. That would be probably going to what they call TPP – tactics, procedures, processes, whatever it is. But I thought, "Okay. If you've put it in there, let's give it a whirl.*

He confirmed that he was reasonably confident when he made the application that he would get a "*TPP*" response: T368.23-34.

162B. RS [104] does not account for this evidence, or Mr Willacy's evidence in which he ultimately accepted that he did not know, in reading Defence's response to the application, which of the four categories of documents sought there were documents to produce, which included a category that was not limited to November Platoon: T372.38-373.4.

163. Mr Willacy drafted an article by about 8am and emailed it to Mr Robertson and Ms Puccini for them to carry forward: CB.216, p1480-1482. He says in his affidavit that he did so because it was his day off. Mr Robertson had nothing to do with the October Article and the first he knew of this proposed publication was when he received the 8am email: Robertson CC.38, p274, [65]-[67]; CB.216.

164. The pretext for the urgency was that Mr Willacy was concerned that the response would go onto Defence's FOI Disclosure log and be reported on by another media organisation: Willacy at T403.5-6; Robertson at T515.20-41, T516.25-45; Puccini at T761.23-25. This did not appear in Mr Willacy's affidavit, but when asked about it at trial he said (at T403.5-16):

> *Why did you think it was urgent?---Because as I've – as we've discussed previously, because of the FOI disclosure log issue.*
>
> *I mean, putting to one side what I suggested to you yesterday, that this response would never have gone on to the FOI disclosure log, in your experience with these*

departments, you didn't really think, even if it was supposed to go on the log, that it would go up so quickly?---Well, let's just say that various government agencies are not very consistent with when they put things on the disclosure log.

Right. And - - -?---Sometimes, it's up pretty quickly. Other times it appears a lot later, and so I didn't know. With FOIs, it's always best to get the story done in an expeditious manner.

165. This explanation was quite implausible. If Defence provides documents in response to an FOI application, the statement of reasons and the documents themselves are recorded on the Commonwealth FOI Disclosure Log: Ex.K; T244.44 – T245.2. If no documents are provided, however, and the application is rejected, it will not appear on the disclosure log: T245.4-16. Mr Willacy denied knowing this at the time, even though he gave evidence that he had done approximately one hundred FOI applications including 12-20 to the Department of Defence, had trawled through the disclosure log previously, and had done training sessions about FOI requests: T159.36-39; T245.7-22; T246.3-28; T374.44 – T375.12; see also RS [103].

166. Mr Robertson gave fantastical evidence in the witness box about this issue, including a suggestion that the November Article had to be published quickly (not with haste but with speed: T514.40) because another media organisation might be interested in a story about Mr Willacy's failed FOI application: T514.40-44; T516.25 – T517.7; T530.31-46. He had not mentioned any of this in his affidavit: T515.24-41; T516.15-18. He could not point to any such story having been written before: T517.24-25; T531.1-10.

167. The contrived evidence of the witnesses about the stated urgency of the publication, on a Friday, should not be accepted. It was not in the public interest for the November Article to be published expeditiously, and there was no reason for the respondents to have reasonably believed that it was; they should have taken the time to get the story right. They did not bother to do so because publishing an accurate story in the public interest was not their purpose. Evidence by the journalists to the effect that they believed that the publications were urgent should be rejected as false.

168. In any event, despite it being his day off, Mr Willacy participated via phone calls and emails during the day in the preparation of the article, including by contacting the OSI for comment (CB.218), speaking to Mr Robertson about his headline idea (T407.16-28), approving and amending the radio script, and being sent all versions including the final version prior to

publication: Robertson CC.38, p278, [74]; CB.209; CB.211; CB.212. He even told Mr Robertson and Ms Puccini to "*contact Heston*" so that he would not complain: CC.40.p359, [252]; T318.26-27; T406.19-22; T533.32-33.

169. Unlike the October Article, no producer was allocated to the November Article. This has not been explained by the respondents, other than Ms Puccini's evidence that it was some sort of staffing issue: T762.5-20. That explanation is unusual, given the November Article also involved TV and radio and even a press release. The lack of a producer was reflective of the inappropriate haste with which the November Article was published. It also reflects the fact that the November Article was not actually a proper story at al - it was a contrived, dishonest public relations exercise. The fact that no witness could really explain why the press release was issued by the ABC coincidentally with the November Article is further of the PR purpose of the publication. Ms Puccini was aware of the press release but could not recall why it was published, or being involved in its preparation: T724.5-20. Mr Willacy said that such a press release was "*uncommon*" and that he had not seen that occur very often: T408.33-42. Mr Robertson had nothing to do with the press release: T552.13-22.

170. At about 11.59am, in answer to a query from Mr Robertson, Ms Puccini suggested what questions he should ask Mr Russell (CB.p1446). She said:

> *No just keep it straight*
>
> *Is he aware of an investigation*
>
> *Has he been contacted by investigators*
>
> *To his knowledge has anyone at November platform* [sic] *been contacted.*

171. Mr Willacy assumed that Mr Robertson would ask more questions and gave evidence that the questions suggested by Ms Puccini were insufficient: T409.35-39. Ms Puccini denied that her intention was that Mr Robertson only ask those three questions, and she gave evidence that he could have asked whatever he wanted but that she was pointing out the obvious questions: T763.16-39.

172. Mr Robertson telephoned Mr Russell at about 12.30pm and asked him if he was aware of a criminal investigation into November Platoon. Mr Russell said he was not, and nor were he or any members of his former platoon being contacted by investigators. Mr Russell also added that he was *"looking forward to the ABC conducting their internal review of their*

November Platoon/ marine heard a 'pop' story and an apology being issued.". Mr Robertson recorded that conversation without Russell's knowledge or consent: Russell CC.2, p32, [30]-[33]; T70.7; Robertson CC.38, p283-284, [98].

172A. Mr Robertson's conduct in doing so was in violation of:

a. The ABC Code (Ex.W.pp 1-21) which states, under the heading 'Fair and honest dealing' (on p 8), that "*Secret recording…must not be used by the ABC…to obtain or seek information…except where: (a) justified in the public interest and the material cannot reasonably be obtained by any other means; or (b) consent is obtained from the subject or identities are effectively obscured; or (c) the deception is integral to an artistic work."*

b. The ABC's policy on 'Fair and honest dealing' (CB.4) which states (noting that the heading 'Secret recording and other types of deception' suggests that a secret recording is a type of deception):

Secret recording and other types of deception

5.8 Secret recordings, misrepresentation or other types of deception must not be used by the ABC or its co-production partners to obtain or seek information, audio, pictures or an agreement to participate except where:

a justified in the public interest and the material cannot reasonably be obtained by any other means; or

b consent is obtained from the subject or identities are effectively obscured; or

c the deception is integral to an artistic work.

In all cases, the potential for harm must be taken into consideration.

c. The ABC's guidance note titled "*Secret recording devices in news, current affairs and other factual content*" (Ex.W. pp61-64) which relevantly states:

> *For the purposes of this guidance note, a secret recording device is any device for the recording of vision, audio or other material involving identifiable individuals, which has been deliberately concealed from those individuals by persons responsible for the recording.*
>
> *Under normal circumstances, the ABC does not broadcast or publish content that has been obtained through the use of secret recording devices. This is in accord with the principles of fair and honest dealing. The ABC, in*

gathering material for broadcast or publication, goes about its business honestly and openly. Those participating in ABC content are generally entitled to be aware of what we are doing and why we are doing it, and to make informed decisions about their participation.

173. Prior to that call, Mr Robertson says that he was unaware of the editorial complaint, but he was aware of Mr Russell's concerns about the October Article, having read about that in the press: Robertson CC.38, p284, [99]. Despite that, he did not ask him anything about the complaint or his concerns about the allegations in the October Article, and he certainly did not inform him of the allegations that he intended to make in the new article. Before his telephone call with Mr Russell, the article was all but complete, so there was nothing stopping him from fairly putting the allegations to Mr Russell in that phone call.

173A. Mr Robertson did not make a reasonable attempt in the circumstances to give Mr Russell a fair opportunity to respond and to obtain and publish his response. That was in breach of:

a. The ABC Code (Ex.W, p8, paragraph 5.3); and

b. The ABC editorial policy on 'Impartiality' (CB.8) which relevantly states that one of the 'four hallmarks of impartiality' is 'fair treatment' and gives as an example of 'unfair treatment' "*Not providing stakeholders opportunities to comment on issues that directly affect them*" and "*Not giving interviewees a reasonable chance to answer questions and explain their point of view*";

c. The ABC guidance note titled 'Fair opportunity to respond' (Ex.W, pp50-56) – see for example:

- Under the heading 'Why the requirement to provide a fair opportunity to respond?' (Ex.W, p51):

  One of the recognised standards of journalism is the provision of an opportunity to respond to allegations. It is fundamental to fairness…

  Seeking a response can help to achieve accuracy by providing an opportunity for errors to be identified and misunderstandings to be clarified.

  Obtaining a response can also contribute to the quality of a piece of journalism by enriching the detail, sharpening the point or opening fresh angles of

enquiry.

- Under the heading 'How much information should be given to the respondent' (Ex.W, p51):

  The opportunity is more likely to be regarded as fair if you err on the side of clarity and precision rather than be vague and broad about what is being alleged and the basis for it.

  Provide sufficient information to allow the person or organisation to understand the allegation and its basis. It is not usually enough to tell the person that you wish to talk to them about some general topic. Even if you believe the person is familiar with the allegations already, you should not assume that and should set out the relevant information.

d. The MEAA Code (CB.459), which relevantly requires journalists to: "*Do your utmost to give a fair opportunity for reply*".

173B. Mr Robertson's evidence about this issue was unsatisfactory. It was not sufficient for him to have given Mr Russell a 'cue' as to what he was proposing to write about (T546.33-37). Mr Russell should not have been left to guess that Mr Robertson intended state as fact that an criminal investigation was underway and further to resurrect the allegations from the October Article (notwithstanding Mr Russell's complaints about that story) and link them to his question about a criminal investigation. Mr Robertson's evidence quoted at RS [180(d)] is particularly unfortunate and reflects a total failure on the part of Mr Robertson to comprehend his obligations to give a fair opportunity to respond under the guidelines and policies referred to in the preceding paragraph.

174. Mr Robertson included Mr Russell's quote in the draft article, but despite initially approving it, twenty minutes later Ms Puccini queried the inclusion of the quote because Mr Russell "*had a Huge platform on 2gb. I don't think that we need to amplify it.*" Mr Robertson removed it: Robertson CC.38, pp284-285, [100]-[105]. When asked by Mr Robertson if he had anything else he wanted to say, Mr Russell had given a one sentence response – "*Just that I'm looking forward to the ABC conducting their internal review of their November Platoon / marine heard a 'pop' story and an apology being issued*". It was improper and unjustifiable for the respondents not to have included that full response in the November

Article by removing reference to Mr Russell's complaint and the respondents' internal review in relation to the October Article; it would have been relevant to the ordinary reasonable person's reaction to the November Article, including the extent to which they regarded it as credible, to know that the underlying story was the subject of a complaint.

174A. It was also in breach of the ABC guidance note titled 'Fair opportunity to respond' (Ex.W, pp50-56) – see for example, under the heading 'Conveying the response to the audience' (p 53):

> *Once obtained, a response should be treated fairly and accurately.*
>
> ...
>
> *If the person provides a response, it is usually necessary for that response to be in the initial story and any other story reporting the same matters.*
>
> ...
>
> *A response needs to be included in the story in appropriate detail and presented reasonably. Simply stating that the person 'denies the allegations' may not be sufficient if the person provided a more detailed response.*

174B. Also, in light of Mr Robertson's awareness of Mr Russell's complaint about the October Article, he was not entitled to simply rely on Mr Willacy's previous work - that it was 'properly published' (as suggested at RS [114], [151(c), and [157]) without properly scrutinising it. The November Article did not attribute Mr Willacy as an author and as such, Mr Robertson was publicly taking responsibility for the content and was therefore obliged to check it – or at least present it in qualified language. Further, the submission also ignores Mr Robertson's concession in cross-examination at T506.44-507.1:

> *And you accept that when you're given information as an investigative journalist as part of the ABC Investigations unit, that you need to check it, no matter who gives it to you? --- I agree.*
>
> *Otherwise, you wouldn't be any kind of investigative journalist, would you? --- True.*

175. At about lunchtime, Ms Puccini referred the article up the editorial chain to John Lyons: CB.202, pp1446-1447; T775.1-6. She confirmed that he became the decision maker as to

whether to publish the article from that point: T697.26-30; T775.5-6. The emails and evidence about his state of mind in relation to approval of the November Article have been limited under s 136 of the *Evidence Act 1995* as only evidence of what was said, and not the underlying truth of his state of mind: T463.32-45. The ABC has thus failed to relevantly prove the state of mind of the relevant decision maker on the question of publication. The respondents have failed to address this significant gap in their evidence.

176. Daniel Harrison, an experienced journalist and digital producer for ABC stories, reviewed the draft article and the related October Article and drafted the Key Points to capture the "*main gist*" of the story: [17]. The first bullet point came from his understanding of the October Article: Harrison CC.32, pp194-195, [21]. He then included links to the October Article because it seemed to him to be "*central to the November Article*": [35]. He arranged for mobile alerts to be sent in relation to the article and drafted teasers: CB.200.

177. Mr Harrison then emailed the draft to Mr Robertson and Ms Puccini with his changes, copying Mr Willacy: CB.208. Mr Robertson read the Key Points and did not alter them, accepting that the "*distinction between Josh's claims and the November platoon in the October Article may have been lost on [him] at the time*": Robertson CC.38, p285, [108].

178. Mr Willacy says he was out to lunch at this time, drinking at a hotel: T367.31-32; T404.30; T404.42-43. Ms Puccini was at an event judging Walkley Award entries and says she did not check it closely and made an error: T767.13-15. The mobile alerts and teasers put November Platoon front and centre as the persons who were the subject of the investigation. Those alerts literally appeared in yellow and blue highlight and were as follows:

Teaser titles:
Defence confirms active criminal investigation into conduct of Australian Commando platoon in Afghanistan
Australian Commando platoon's conduct in Afghanistan under criminal investigation, Defence confirms
Australian platoon accused of unlawfully killing Afghan prisoner the subject of criminal investigation, Defence confirms
Platoon that was accused of killing Afghan prisoner to save space on aircraft now under criminal investigation, Defence confirms

Mobile alert options:
The Defence Department has confirmed a platoon accused of unlawfully killing an Afghan prisoner is now the subject of a criminal investigation
An Australian platoon accused of unlawfully killing an Afghan prisoner is now the subject of a criminal investigation, the Defence Department says

179. The November Article was published on the ABC website at about 3:30pm and it linked to the October Article in three separate places. Mr Robertson then sent a text with the link to the November Article to Mr Willacy stating "*the Eagle has landed*": Ex.O.

180. Mr Willacy and Mr Robertson both immediately tweeted the November Article: CB.193, CB.197. So did Ms Puccini, although her tweet was not discovered by the ABC: Ex.R. It was also tweeted by many other ABC employees: CB.191; CB.192.

181. The TV Broadcast and the Radio Broadcast were also published around the country and made available for later viewing and listening subsequent to broadcast: CA.3-6; Ex.X.

182. The same day, the ABC issued an accompanying press release (CB.225). Mr Willacy could not recall this sort of press statement accompanying an article before, and said it was "*uncommon*": T40.33-42. Ms Puccini could not explain why the press release was published (T724.5-6; T724.20), could not recall whether she was involved in it (T724.8-10; T724.28), and eventually (after some equivocation from T724.22 – T725.5 in which she initially refused to accept that the press release was unusual) accepted that she could not think of any other example where such a press release had accompanied an article for ABC Investigations (T725.7-8). The Court should find that Ms Puccini gave dishonest evidence about this issue, that the press release was published in order to seek to vindicate Mr Willacy's reporting in the October Article as a public response to the criticism from Mr Russell and from other media outlets, and that it had the effect of increasing the harm to Mr Russell's reputation.

183. Mr Willacy has denied being a publisher of the November Article since September 2022 and only admitted it for the first time on Friday, 14 July 2023. Hiding his involvement at the time of publication, during the editorial complaints process, and in successive iterations of his pleadings in this Court, was dishonest. Mr Willacy's work in substantially drafting the November Article was misrepresented as Mr Robertson's work in breach of the ABC Code (Ex.W, see paragraph 5.6 on p.9: "*Do not misrepresent another's work as your own*") and the ABC's editorial policy on 'Fair and honest dealing' (see paragraph 5.6 at CB.4, p 7). It was improper, unjustified and lacking in bona fides. The discovery process was always going to reveal his role as a publisher if the proceedings continued. This strongly suggests that the pleadings were prepared and pursued to raise false issues, increase time and costs, and thereby impose pressure on Mr Russell, in the hope that he would settle.

184. It was clear that the respondents were alleging, and intended to allege, that November Platoon was the subject of the Josh allegation and was under investigation for that killing:

(a) Mr Willacy denied this, and even denied that with hindsight the November Article

was structured in such a way as to point the finger at November Platoon, but his denials were disingenuous and false: T286.18 – T287.19; T306.12-13.

(b) Mr Robertson admitted that he intended to allege it was November Platoon, which was to his credit: T495.39-46; T496.1-5. However, he then repeatedly claimed that he had made an error, having "*misread*" the October Article and had a "*misguided understanding at the time*": T631.14.21. This change of position was telling and made it clear that Mr Robertson was doing no more than toeing the editorial line subsequently adopted by the respondents.

(c) Ms Puccini repeatedly denied that she intended to suggest that November Platoon was under investigation for the Josh Allegation, even though she accepted that she intended to convey the criminal investigation related to November Platoon: T723.7-30; T734.1 – T735.17. This evidence should not be accepted. It was contradicted by her tweet at the time which stated "*FOI response confirms an incident we reported is under criminal investigation*": Ex.U. Ms Puccini gave confused evidence about this tweet, claiming again that she did not intend to suggest the November Platoon was being investigated for the Josh Allegation. She could not explain the tweet, other than by asserting that it was an 'error': T768.18 – T769.23.

Russell's engagement with the ABC and amendments to November Article

185. Mr Russell immediately responded to the November Article. His first step was to email ABC's David Anderson (copying others) with an offer to participate in a live interview with the journalists involved in the story. CB.194; Russell C.1, p10, [78]. He never received a response to that offer, although it was discussed and dismissed internally and came to the attention of each of Mr Willacy, Mr Robertson and Ms Puccini: CB.241.

186. Mr Russell then noticed the allegation that the murder had occurred in June-July 2012 and gave interviews to other media and made publications on social media pointing out that the allegations were false, including because of the date: Russell CC.1, p11, [86]. On 23 November 2021, he published a YouTube video and a formal statement which pointed out that no missions were conducted by November Platoon until August 2012 and that they were not in Helmand until September 2012: CB.236; CB.240.

187. The ABC corresponded internally about the flaw in their reporting as to the timing of the murder: Puccini CC.36, p248. Ms Puccini had the following conversation with Mr Willacy:

Me:	*Does this impact our story? Why is he saying he wasn't in Helmand?*
Mr Willacy:	*Our guy doesn't remember the precise date; he said he thought it was around mid 2012.*
Me:	*Can't we check the rotation dates?*
Mr Willacy:	*That information is classified so it's not straightforward.*
Me:	*The FOI response has a third bullet that doesn't mention a timeframe, could it be that they're referring to that bullet in their response?*
Mr Willacy:	*I don't think it affects the story at all, but I think we should maybe update the description of the FOI to reflect the nature of the request.*
Me:	*Ok, I agree. I'll get Dan (Harrison) to do it.*

188. Mr Willacy admitted that this conversation occurred: T426.19 – T430.17.

189. This evidence puts it beyond doubt that Ms Puccini at all times intended to accuse November Platoon of the killing described by Josh in the November Article. She had no explanation in the witness box in response to the assertion that she would not have had this conversation had that not been the case: T775.1-26. Her denial was knowingly false.

190. On 23 November 2021, the ABC amended the November Article (CB.241) as follows:

> *ABC Investigations lodged a Freedom of Information request seeking audio copies of mission communications in Afghanistan and mission summary reporting. <u>It also sought</u> any complaints or disciplinary action taken against members of November platoon ~~covering June and July 2012~~ across 2012, when the alleged killing took place.*

The following editor's note was added to the end of the article:

> *An earlier version of this story stated the ABC sought complaints or disciplinary action taken against members of November platoon in June and July 2012, when an alleged killing took place. The story has been amended to better reflect the ABC's FOI application.*

191. The amendment and note were disingenuous. The first two bullet points of the FOI application sought communications from June and July 2012. The third bullet point did not mention November Platoon at all, and was a bold ambit claim for all communications between the ADF and DEA from 1 January to 31 August 2012, unlimited by topic. The

fourth bullet point sought all complaints or disciplinary action against November Platoon for 2012. Mr Willacy knew that Josh had repeatedly said that the incident occurred in June or July 2012, and that it was at the beginning of his deployment, which started in May, and once said it was perhaps late July or early August: T183.11-15; T247.16-22; T423.14-17.

192. The evidence of each of the witnesses about this issue is found at T427.41 – T428.17 (Willacy); T612.7 – T616.33, T617.5 – T619.4 (Robertson); and T775.29 – T777.21 (Puccini). Each of them gave unsatisfactory responses to justify the alteration to the article and the clarification.

193. Mr Robertson tried to defend his position on Twitter, claiming that the timing was only as specific as "mid-2012": CB.244. This ignored the dates in the FOI application, which Mr Willacy had based on what he had been told by Josh. Mr Robertson knew nothing of what Josh had said because he took no steps to look at any of that material before putting his name on Mr Willacy's November Article.

194. In cross-examination, Mr Robertson again tried to justify his position that mid-2012 was correct, and that it accorded with his belief that November Platoon was being investigated for the Soldier X allegation (T581.14 – T582.7):

> But then you say:
>
> *But now defence has flagged there's a current criminal investigation relating to November platoon missions in mid-2012.*
>
> ?---Yes.
>
> Right. Now, first of all, I want to suggest to you that I was wrong to your knowledge at the time to say that it was your understanding that there was a current criminal investigation relating to November platoon missions in mid-2012?---No. No, I don't agree.
>
> You had, even after everything you've told us about the information you had, no idea if November platoon was being investigated on your version in mid-2012 – for conduct in mid-2012?---No. No, I had – I had – I knew they were.
>
> From mid-2012?---Mmm.
>
> Why do you think it was mid-2012, given all the information you've told his Honour that you had?---So mid-2012 – if mid-2012 can include October 2012, yes.
>
> On – are you saying you consider October to be middle of the year?---Potentially.
>
> Is that a true answer?---Yes.
>
> The 10th month of the year out of 12 you consider as a matter of plain English is mid-2012?---Yes.
>
> You're just lying, aren't you, Mr Robertson?---No, I'm not.

195. The following day, on 24 November 2021, *The Daily Telegraph* recorded an interview with Defence "*rejecting its claim there was an active criminal investigation into a commando platoon [the ABC] accused of a war crime in Afghanistan in 2012,*" and stating further that its response to the FOI application was not a confirmation and "*Defence has not confirmed there is a current criminal investigation involving November Platoon in Afghanistan in 2012….Defence is not currently conducting an investigation into this matter.*": CB.245. The Minister for Defence gave a radio interview to the same effect: Russell CC.1, p12, [89].

196. The headline was not altered despite those statements from Defence. Mr Willacy accepted that it should have been: T431.16-36. Both Mr Robertson and Ms Puccini, however, disingenuously refused to concede this: Robertson at T539.26-28, T577.7-21, T621.1 – T622.40; Puccini at T77736 – T778.44. That the headline was not promptly fixed was in breach of the ABC Code and the ABC's editorial policy on 'Corrections & Clarifications' (Ex.W, pp27-33). The evidence of Mr Robertson and Ms Puccini on this issue is another example of their discredible conduct in the witness box.

197. At around this time, Mr Robertson started actively to pursue the Only Fans story after a tip from Mr Willacy: Willacy T429.1-27; CB.246; Puccini T779.5-6 (c.f. re-examination, she said he started work on it "*either the day before or two days before the publication of the November Article*": T786.5-17; in her affidavit CC.37 at [4]-[5] she said he received the tip-off on 10 September 2021 and started working on it "*shortly afterwards*" being 2 months before the November Article). There are no documents evidencing any work on the Only Fans story by Mr Robertson before 23 November 2021: CC.39; T623.8 – T626.17. Again the evidence of Mr Robertson and Ms Puccini should not be accepted.

Media Watch and response to and outcome of editorial complaints

198. On 3 December 2021, *Media Watch* raised queries with the ABC about the November Article. The response was replete with falsehoods and plainly takes stances contrary to how the respondents now put their position (CB.267):

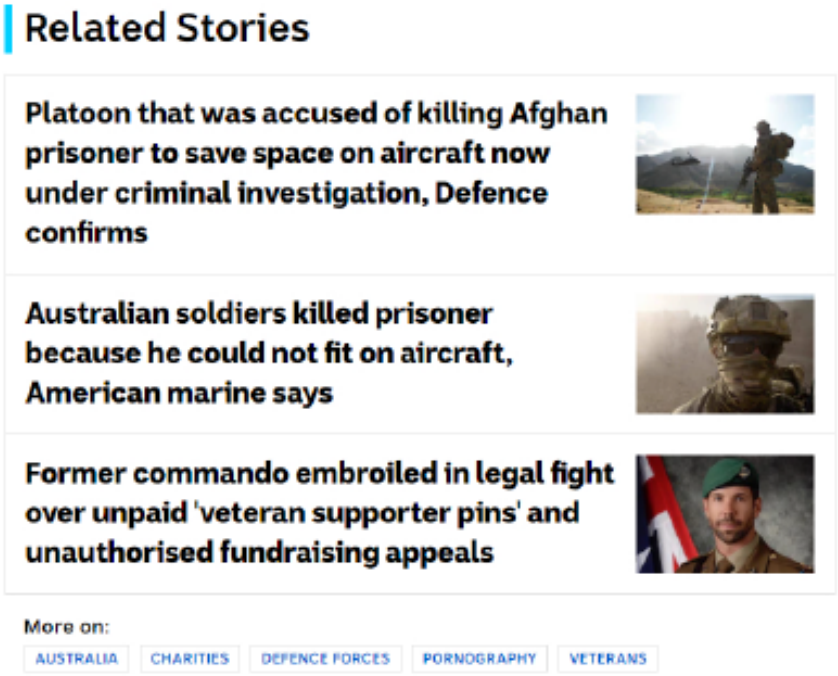
(a) "*The "Josh" story was based on credible information from interviews with multiple confidential sources in Australia and the US*". This was false, as Josh's allegations were never corroborated.

(b) "*The ABC spent two months checking his detailed account, which he stands by"*.

This was false, as they only checked his identity and took no real steps to check the substance of his account. There is no evidence that they contacted him in November or December 2021, and so he could hardly have "*stood by*" his account at that time.

(c) Asked whether there was enough evidence to publish "*the alleged execution of a prisoner by November platoon*", the ABC said that it *"accurately reported credible and highly significant allegations based on information from interviews with multiple confidential sources in Australia and the US*". In saying this, they failed to admit that Josh had never implicated the Commandos, let alone November Platoon.

199. On 4 December 2021, the Only Fans article was published (**December Article**): CB.269. It relevantly repeated the allegations in the November Article at the end (pp1629-1630) and included the following links to the October Article and the November Article (p1630):



200. On 6 December 2021, *Media Watch* broadcast an episode criticising Mr Willacy's reporting of the Josh allegation and stating that the ABC "*hit back*" with the December Article after Mr Russell had pointed out the flaws in the reporting: CB.275; CB.276.

201. On 7 December 2021, Mr Willacy and Ms Puccini submitted their response to the First Complaint. It contained numerous statements which they must have known were false, including the following (Ex.R):

(a) "*The claims, from a decorated US Marine helicopter crew chief Josh…were thoroughly vetted over a more than two-month period…*"

(b) "*For this story I checked with Australian sources regarding 2nd Commando Regiment (of which November Platoon was part) and also confirmed that November Platoon personnel were under investigation over the killing of prisoners.*"

(c) "*Dan Oakes also spoke to members of 2 Commando who served on that tour (or rotation) of Afghanistan and who were involved in joint operations with the US Drug Enforcement Administration (DEA). These soldiers confirmed that the DEA and 2 Commando members had serious concerns about the conduct of November Platoon on operations.*"

(d) "*It must also be noted that in the story the ABC never accused November Platoon nor any of its members of being involved in the alleged execution.*"

(e) "*I have spoken to one of the senior DEA officers who worked with 2 Commando on that rotation. He confirmed that the DEA leadership had a 'very uneasy feeling' about working with November Platoon, that Russell was 'boisterous' and that after one or two missions with November Platoon the DEA approached the leadership of the Australian Special Operations Task Group about working only with Oscar Platoon. The DEA officer told me the DEA's concerns were "100% accepted".*"

(f) "*After the talk and a book signing, Russell approached me with his female companion and began haranguing me about this story, directly questioning the right and role of the media to investigate and report on issues such as alleged war crimes.*"

(g) "*This reporting has also sparked war crimes investigations by the IGADF, the AFP and the Office of Special Investigator. Not a single story we have published has proved to be incorrect or inaccurate. It has led to the discovery of crimes and alleged perpetrators.*"

202. On 16 December 2021, Mr Russell submitted an editorial complaint about the November Article (**Second Complaint**): CB.279, p1673-1675.

203. On 19 January 2022, the ABC added the following editor's note to the October Article (CD.1.p6, [46]):

> *The story was further amended on January 19, 2022 to reflect Heston Russell's denial of the specific allegation made by a US marine who said Australian commandos shot and killed an Afghan prisoner.*

204. On 21 January 2022, Ms McLeish emailed Ms Puccini and Mr Willacy with a number of questions about the October Article: CB.297, p1748-1749.

205. On 25 January 2022, Ms Puccini replied to Ms McLeish: CB.297, p1746-1747. She claimed that:

(a) "*the team made reasonable efforts to ascertain whether the allegation was credible, sufficient to justify its publication*", which for the reasons given elsewhere in these submissions, was false;

(b) Mr Oakes had made repeated efforts over a long period of time to "*discuss these events … with members of both Oscar and November platoons*", which again was false, given that he had made no attempt to contact anyone from November Platoon about the Josh allegation;

(c) the December Article was "*an appropriate time and place to include later developments*" and Mr Russell's denial of involvement;

(d) Josh contacted two members "*on the operation*" who "*declined to comment on mental health grounds*", however "*Josh told Willacy that they confirmed his version of events*" and that it was "*not possible to contact these people independently*" because of "*their PTSD and their protected identities*", whereas Josh had actually said no such thing;

(e) "*we did not say the alleged shooting was by his platoon or that he was in command, and we did not specify a date*", which, plainly, was false.

206. From 7 February 2022 to 10 February 2022, Mr Willacy and Ms Puccini engaged in an aggressive back-and-forth with staff at *Media Watch* over its program:

(a) On 7 February 2022, Ms Puccini emailed Paul Barry and Timothy Latham complaining that Mr Barry had falsely alleged that the October Article named

November Platoon as being responsible for the murder: CB. p1729.

(b) On 9 February 2022 at 11:50am, Mr Latham replied that he was "*somewhat flummoxed*" by the complaint, because the October Article was about the November Platoon and there could be no other conclusion: CB.308, p1783.

(c) On 9 February 2022 at 2:53pm, Mr Willacy retorted (CB. p1724):

> *You were wrong, and you have offered absolutely nothing to validate the key premise of your segment. The segment itself undermined some of the hardest, most forensic reporting on a highly sensitive and shadowy subject that I have done in my career*.

Mr Willacy threatened escalating his complaint if Mr Latham did not take his complaint seriously.

(d) On 9 February 2022 at 5:51pm, Mr Latham said he took his complaint seriously, but did not agree with it (CB. p1723).

(e) On 10 February 2022 at 8:41am, Mr Willacy and Ms Puccini exchanged drafts of another complaint: CB. p1722. The draft complaint included a statement by Mr Willacy that "*the allegation made by 'Josh' is considered so credible that it is now the subject of a priority investigation by Australia's first dedicated war crimes investigation unit*".

(f) On 10 February 2022 at 1:12pm, Ms Puccini emailed a complaint to Gavin Fang, copying in Mr Willacy and the staff at *Media Watch*: CB. p1726). The complaint railed against *Media Watch* for asserting that the October Article had accused the November Platoon of executing the prisoner. The email repeated the falsehood that Josh's allegation was the subject of investigation by the OSI.

207. On 16 February 2022, the ABC sent an email to Mr 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: CB.279, pp1671–1672; CD.1.p6, [47].

208. On 2 March 2022, Ms McLeish raised queries about whether November Platoon was the target of the allegation made by Josh, noting that a number of persons who read the October Article had come to that conclusion, including *Media Watch* and the digital editor Dan Harrison (CB.296). In response, Mr Willacy (CB.297, p1745):

(a) confirmed that November Platoon was not the subject of Josh's allegation, noting that "*He only mentioned the Commandos as a whole. He never mentioned the words November Platoon*";

(b) said "*Whatever conclusions others have drawn is for them. And Media Watch was wrong. Plain wrong*";

(c) lied when asked whether, apart from Oscar and November Platoons, any other commando platoons participated in DEA operations in Afghanistan in 2012;

(d) dissembled when asked why his FOI application had only sought information about November Platoon and not any other platoon, and falsely asserted that he had been told by OSI that the "*investigation into November Platoon is making headway*"; and

(e) raised a complaint about Ms McLeish linking the October Article and the November Article and asked her to clarify the relevance of her questions about the November Article.

209. Ms McLeish said that she was asking so that she could be satisfied that November Platoon was not the target of the allegation made by Josh: CB.296, p1742. She elaborated:

> *News has explained that Josh did not know which commando regiment he was supporting on the night of the alleged incident, and that the story didn't state or imply that his allegation related to November platoon. However and as you know, others have drawn precisely that conclusion from the 2020 story – including Heston Russell, other media organisations, Media Watch and the digital producer that worked on the Defence FOI story. I needed to be clear about the circumstances in which we subsequently reported that November platoon was the subject of Josh's allegation because this does not align with the comments News has provided about the 2020 story. This inconsistency in the description of Josh's allegation is problematic and will need to be addressed in our assessment.*

210. In response, Mr Robertson and Ms Puccini proposed that the first Key Point be changed to make clear that Josh alleged that Australian Commandos, not November Platoon, killed an Afghan prisoner after being told he would not fit on an aircraft: CB.295, p1740-41.

211. On 4 March 2022, Ms McLeish sent Ms Puccini, Mr Willacy and others her preliminary findings: CB.298, p1751. Ms McLeish found that the October Article had not breached any standards, but needed a clarification to prevent readers from misinterpreting the article as

accusing November Platoon of murder. Ms McLeish also found that the November Article was in breach of standard 2.1 for errors in characterising Josh's allegation. Standard 2.1 required the ABC to "*make reasonable efforts to ensure that material facts are accurate and presented in context*": Ex.W, p6; CB.3.

212. Later on 4 March 2022, Mr Willacy queried the utility of the proposed clarification for the October Article, stating that "*[r]eaders can misinterpret any story we publish*" and "*[i]t can't be any clearer*" and "*Of course, Media Watch fucked it up…*": CB.298, p1751. He further complained that Media Watch did nothing for a year, and not until "*Ben Fraudham* [sic] *kept bleating on*": CB.299, p1753.

213. As a result of those exchanges, on 10 March 2022 Ms Puccini wrote to Ms McLeish complaining about the two articles being dealt with together and the proposed clarification, because the "*ABC cannot be held responsible for any misinterpretation by readers*" – an interesting perspective, to say the least: CB.301. Mr Lyons then wrote to Ms Puccini and Mr Willacy about the supposed unfairness, given "*it appears that only one person – Heston Russell – 'misinterpreted'*" the story, and querying whether they could challenge the findings: CB.303.

214. On 11 March 2022, the ABC added the following correction to the November Article and Linked Article:

> *A key point for this story initially stated that a US Marines helicopter crew chief alleged that November platoon killed an Afghan prisoner after being told he would not fit on an aircraft. It was amended on March 11, 2022 to reflect that the marine's allegation did not identify a particular platoon.*

215. On 17 March 2022, Mark Maley responded to Ms McLeish's preliminary findings: CB.310, p1788. He took issue with the October Article and November Article being dealt with in the findings, because "*[e]ach complaint deals with separate stories done by different reporters at different times and has different outcomes*". According to Mr Maley, there was a risk that "*in public perceptions the two stories will be conflated unnecessarily, causing undue reputational damage to Mark Willacy, as well as Clare and Dan, whose bylines appear on the first story but had nothing to do with second story*". He did not disclose to Ms McLeish that Mr Willacy had also written the second story.

216. On 18 March 2022, the ABC added the following clarification to the October Article:

> *On October 21, 2020, the ABC published this story comprising two elements: firstly, a US Marine Corps helicopter crew chief's allegation that Australian soldiers of the 2nd Commando Regiment shot and killed a bound Afghan prisoner after being told he would not fit on the US aircraft coming to pick him up; and secondly, accounts from members of the 2nd Commando Regiment's Oscar Platoon that the 2nd Commando Regiment's November Platoon had a bad reputation among the Americans based on their behaviour in the field.*
>
> *The US Marine Corps helicopter crew chief did not claim that the commandos he alleged killed a prisoner were from November Platoon and nor did the ABC's story.*

217. Negotiations then ensued about the wording of the press release, in which Ms Puccini and Mr Willacy were heavily involved. On 21 March 2021, Ms Jackson sent proposed wording: CB.318, p1811. Ms Puccini suggested that the release record that the "*error occurred during the production process of the story…*": CB.314. She also argued that the wording should be changed because "*Kristin agreed*" that "*the only person who misinterpreted it was Heston Russell*": CB.317.

218. Mr Robertson and Mr Willacy then also intervened on the wording, despite Mr Willacy claiming that he did not "*give two fucks any more*": CB.318.

219. Even so, later that day Mr Willacy made amendments to the draft statement, emphasising that his story had been cleared and that a "*separate story*" had been found in breach. Tellingly, he excluded Mr Robertson from the email chain: CB.319. These amendments by Mr Willacy can only be described as dishonest, given what can now be seen as his intimate involvement in the creation of the November Article.

220. On 29 March 2022, the ABC responded to the First Complaint by finding no breach of the Editorial Policies for the October Article, but indicating that a clarification had been added on 18 March 2022.

221. On 29 March 2022, the ABC revised its 16 February 2022 decision in relation to the Second Complaint, with respect to a 'Key Point' in the November Article. In an email sent to Mr Russell, the ABC upheld one aspect of the complaint as follows:

> *Consistent with the findings in relation to the October 2020 story, Audience and Consumer Affairs find that reasonable efforts were not made to ensure that the US marine's allegation was correctly reported in the November 2021 story. This was in breach of standard 2.1 and that aspect of the complaint is upheld.*

ABC News apologise for this error and the story has been corrected. Further, the clarification which has been added to the 2020 story will help to ensure that any future developments in this story are reported with accuracy.

222. On 30 March 2022, the ABC released a public statement about the Second Complaint: CB.329. It included the following:

> *The ABC's Audience & Consumer Affairs unit has responded to a complaint received from Heston Russell concerning a 21 October 2020 story by Mark Willacy, 'US marine says Australian special forces soldiers made 'deliberate decision to break the rules of war''.*
>
> *No breach of the ABC's editorial standards was found and the story remains online unchanged.*
>
> *A&CA found that a clarification note would make one aspect of the story clearer and that has been added at the bottom of the story.*
>
> *...*
>
> *In light of the conclusions of A&CA's investigation of the 2020 story, the unit revisited its finding in relation to a complaint about a separate story published on 19 November 2021, 'Defence confirms criminal investigation into conduct of Australian commando platoon in Afghanistan'.*
>
> *An aspect of this complaint was subsequently upheld for inaccuracy. ABC News has explained that an error in the story and an alternate headline arose in the production phase for the story. These have been amended and a correction has been published at the bottom of the story.*

223. Later on 30 March 2022, Mr Willacy tweeted about the ABC's determination on the October Article: CB.341.

224. This tweet was disingenuous, given Mr Willacy had been intimately involved in the publication of the November Article. The ABC's investigation into the complaint was carried out dishonestly in that Mr Willacy and Ms Puccini misled Ms McLeish, directly and by omission, and then Ms McLeish was pressured into the finding by Ms Puccini, Mr Willacy and others who were thereafter given license to draft the press release that was issued.

225. Mr Robertson also tweeted the editorial outcome, claiming that his report "*stands*": CB.340.

Commencement of proceedings

226. In June 2022, Mr Willacy contacted Bret Hamilton for an interview: CB.376; Hamilton, CC.15, p104, [13].

227. On 26 July 2022, Mr Russell served a concerns notice: CB.359. The same day, after receipt of the concerns notice, Mr Willacy emailed the OSI and sought a copy of their 13 November 2021 notes: CB.357; CB.359.

228. On 24 August 2022, the ABC, Mr Willacy and Mr Robertson responded to the concerns notice: CB.362.

229. On 29 August 2022, Mr Hamilton engaged in a recorded interview with Mr Willacy: CB.360; CB.361.

230. Between 6 and 8 September 2022, Mr Willacy sought an interview from Mr Russell about a story he said he had been working on for 8 months concerning his rotation in Afghanistan in 2012: CB.364; CB.366; CB.369; CB.370. The timing of these requests was curious to say the least.

231. On 8 September 2022, Mr Russell commenced these proceedings.

232. On 21 and 22 September 2022, the ABC, Mr Robertson and Mr Willacy published articles and a two-part *7:30 Report* making allegations against the Commandos, including helicopter footage: CB.372-376. Relevantly those articles stated:

(a) In relation to the "quota video" referred to in the first article (CB.372), it is said that "*[n]either the platoon commander nor any officers appear to be present*" (p2159);

(b) "*Unlike their elite colleagues in the Special Air Service Regiment (SAS), the commandos emerged largely unscathed from the Inspector-General of the Australian Defence Force's inquiry into alleged war crimes led by Army Reserve Major General and NSW Supreme Court Judge Paul Brereton*" (p2161; and a similar quote at 2166);

(c) "*The Brereton war crimes inquiry found credible information that Australian Special Forces, in all cases SAS not commandos, murdered 39 Afghans who were detained or under their control*" (p2167);

(d) Mr Hamilton referred to the Commandos as "*the best operators we ever worked with" and "absolute, consummate professionals*" (p2172); and

(e) In relation to the incident in Qarabagh, "*the officers and commander as well as some of his team were stationed away from the raid, in a different part of the district and did not see what happened*" (p2174);

(f) The third of the 'Key points', on p2178, states: "*Defence sources say officers and the commander were in another location and did not see the killings*".

233. Mr Willacy and Mr Robertson accepted that the "quota video" showed members of November Platoon but not Mr Russell (T447.36-37; T635.9-10) and that Mr Russell was not involved in relation to the incident in Qarabagh (T447.31-34; T634.17 – T635.32).

234. On 7 October 2022, the respondents filed a defence (CB.377) in which they denied that the pleaded imputations were carried and denied that they were defamatory; denied that Mr Willacy was a publisher of the November Article; denied that the element of serious harm had been established for any cause of action; pleaded a defence of justification to some imputations, but not all; pleaded a contextual truth defence; and pleaded a defence pursuant to s 29A of the *Defamation Act 2005*. All of these pleadings were improper.

235. First, to suggest that none of the imputations (many of which raised serious allegations of committing or being involved in war crimes) were defamatory could have only been the tactic of a cynical respondent attempting to intimidate an applicant with false issues.

236. Second, given Mr Willacy's extensive involvement in the November Article, as set out earlier in these submissions, there was no basis for denying that he was a publisher of it.

237. Third, given the gravity of the imputations and the fact that the ABC is a mainstream media outlet, there was never a basis for alleging an absence of serious harm.

238. Fourth, the particulars of justification were improper. It was plain from the hearing of the strike-out application that even if the particulars were assumed to be true, they did not come close to proving the particulars true. But it has now emerged that many of the particulars must have been known by the respondents to be false. For example:

(a) <u>The particulars relating to the IGADF Inquiry (particulars 12 to 14) (CB.377, p 2214 and 2215):</u> By this point, Mr Willacy and Mr Robertson had published an article acknowledging that the IGADF had found no credible evidence of war crimes by 2 CDO REGT: CB.375, p 2179. They knew that nothing in the IGADF's findings related to the truth of the imputations: T175.39 – T177.5, T193.26-33, T194.11-37 (Willacy); T477.8-10 (Robertson). Instead, they dishonestly included the findings to lend credence to the allegations they had made against Mr Russell.

(b) <u>The allegation that Mr Russell fired multiple shots from the door of a helicopter towards Afghan nationals on the ground below (particulars 16 to 21) (CB.377, p 2216):</u> Mr Robertson, and therefore the ABC, had previously declined to advance work on publishing this allegation because they did not believe it was true and Mr Willacy was aware of the results of that investigation: T331.42 – T332.39, T446.5-22, T450.38-42 (Willacy); T505.16 – T506.42 (Robertson).

(c) The allegation that it could reasonably be suspected by the OSI that members of the November Platoon had committed the war crime of murder based on Josh's allegation (particular 50) (CB 377, p 2221): While Mr Willacy and Ms Puccini always accepted that Josh never made the allegation against November Platoon and have always denied that the October Article made the allegation against November Platoon, Mr Willacy was perfectly content to allege in his Defence that the OSI reasonably suspected November Platoon of committing murder based on Josh's allegation. The OSI never told Mr Willacy that Mr Russell was under investigation in relation to Josh's allegation: Willacy CC.40, [239]; T403.36-40. Mr Robertson also accepted that he had no information that Mr Russell was involved in that alleged killing or that he was being investigated personally for it: T510.26-32; T544.13-18; T569.3-32.

(d) The Quarabagh murder allegation (particulars 27 to 39): Mr Willacy and Mr Robertson did not believe that Mr Russell was present during this alleged murder, as stated in their September publications: CB.372-376; T447.31-41; T451.44-47; T634.17 – T635.32.

(e) Quota video (particulars 40 to 42): Neither Mr Willacy nor Mr Robertson believed that Mr Russell was in the video, nor that he was aware of it: T447.36-37; T635.9-10. This was made clear in the September publications, as noted above.

(f) In each version the defence, the respondents also state that Josh had made allegations that members of a Commando unit unlawfully killed PUCs and that he stated that he worked with Australian soldiers from Task Force 66 on drug raids, 'including the Commandos' (at (44) on p 2219 and at (21) on p 2225). These allegations were knowingly false.

(g) RS [268] acknowledge that, at the time of the November Article, Mr Willacy had no evidence that November Platoon was responsible for the Josh Allegation.

(h) RS [153] acknowledges that, at the time of the November Article, Mr Robertson did not have any information implicating Mr Russell in any unlawful killing.

The justification particulars were maintained in the November 2022 and March 2023 versions of the defence until struck out on 24 March 2023.

239. On 10 November 2022, *The Guardian* published an article publicising the allegation in the defence that Mr Russell had shot at unarmed civilians from a helicopter: CB.379, p 2247 As there is no publicly accessible online file, and no application for access to the pleadings was made, the only rational inference is that the ABC provided the defence to *The Guardian* for publication. The provision of the defence to the media, and resulting publicity, has caused significant emotional harm to Mr Russell (CC.1.p17, [129]-[130]) and significant harm to his reputation (see the examples of online commentary at CB 380, p 2254 – CB 396, p 2270; CB.398, p 2275 – CB.404, p 2281; CB.406, p 2283 - CB.411, p 2288). It is a matter of serious aggravation.

240. On 11 November 2022, Mr Willacy and James Willis (the executive producer for *The Ben Fordham Show* on 2GB) had two conversations on the phone about 2GB's reporting of the proceedings. There is no dispute that Mr Willacy called Mr Willis to complain about 2GB's coverage of the dispute and that it was a tense conversation. The only disputed aspect of the conversation is whether Mr Willacy was nearly shouting and said *"Get Ben to back off – he has fucking defamed me*" and asserted that it was Mr Russell in the helicopter: T114.19-21, p 114; CC.29, p 177. Mr Willis's evidence on the issue should be accepted for the following reasons.

241. First, the only person who contradicts it is Mr Willacy who, the Court would conclude, was not a credible or honest witness.

242. Second, Mr Willis's version of events is corroborated by Mr Russell's evidence that shortly after the conversation, Mr Willis phoned him and told him what had happened: Russell CC.1, p17, [131]. No one corroborates Mr Willacy's version of events.

243. Third, Willacy saying "*Get Ben to back off – he has fucking defamed me*" is consistent with things he has said on other occasions. For example, despite his issues with the law of defamation, he threatened to invoke it against Mr Russell in his submission to Ms McLeish, saying that if Mr Russell repeated his claims about what happened at the Avid Reader Bookshop Event in a public forum, he would like him to know he would "*reserve his right to seek legal redress*": Ex.R at 7. It is also clear from the evidence that Mr Willacy resents public criticism of his reporting, including from 2GB.

244. On 23 November 2022, the respondents filed a Defence to the Amended Statement of Claim, which maintained the pleadings referred to above.

245. On 30 November 2022, the Court heard argument on whether the pleaded imputations were conveyed in the natural and ordinary meaning of the publications. On 1 February 2023, the Court found that the November Article, the Linked Article and the TV Broadcast, but not the Radio Broadcast, carried imputations about Mr Russell in their natural and ordinary meaning: *Russell v Australian Broadcasting Corporation* [2023] FCA 38 (CA.13).

246. On 1 March 2023, the respondents filed an Amended Defence to the Amended Statement of Claim, which maintained the pleadings referred to above, and expanded the defence of justification to imputations which were found to have been carried by the Court but had not previously been the subject of a plea of justification: CB.425, p2364.

247. Notably, the defence was expanded to encompass Linked Imputation 3, that Mr Russell, as commander of November Platoon, was involved in shooting and killing an Afghan prisoner during an operation in Helmand province in mid-2012. The respondents sought to justify that imputation by reference to the Qarabagh allegation (CB.427, pp2391–2392, 2396), notwithstanding that Mr Willacy believed that Mr Russell was not even on that mission (T447.31-34) and Mr Robertson had no information that he was commander of the mission or near the mission (T634.17-23).

248. On 24 March 2023, the Court struck out the particulars of justification, although it granted the respondents leave to replead.

249. On 28 April 2023, the respondents filed a Further Amended Defence which maintained the denials of serious harm and the s 29A defence.

250. On about 3 July 2023, the respondents purported to provide their discovery. As has become clear from the course of the proceedings, they provided documents that had been heavily redacted, without a legitimate basis. In a disturbing state of affairs which was never satisfactorily resolved, they failed to discover key documents which significantly undermined aspects of their defence. These issues have been canvassed on numerous occasions and do not require further elaboration now.

251. On 11 July 2023, the Court ordered the respondents to discover copies of documents that had been redacted to obscure the identity of Josh with such redactions removed.

252. The respondents' email to the Court at 12 July 2023 at 4:31pm (after time for compliance with the order) gave the impression that it was a last-minute decision. In fact, the documents

show that it was not. In a text message at 9:10am on 12 July 2023, Mr Leys texted others at the ABC (including Ms Puccini) to update them on the progress of the statement which was later published on the night of 12 July 2023. It is apparent from these text messages that the statement was something the ABC had internally discussed for some time before this point. In this text message exchange, the participants discussed procuring the attendance of *The Guardian* and *The Sydney Morning Herald* at the hearing the respondents would later request. Throughout the day, various people participated in drafting the statement, including Mr Willacy who, according to Ms Puccini, "*was very sensitive about being kept informed*": CB.437, p2442. Ultimately, Mr Willacy, Mr Robertson and Ms Puccini approved the statement issued by Justin Stevens: CB.437, p2459; T784.14.

253. At 4:31pm, the respondents told the Court that they sought a stay of the order, having already attended to their public relations strategy before giving Mr Russell or the Court the courtesy of announcing their intention. They announced through their counsel (without any criticism being intended of her) that the defence was being dropped because the respondents "*take their promises to sources very seriously*". Their counsel also conceded that Mr Russell was entitled to judgment in his favour.

254. The statement (CB 436, p2437) should be regarded as dishonest. According to the respondents, the public interest defence was dropped to avoid disclosing the identity of Josh, ostensibly because "*[c]ommitments made and kept by journalists to sources are central to ensuring journalists retain the ongoing trust of people speaking to truth to power, they are a key tenet of journalistic ethics and press freedom in this country*". That was false, for a number of reasons:

(a) First, the respondents had freely disclosed so much information about Josh in the publications that his identity was relatively easy to ascertain by anyone motivated to do so, as the Court observed in *Russell v Australian Broadcasting Corporation (No 2)* [2023] FCA 808. The notion that the respondents had treated his identity with any real secrecy was false.

(b) Second, the respondents must have known that Josh's identity could never have been kept confidential forever. He would necessarily have been called to support the justification defence they maintained until April. Moreover, his identity would always have been relevant to the question of aggravated damages. Dropping the s 29A defence could not have made any real difference.

(c) Third, despite declarations in the statement about the importance of commitments made to sources, Mr Willacy let Josh's real name slip on at least three occasions in the witness box, under no pressure to do so from the cross-examiner. These slips were clearly inadvertent, yet remarkably, no non-publication order was sought by the respondents. Nor did they seek non-publication orders on a final basis over the affidavit of Rebekah Giles sworn 13 July 2023, where she set out Josh's real name and how she so easily found him.

255. Unsurprisingly, after media outlets across the country reported that the respondents had conceded that Mr Russell had won, he was inundated with congratulatory messages: see CB.433, p 2534 – CB.446, p 2595. He gave evidence that he was relieved that the case was over: Russell CC.2 p34, [45]. Yet his victory was short-lived. On 14 July 2023, the respondents sought to reinstate their public interest defence and were granted leave to do so: *Russell v Australian Broadcasting Corporation (No 2)* [2023] FCA 808. The whole sequence of events can fairly be described as farcical.

255A. Even after accepting on 12 July 2023 that Mr Russell was entitled to judgment in his favour, the respondents still left the November Article and the Linked Article online: CB.439-440. That was improper and unjustifiable.

256. It cannot seriously be doubted that the ABC is subject to an obligation to act as a model litigant, since it answers the description of a "*Commonwealth agency*" within cl 1 of Appendix B to the *Legal Services Directions 2017* (Cth). It says that it is "*exempt*" from that instrument (CB.362, p 2129), seemingly on the basis that it has been given an exemption from the instrument by the Attorney-General, yet despite that contention, it has never served a copy of that exemption nor discovered one. In those circumstances, the Court should infer that the exemption does not exist and should conclude that the ABC is subject to an obligation to behave as a model litigant. The Court should conclude that the ABC's denial of that proposition, in five versions of its defence, was improper.

257. The ABC's conduct in this litigation has fallen well short of what the Court would expect of a model litigant. That is a matter relevant to the award of aggravated damages.

B. WITNESSES' CREDIT

258. Aside from his own evidence, Mr Russell relied on affidavits sworn or affirmed by twenty-six witnesses. Only he and one other deponent, James Willis, were required for cross-examination. The cross-examination which did occur was limited in scope.

Heston Russell

259. Mr Russell was an honest witness and the Court would accept his evidence.

260. There was some challenge to Mr Russell's evidence about the extent to which his hurt had been aggravated by a few of the matters particularised, but these challenges related only to peripheral aspects of his evidence. Mr Russell forcefully rebuffed those challenges and they ultimately went nowhere. For example:

(a) At RS [341(a)], it is suggested that Mr Russell's evidence of being hurt as a result of Mr Robertson secretly recording their conversation on 19 November 2021 was 'inherently implausible'. To the contrary, Mr Russell gave forceful and entirely plausible evidence that he felt "*manipulated and violated by having* [his] *phone conversations recorded without being told by a journalist*"): T78.7 – T81.38. That is not an inherently irrational or unreasonable response to being secretly recorded by a journalist. Indeed, most people would have that reaction.

(b) In cross-examination and at RS [341(b)], it is suggested that that the conversation between Mr Willacy and Mr Willis on 11 November 2022 did not truly aggravate Russell's harm, and that Mr Russell's evidence about this was 'inherently implausible, because if the conversation did increase Mr Russell's harm he would have raised this as a particular of aggravation prior to 8 June 2023. Regardless of when it was first formally raised in the proceedings (Mr Russell said he believed "*it ha*[d] *just been missed*"), Mr Russell's clear evidence was that when he found out about Mr Willacy contacting "*the only media people that were helping to defend* [him]" "*it absolutely impacted* [him]" (T96.47 – T97.2) and that it was "[a]*bsolutely incorrect*" to suggest it did not hurt his feelings (T99.1-3). It is quite clear that Mr Willacy's conduct increased his harm. As to why it was not raised in the proceedings sooner, the applicant's hurt is not all that needs to be proved. The pleader must be satisfied that they can also establish the underlying conduct – so the timing of the

pleading of the allegation was not a matter for Mr Russell. The allegation was raised on 8 June 2023, by which time orders had been made on 16 May 2023 for the service of affidavit evidence by 3 July 2023, so by early June 2023 Mr Russell's legal representatives were preparing his evidence which ultimately resulted in Mr Willis' affidavit being sworn on 4 July 2023. It is obvious that it was raised at that time because the applicant's legal representatives formed the view that they were in a position to prove the conversation.

(c) RS [341(c)] ignores Mr Russell's evidence on this issue – see T103.28 – T104.24, and especially the following (at T104.1-11):

> [T]*his was at the end of a long line of continuing misinformation and disinformation by the ABC, and again they chose to directly misquote me and I complained about them directly misquoting me. Not the substance of what was said, the fact that they directly misquoted me and said it was 5 me saying that in a publication.*
>
> ...
>
> *I was disgusted that the ABC had again published something inaccurately and gone to the lengths of saying it was me saying that directly. That was my concern.*

It was not the generalised wording of the denial that was objectionable – it was the fact that it was made up that was offensive.

261. Some of these challenges sought to impugn Mr Russell for decisions which had obviously been made by his legal representatives and not by him personally. For example, it was put to him that he had attempted to bolster his case by including in the Court Book some social media posts which were in fact unrelated to the publications sued upon. Mr Russell fairly accepted that some of them were unrelated but said that he was not involved in the process of selecting those tweets: T105.1 – T109.37. That evidence was obviously true since decisions about what is to be tendered are ultimately for the lawyers. At RS [346], it is said "*it may be inferred that Mr Russell provided the screenshots to his lawyers in the first place*". This was not put to Mr Russell and is not a fair inference having regard to the evidence given in answer to his Honour's question about the selection of the tweets – which

are publicly available documents that could be found by lawyers by searching Twitter (as it was then known).

262. The cross-examiner made a more substantial challenge in relation to the invoice at CB.260, which Mr Russell had sent by email to Mr Robertson on 30 November 2021. Mr Russell gave evidence he spent more than $10,000 buying exercise equipment for Swiss 8: T85.26-30. He initially said the invoice was "*a genuine invoice*" (T86.46), but then accepted it was not (T92.46). This evidence should be seen not as an attempt to mislead the Court about whether the invoice was "*genuine*", or as a lie (RS [344(b)]), but rather, as the product of being at cross-purposes with the cross-examiner as to what was meant by the document being a "*genuine invoice*".

263. Mr Russell's evidence was to the following effect:

(a) He received Mr Robertson's emails while he was sitting in the Royal Commission into Veteran Suicide (T91.19-20; see also Russell at CC.1, p12, [94]).

(b) He thought Mr Robertson and Swiss 8 together had "*an agenda…to quickly get out this article and have it look as bad as it could*" (T91.21-23).

(c) He could not find the final invoice and could only find the initial pro forma invoice (T91.23-24).

(d) He felt he was under time pressure to send Mr Robertson the invoice and that "*he needed it there and then*" (T91.30-33; T91.35-37).

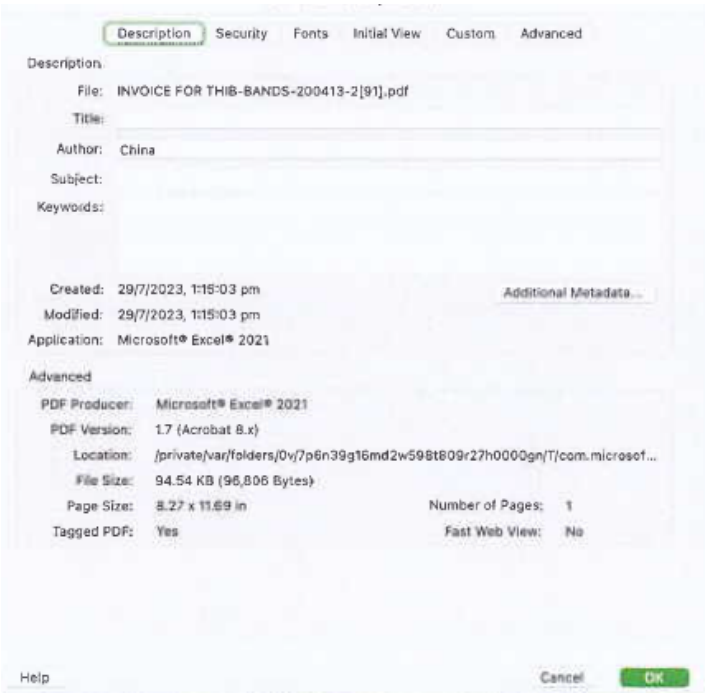
(e) For that reason, he amended the pro forma invoice so that it reflected the final invoice (T91.23-27).

264. Mr Russell readily accepted he made changes to the invoice (T89.46; T90.1). He explained that he did so to reflect the final invoice, so that the information in the invoice sent to Mr Robertson was the same as the final invoice (T90.3-6; T91.23-27; T91.35-41). He said, "*This is me providing what was an exact representation of what occurred, just not the actual document at the time requested by Mr Robertson on his timeline*" and "*It's a duplication of a document that I've edited to reflect what was the final document*" and "*This is a replication of the original invoice*" (T92.12-17). Mr Russell ultimately accepted that the invoice was not genuine (from T92.45-46) but explained that his previous evidence was the result of him

being confused and thinking the invoice sent to Robertson did "*represent*" the genuine final invoice (T93.3-11). His position was perhaps most accurately captured at T93.15-16 ("*This is what the final invoice was, but this was not the final invoice*") and T94.5-7 ("*I was definitely not of an understanding of a genuine invoice. For me, again, it was down to the information, not the physical document, so I was incorrect*").

265. None of that was dishonest: Mr Russell believed the invoice was "*genuine*" in the sense that it accurately reflected the information in the final invoice (which he could not, in that moment, find), and that it reflected the transaction which actually took place. The respondents then called for the final invoice, and it was produced: Ex.D, p23. The metadata for that document (tendered by the respondents) shows that it was exported from Microsoft Excel into a PDF the day it was emailed: Ex 10. That demonstrates that it was created from information in the manufacturer's Excel records, a matter supportive of its authenticity.

265A. At RS [344(c)(iii)], the respondents state that the 'final invoice' in Ex.D was "*created…three minutes before it was emailed by Tony Lee to Mr Russell*". The metadata in Ex.10 shows that the PDF was 'Created' and 'Modified' on 29 July 2023 at 1.15.03pm:



This simply shows that the document was exported to PDF from Microsoft Excel at that time. Further, that it was not in any way modified after it was exported from the data in Microsoft Excel given the creation and modification times were identical.

266. What is important is that the major premise of the respondents' questions about this issue – namely, that Mr Russell amended the invoice to conceal that the equipment was not ordered for Swiss 8 at all – was wrong. Mr Russell said, emphatically and several times, that the equipment was ordered for Swiss 8 and that it was physically delivered to Swiss 8 at Coogee Diggers: T91.8-13, T91.30-33, T91.44-45. The accuracy of that evidence is confirmed by:

A. the message from Adrian Sutter at Swiss 8 dated 12 December 2020 (Ex.D, p13), which demonstrates that the equipment was sent to and arrived at Coogee Diggers; and

B. the December Article (CB.269, p1628) which stated: "*Mr Sutter said the charity was never told the OnlyFans proceeds would be spent on the fitness equipment, which arrived last November without notice and was redirected by the charity to Mr Russell's home*".

267. Those text messages were produced by Mr Sutter to Mr Robertson in late November 2021 and discovered in these proceedings by the ABC – so the respondents have always known that the exercise bands ordered by Mr Russell were in fact delivered to Swiss 8 in 2020. The question put to Mr Russell at T91.11 was improper and should never have been put having regard to the information in the respondents' possession, **as recorded in their own article**. It is not apparent, having regard to the respondents' own discovery and article, on what proper basis this allegation was put to Mr Russell. The allegation of fraud that then followed at T91.15 should also have never been put. There was no fraud – Mr Russell's version of what occurred with the delivery of the bands was true.

267A. At RS [345], there is speculation that the bands may have been sent to Mr Russell first before being forwarded to Swiss8. This was never put to Mr Russell (despite two sessions of cross-examination on the topic) and there is no evidence to support it.

268. Mr Russell was also asked why he discovered only his email to Mr Robertson but not the attached invoice. He said he was unsure whether he had discovered the invoice, but said it should have been discovered: T86.19-29. This did not involve any dishonesty. The Court would find it was an oversight, either by Mr Russell or by his solicitors.

James Willis

269. Mr Willis was a witness of truth. The only aspect of his evidence that was the subject of a (half-hearted) attack was his evidence that during his conversation with Mr Willacy on 11 November 2022, Mr Willacy, yelling or one decibel below yelling, said *"Get Ben to back off – he has fucking defamed me*"; T114.19-21, p 114; CC.29, p 177. For the reasons given earlier, this evidence should be accepted in full and the challenge to it should be rejected.

Mark Willacy

270. As set out elsewhere in these submissions, the problems with Mr Willacy's evidence were serious and included the following:

(a) Mr Willacy clearly misrepresented what Josh had actually told him in the October and November Articles.

(b) His affidavit and oral evidence were in many ways inconsistent with documentary evidence, including the evidence of his own contemporaneous notes.

(c) Some of the notes themselves, however, were demonstrably incorrect, which casts doubt on the reliability of all of them.

(d) The late production of many crucial documents relating to Mr Willacy's research for the publications also reflects poorly on his credibility.

(e) Mr Willacy was often evasive in cross-examination and reluctant to make obvious concessions, or, often, to answer the question at all.

(f) This was consistent with the attitude he displayed in the internal documents relating to the editorial complaint process and *Media Watch's* enquiries, which reveal him as highly defensive and resentful of any criticism of his work.

(g) After Mr Russell raised complaints about the publications, Mr Willacy made numerous statements and created numerous documents, in an attempt to defend himself and support his position, which contained demonstrably false statements.

Mr Willacy should not be regarded as a credible witness and his evidence should not be accepted unless it is an admission against interest.

Joshua Robertson

271. Mr Robertson evidently came to the witness box with the intent of upholding the respondents' "*official line*". For example:

(a) His evidence that his initial reading of the October Article was mistaken, and that he had "*misread*" it, was highly telling. The only inference can be that his interpretation was a "*misreading*" in the sense that it contradicted the ABC's line about the meaning of the October Article.

(b) When it became apparent that Josh's allegation could not have related to November Platoon, because it concerned something which had happened mid-year, Mr Robertson tried to insist that the November Article was nevertheless not wrong because he knew that the platoon was being investigated in relation to the Soldier X allegation. This concerned the Qarabagh mission, which had happened in October. Mr Robertson forlornly tried to suggest that October was "*mid-year*".

(c) He refused to make obvious concessions, such as that the headline of the November Article demanded change after Defence confirmed that, in fact, there was no criminal investigation into November Platoon.

Mr Robertson should not be regarded as a credible witness and his evidence should not be accepted unless it is an admission against interest.

Alexandra Blucher

272. There was a noticeable difference between the specificity of the evidence in Ms Blucher's affidavit and the decided lack of specificity in her evidence in the witness box. She lacked the ability to recall basic components of the events referred to in her affidavit. The last-minute amendment to her affidavit has been discussed above, but the difficulties with the document go further than that.

273. For example, although in her affidavit she deposed to "*fact-checking*" the October Article (CC.30.pp183-185, [20(e)], [23]-[38]), Ms Blucher was unable to recall what information she actually saw to fact-check: T601.33-35. Moreover, Ms Blucher also deposed to receiving information (which she was unable to recall) orally from Mr Willacy, since they "*would speak every day, through the week*", even though he was on leave during the period

in question: T594.40-46.

274. Given the discrepancy between what was in her affidavit and her actual recollection of events, the Court would hesitate to accept Ms Blucher's evidence. In any event, it was so devoid of detail that it would be of essentially no assistance to the Court.

Daniel Oakes

275. Mr Oakes presented as an honest witness. He did not pretend to have done more than he had in the preparation of the October Article, including in his discussions with sources. His involvement was very limited and marginal, and his evidence reflected that.

Joanne Puccini

276. Before lunch Ms Puccini made appropriate concessions about the general obligations of journalists at the ABC, but her attitude seemingly changed after the adjournment, and she often became evasive and uncooperative. For example:

(a) She refused to accept that it was inaccurate to report that a source had said something, when in fact the source had said no such thing but rather, the allegation had been deduced by the journalist from other material: T710.1-20.

(b) In the face of overwhelming evidence, she refused to accept that the October Article was constructed to give the reader the impression that Josh had made his allegation against November Platoon: T736.16-29.

(c) Her evidence about what she intended to convey about November Platoon in the November Article was a lie, which was demonstrated by her tweet that day and her conversation with Willacy on 23 November 2021.

(d) When asked recall her role in the ABC's decision to drop its public interest defence less than three weeks before, she pretended she knew very little: T783.16-45.

277. Ms Puccini's evidence should not be accepted unless it is an admission against interest or is corroborated by documents.

C. TRUE INNUENDO

277A. Mr Russell claims that:

(a) The November Article, in its natural and ordinary meaning, carried the imputations pleaded at subparagraphs [8.1]-[8.13] of his Amended Statement of Claim (**ASOC**) or, alternatively, that those imputations were carried to readers of the November Article who also viewed the TV Broadcast and/or listened to the Radio Broadcast (ASOC at [8], [8A]);

(b) The Linked Article, in its natural and ordinary meaning, carried the imputations pleaded at subparagraphs [11.1]-[11.18] of his ASOC or, alternatively, that those imputations were carried to readers of the Linked Article who also viewed the TV Broadcast and/or listened to the Radio Broadcast (ASOC at [11], [11A]);

(c) The TV Broadcast, in its natural and ordinary meaning, carried the imputations pleaded at subparagraphs [11.25]-[11.32] of his ASOC or, alternatively, that those imputations were carried to viewers of the TV Broadcast who also read the October Article, the November Article and/or the Linked Article (ASOC at [11D], [11E]); and

(d) The Radio Broadcast, in its natural and ordinary meaning, carried the imputations pleaded at subparagraphs [11.39]-[11.44] of his ASOC or, alternatively, that those imputations were carried to listeners of the Radio Broadcast who also read the October Article, the November Article and/or the Linked Article (ASOC at [11H], [11J]).

277B. There is no ambiguity as to how the case on this issue is put (c.f. RS at [75]).

278. This issue was addressed in Mr Russell's submissions on the separate question in November 2022 (CD.11), but not determined in *Russell v Australian Broadcasting Corporation* [2023] FCA 38 because at that time there was no evidence before the Court in relation to the overlapping audiences of the ABC publications on 19 November 2021 – the November Article and Linked Article, the TV Broadcast and the Radio Broadcast.

279. Given the serious imputations already found by the Court to have been conveyed in the natural and ordinary meaning of the publications, whether any other imputations were

conveyed as true innuendos really goes only to damages.

280. The evidence is that several of Mr Russell's witnesses read, watched or heard combinations of the November Article, the Linked Article, the TV Broadcast and the Radio Broadcast:

(a) Mr Bishop read the October Article and the November Article and recalled "*hearing and seeing the allegations on ABC radio and television at around the same time in November 2021*": CC.6.p56, [12]-[13].

(b) Mr Burson watched the TV Broadcast and read the November Article: CC.8.pp66-67, [10]-[11].

(c) Mr Cullen read the November Article, thinks he clicked on the link to the October Article embedded in the November Article, heard the Radio Broadcast, and watched the TV Broadcast: CC.10.p78, [21]-[26].

(d) Mr Evennett and Mr Fortune read the November Article and the October Article and watched the TV Broadcast: CC.12.p90, [8]-[12] (Mr Evennett) and CC.13.p95, [16]-[19] (Mr Fortune).

(e) Mr Henneberry read the October Article and November Article, watched the TV Broadcast and heard the Radio Broadcast: CC.17.pp112-113, [7], [18]-[20].

(f) Mr McConnell read the November Article, clicked the link within it and read the October Article, and watched the TV Broadcast: CC.21.pp135-136, [16], [22]-[23].

(g) Mr Paterson watched the TV Broadcast and then "*went looking online for the articles*" and found and read the November Article and the October Article: CC.22.p140, [7]-[13].

281. Given that each of these people read, watched, or listened to multiple publications, it is to be inferred that, more probably than not, many other ABC readers, viewers and listeners also did so. That inference also arises from the fact that each appeared on an ABC platform with extensive national distribution, and from their overlapping subject-matter.

282. An ordinary reasonable person who read the November Article or the Linked Article and also watched the TV Broadcast or listened to the Radio Broadcast would have concluded that the imputations pleaded by Mr Russell were carried, for the following reasons.

283. In the TV Broadcast:

(a) The presenter alleges that November Platoon is the subject of "*an active criminal investigation*" (line 1).

(b) Mr Robertson asserts that the investigation involves the conduct of November Platoon during a particular period of their operations in Afghanistan in June and July 2012 (line 4). He emphasises that the investigation "*is current*" and "*relates to that particular period and that particular platoon*" (line 6).

(c) He states that the "*background to this*" is that last year (a reference to the October Article), the ABC had reported allegations by a US Marine who was said to have been "*involved in operations with November Platoon*" in mid-2012 (line 8).

(d) Mr Robertson states that the Marine alleged that November Platoon had "*shot and killed an Afghan prisoner after being told that he couldn't fit on a US aircraft during an operation in Helmand province in that year 2012*" (line 8).

(e) Mr Russell is named as the former commander of November Platoon (line 9).

(f) He is said to have denied the allegations and sought a retraction and apology (lines 9 and 11), but the ABC neither retracts the allegation nor do they apologise, while reporting on an active criminal investigation against the platoon. From this, the ordinary reasonable person would infer that the ABC's position is that Mr Russell's denial is not to be accepted.

284. In the Radio Broadcast:

(a) It is said that last year (again, plainly a reference to the October Article), the ABC had reported allegations by a US marine that Australian commandos shot and killed an Afghan prisoner after being told he wouldn't fit on a US aircraft during a mission in Helmand province in 2012.

(b) It is stated that Mr Russell denied this, but that "*now*" Defence had revealed a current criminal investigation into November Platoon "*relating to November Platoon missions in mid-2012*". This directly undercuts Mr Russell's denial, and the ordinary reasonable person would conclude that his denial was to be rejected.

285. The findings sought are that further imputations (i.e. further than those found to have been conveyed in *Russell v Australian Broadcasting Corporation* [2023] FCA 38) were carried to such audiences, including by the Radio Broadcast, which should increase the damages payable to Russell in order to vindicate his reputation.

285A. At RS [73], the respondents misconceive Mr Russell's case on innuendo. He does not rely on extrinsic facts outside of the publications themselves. Rather, he relies on the substance of those publications. For example, a person who saw the TV Broadcast or listened to the Radio Broadcast who then read the November Article or the Linked Article would have had more imputations conveyed to him/her. The respondents compound their erroneous understanding in RS [74] – the fact that the meanings have been found to have not been carried in their natural and ordinary meaning is the point of a true innuendo plea.

285B. The respondents complain at RS [76] that it has not been pleaded that Mr Russell's innuendo plea 'just really goes to damages'. That is because, when the ASOC was filed, there had been no determinations as to meaning. Since 1 February 2023, as a result of the Court's findings that defamatory imputations were conveyed by the November Article, Linked Article and TV Broadcast, Mr Russell's innuendo plea has relevance only to damages; the causes of action have already been made out.

285C. At RS [77], the respondents mischaracterise the evidence – including in the following ways:

(a) At [77(a)], it is stated that "*there were two radio broadcasts*". The sole transcript reference provided to support that statement was T580.19-24; this was a passing comment by Mr Robertson that "*there might have been two*" and that it was "[s]*ort of common practice to do two*". That was the only suggestion by any of the respondents' witnesses that there *might have been* more than one broadcast, and it does not provide sufficient support for the respondents' suggestion (never made previously and never pleaded) that "*there were two*". None of Mr Russell's witnesses who read, watched or heard multiple publications were cross-examined, despite the fact that many of them had initially been required for cross-examination (see the affidavit of Jeremy Marel dated 26 July 2023 at [18]). If the respondents seriously wished to suggest that Ms Asser, or any of Mr Russell's other witnesses, did not hear the Radio Broadcast, this should have been put to them in cross-examination. [The same applies for the respondents' comments about Mr Cullen (see RS [77(c)(ii)]) and Mr Henneberry (see RS [77(f)(iii)]).]

(b) Mr Burson's evidence at CC.8, p66 at [10], referred to at RS [77(b)], should be understood as meaning that he 'saw snippets' of the ABC's news program on or around 19 November 2021 which included 'a segment' which was the TV Broadcast (not that he saw snippets of the TV Broadcast – which was plainly one segment of the ABC news hour). He specifically says that what he watched 'is referred to as the TV Broadcast in these proceedings'. He does not recall where he saw the TV Broadcast but thinks it was online; if it was online, this does not cast doubt on whether he saw the TV Broadcast but, rather, shows that the TV Broadcast had been spread online (not necessarily because it had been posted by the ABC on YouTube or its social media platforms; it could have been shared online by anyone). Again, if the respondents wished to challenge any of this evidence, they could have cross-examined Mr Burson. [The same applies for the respondents' comments about Mr Cullen (see RS [77(c)(iii)]), Mr Fortune (see RS [77(e)]), Mr Henneberry (see RS [77(f)(ii)]), Mr Niven (see RS [77(g)]).]

(c) At RS [77(d)], the respondents extract part of Mr Evennett's evidence (at CC.12, p90 at [12]) about watching the TV Broadcast and say that "*Mr Evennett does not identify the news broadcast he saw or specify where he saw it*". Mr Evennett's evidence is as follows:

> *I recall watching an ABC news broadcast on or around the time the November Article was published. It was about Heston and made similar allegations to the November Article and I understood it to assert that a formal criminal investigation was being progressed by the ADF into the conduct of November Platoon and Heston in Afghanistan (TV Broadcast).*

This clearly was the TV Broadcast. There is no suggestion by the respondents that there was more than one broadcast. Again, the respondents elected not to cross-examine Mr Evennett.

(d) At RS [77(f)], the respondents refer to Mr Henneberry's evidence (which is at CC.17). The respondents say "*there is no evidence that the Radio Broadcast was available on social media*". There is such evidence because Mr Henneberry gives it (at CC.17, pp113-114 at [20]); that evidence was unchallenged.

(e) At RS [77(g)], the respondents refer to parts of Mr Niven's evidence (which is at CC.20, p131 at [28]-[29]). Mr Niven gives evidence that he "*recall*[s] *watching a snippet of the ABC news which was a short segment about Heston on Facebook*", that he does "*not recall who posted the segment but it was not the ABC*", and that he observed "*the segment circulated on social media for some time*". Again, this does not create doubt as to whether Mr Niven saw the TV Broadcast, but rather shows the TV Broadcast had been republished and shared by others including on Facebook and elsewhere on the internet. This is consistent with Mr Burson's evidence, Mr Cullen's evidence, and Mr Henneberry's evidence. It is also generally consistent with other evidence, such as Mr Chapman's evidence that he recalls the November Article being "*a topical and trending story at the time*" (CC.9.p72, [11]); it would be inferred that the related publications – the TV Broadcast and Radio Broadcast – were similarly prevalent at the time.

285C. RS [78] is contrary to several basic principles. Evidence as to what meaning(s) a particular person understood to be carried carried is not admissible on the question of defamatory meaning. Whether a particular person believed an allegation to be true, and whether a particular person actually thought less of a plaintiff as a consequence of the publication are both also irrelevant to defamatory meaning.

285D. Further, because serious harm has been admitted, Mr Russell has not addressed the Court on the principles relevant to that issue. To be clear, however, by introducing serious harm as an element of the cause of action, s 10A of the Act does not undermine or overturn the longstanding common law principle that reputational damage is presumed once it is established that the defendant's publication was defamatory of the plaintiff. *Newman v Whittington* [2022] NSWSC 249 at [69], which the respondents cite, is not authority to the contrary. It was an interlocutory decision, the Court was not addressed on the question, and the remarks on which the respondents rely were clearly *obiter*. In any case, those remarks were wrong. If the legislature had intended to overturn the well-established common law principle that damage is presumed, one would expect it to have done so in clear and express terms. Indeed, the existence of the presumption of damage has been seen as a matter which supports the concept of serious harm as an element of the cause of action: *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985 at [94] per Tugendhat J.

D. SECTION 29A DEFENCE

Statutory text

286. Subsection 29A(1) is in the following terms:

> *(1) It is a defence to the publication of defamatory matter if the defendant proves that –*
>
> *(a) the matter concerns an issue of public interest, and*
>
> *(b) the defendant reasonably believed that the publication of the matter was in the public interest.*

287. Russell has admitted that the matters each concerned an issue of public interest for the purpose of s 29A(1)(a): Reply at [4.1]-[4.4].

"An issue of public interest" vs what is "in the public interest"

288. There is no definition of the phrase "*public interest*" anywhere in the Act, but this phrase, alongside similar phrases such as "*public benefit*", has a history of use in the common law of defamation and in defamation statutes. Examples include s 15(2)(b) of the *Defamation Act 1974* (NSW), s 377(8) of the *Criminal Code* (Qld) and its predecessors, the common law defence of fair comment, and s 31(1)(b) of the 2005 Act.

289. The concept of public interest is used in two different senses in s 29A.

290. Subsection 29A(1)(a) focuses attention on the relevance of the publication to "*an issue of public interest*", defined at a greater or lesser level of generality: compare *London Artists Ltd v Littler* [1969] 2 QB 375 at 391 per Lord Denning MR; *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 214-215 per Dawson, McHugh and Gummow JJ. In principle, the verb "*concerns*" is capable of denoting a fairly broad relationship between the matter published and the issue of public interest: see *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 289, 302.

291. Questions which do not arise in this case, given Russell's concession about s 29A(1)(a), but which may require resolution in a future case, include the specificity with which the issue of public interest must be identified, and the degree or closeness of connection necessary between the defamatory matter and the issue of public interest.

292. Subsection 29A(1)(b), by contrast, focuses attention on the character of the publication in question and requires the making of a value judgment about whether the publication was "*in the public interest*". As Mason CJ, Brennan, Dawson and Gaudron JJ observed in *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216:

> *The expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only "in so far as the subject matter and the scope and purpose of the statutory enactments may enable… given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.*

293. Expressions similar to "*in the public interest*" also have a history of use in defamation law. In *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183, the Court was concerned with s 377(8) of the *Criminal Code* (Qld), the successor to s 17(8) of the *Defamation Act 1889* (Qld), drafted by Sir Samuel Griffith. This provided a defence to the publication of defamatory matter:

> *… if the publication is made in good faith in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit, and if, so far as the defamatory matter consists of comment, the comment is fair.*

At 229, Dawson, McHugh and Gummow JJ held that:

> *The subsection calls for what is essentially a value judgment as to whether the public would benefit from the subject being discussed publicly. In the great majority of cases, the public discussion of a subject of public interest must be for the public benefit.*

294. The second sentence of this passage must be understood in the context of the composite statutory phrase "*some subject of public interest, the public discussion of which is for the public benefit*". The question posed by s 377(8) was simply whether, in principle, it was for the public benefit that the relevant subject of public interest should be publicly discussed. The question posed by s 29A(1)(b) – whether it was reasonable for the defendant to believe that "*the publication of the matter was in the public interest*" – is more specific. The issue is not whether it was in the public interest to publish *something* about the relevant "*issue of public interest*", but whether the *particular publication which was made* was in the public interest: compare *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at [20]-[21] per Gleeson CJ and Crennan J, about s 15(b) of the *Defamation Act 1957* (Tas).

295. The two stage test in s 29A(1) recognises that not every publication which concerns an issue of public interest will in itself be in the public interest. For example, an article about the 2020 Presidential election would concern an issue of public interest, but if the article uncritically repeated claims about voter fraud, the publication of that particular article would arguably not be in the public interest, because it would contribute to mis-information and undermine faith in the integrity of the electoral system.

The defendant's reasonable belief that the publication was in the public interest

296. The threshold question posed by s 29A(1)(b) is whether the defendant actually believed that the publication was in the public interest. This turns on his or her actual state of mind: *Murdoch v Private Media Pty Ltd* [2022] FCA 1275 at [66] per Wigney J. The existence of a particular state of mind is a question of fact like any other: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ. It is a matter for evidence.

297. This element of the defence is not made good by showing that a notional reasonable person in the defendant's position could have believed that publication was in the public interest. The defendant must prove this element by adducing evidence that he, she or it actually turned their mind to the issue and did hold the relevant belief: *Turley v Unite the Union* [2019] EWHC 3457 at [138] per Nicklin J.

298. In relation to the defence pleaded by a corporate defendant such as the ABC, the focus of the enquiry must be on the state of mind and actions of the employees or agents who were responsible for the corporation's decision to publish the publication: *John Fairfax Publications Pty Ltd v Zunter* [2006] NSWCA 227 at [12] per Handley JA (Spigelman CJ and McColl JA agreeing); *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336 at [157]-[160].

299. In addition to the subjective belief of each defendant, however, s 29A(1)(b) also requires that it was *reasonable* for them each to hold that belief.

300. The reasonableness of the defendant's belief that it was in the public interest to publish the matter, clearly, is an objective question for the Court to determine, not something which is determined by the subjective attitudes of a journalist or editor. The question is whether a reasonable person in the defendant's position, having regard to all the circumstances known

to the defendant, would have thought that it was in the public interest to publish the matter: *Murdoch* at [67]-[68] per Wigney J.

"believed that the publication of the matter …"

301. The reference in s 29A(1)(b) to "the publication of *the* matter" is evidently a reference to the opening words of s 29A(1), "It is a defence to the publication of *defamatory matter* …". "The matter" is the defamatory matter to which the defence is raised.

302. The language and structure is similar to other provisions of the Act which provide defences, including ss 27-29 and s 30-32 (including the new s 30A). These provisions all grant a defence by way of confession and avoidance, which is to say that it assumes that the plaintiff's case is established (that is, it confesses the defamatory meaning), but seeks to avoid liability on the nominated statutory basis. This is the same way that defences, such as qualified privilege, operate at common law: see *Bashford* v *Information Australia* (2004) 218 CLR 366, per Gummow J at [58].

303. The consequence is that a defence to the publication of "defamatory matter" must meet the defamatory character of the publication, that is to say, it must be considered in the context of the defamatory meaning found to be conveyed, even if not the precise terms of the imputations. This is the way in which s 31 of the Act has been interpreted: see *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15; (2021) 387 ALR 123, per Lee J at [131] *Dutton v Bazzi* [2021] FCA 1474; per White J at [68]-[74] (overturned on appeal, but on a different issue). It is also the way in which s 30 has been interpreted, in that the importance of the imputations carried, and the relevance of the publisher's state of mind in relation to them, has been recognised: see *Palmer v McGowan (No 5)* (2022) 404 ALR 621, per Lee J at [184] (1)-(3); *Wing v Fairfax Media Publications Pty Ltd* [2019] FCA 185 per Wigney J at [109]-[116]; *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48 at [188]-[193].

304. In the context of s 30, the importance of the imputations conveyed is made clear by s 30(3)(a) which provides that the Court may have regard to the seriousness of any defamatory imputation conveyed, a matter likewise available for consideration in relation to the defence under s 29A of the Act by s 29A(3)(a).

305. In short, s 29A provides a defence to the publication of defamatory matter, that is matter which is defamatory in the sense found by the Court. It may be noted that in *Murdoch v*

Private Media Pty Ltd [2022] FCA 1275, Wigney J said that he "strongly inclined to the view" that "defamatory matter" and "matter" in s 29A referred to the publication itself, and not the publication in its defamatory sense: at [69]-[72]. However, his Honour went on to acknowledge (at [73]-[74]) the relevance of the imputations carried in relation to the various issues arising under s 29A. While it is submitted, with respect, that his Honour's preliminary view on the meaning of "defamatory matter" and "matter" was not correct, it may be that there is no substantial difference once the importance of the conveyed meaning is recognised.

Relevant considerations – s29A(2)-(4)

306. As noted above, the question whether the publication of the matter was "*in the public interest*" involves a discretionary value judgment. Similarly, determining whether the defendant's belief that the publication was in the public interest was reasonable also involves an evaluative assessment. This begs the question: What are the principles, policies and values according to which these judgments are to be made?

307. The Court must to take into account "*all the circumstances*": s 29A(2). Nevertheless, for illustration and without limiting what may be taken into account, s 29A(3) contains a list of factors which may be relevant. Although they are expressed as factors which may be taken into account in determining "*whether the defence is established*", the s 29A(3) factors have more apparent relevance to s 29A(1)(b) than s 29A(1)(a).

308. It is clear that s 29A(3) should not be used as a checklist. The factors listed in it are not the only ones which are necessarily relevant to the operation of the defence, and it is explicitly not necessary to take into account each one of those factors in every case: see s 29A(4). Nevertheless, inferences can and ought to be drawn from the fact that the legislature has chosen to list these specific factors to illustrate the considerations which are relevant to whether the defence is made out.

309. As Wigney J noted in *Murdoch* at [68], the particular factors which the legislature has chosen to list in s 29A(3) are such that:

> *While all of the circumstances must be considered, the focus of much of the inquiry… is generally likely to be on the nature and content of the publication, the seriousness of the defamatory imputations found to have been conveyed by the publication, the information possessed by the defendant and its sources, and the steps taken by the defendant to check or verify that information.*

310. The specific inclusion of these factors to illustrate circumstances which may be taken into account in determining whether the defence is made out is indicative of the legislature's judgment as to what would inform a "*reasonable*" belief that the making of a particular publication is "*in the public interest*". It is consistent with the inclusion of these particular illustrative factors to conclude that it is more likely to be reasonable to believe that a publication is in the public interest if:

(a) The publication was based on reliable and credible sources – s 29A(3)(e).

(b) Information is attributed to named sources unless there is a good reason why the identity of a source should be kept confidential – see s 29A(3)(f).

(c) Allegations were based reasonably on the information provided by the sources. Compare s 29A(3)(b). Distinguishing between a suspicion or allegation and a proven fact requires some level of discernment of what the source material is reasonably capable of establishing.

(d) Adequate steps were taken to check and corroborate the information provided by the sources – s 29A(3)(h).

(e) Allegations were put to the person who is the subject of those allegations, and his or her side of the story was published – s 29A(3)(g).

Context and purpose

311. Section 29A is effectively a species of privilege. Reference to the concept of qualified privilege has been deprecated in some of the English authorities about s 4 of the *Defamation Act 2013* (UK), but it is accurate to describe s 29A as a privilege in the strict sense that it creates a policy-based exemption (for the "*common convenience and welfare of society*") from liability for the publication of defamatory matter regardless of whether or not the matter is substantially true, or a fair comment on true facts.

312. If a s 29A defence is being considered, the Court will have already determined that the publication was defamatory of the plaintiff and that it caused or was likely to cause serious harm to his or her reputation: see s 10A of the Act. It is a large step to excuse from liability a defamatory publication which has caused or is likely to cause serious harm to an individual's reputation and which is not shown to be substantially true. This is why, at

common law, privilege defences were only available for publications to a confined number of specific recipients or on very special occasions such as proceedings in Parliament or in a court or tribunal.

313. Statute intervened to create an occasion of privilege for publication to the world at large, such as mass media publications, in s 22 of the *Defamation Act 1974* (NSW) and subsequently in s 30 of the 2005 Act. However, the damage likely to be caused by a defamatory publication to tens or hundreds of thousands of people is much greater than the damage likely to flow from publication to a limited number of people who share a common interest. That is why the defences in s 22 of the 1974 Act and s 30 of the 2005 Act had reasonableness of conduct, and not merely honesty, as their criterion. As the High Court explained in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 572-573:

> *No doubt it is arguable that, because qualified privilege applies only when the communication is for the common convenience and welfare of society, a person publishing to tens of thousands should be able to do so under the same conditions as those that apply to any person publishing on an occasion of qualified privilege. But the damage that can be done when there are thousands of recipients of a communication is obviously so much greater than when there are only a few recipients. Because the damage from the former class of publication is likely to be so much greater than from the latter class, a requirement of reasonableness as contained in s 22 of the* Defamation Act*, which goes beyond mere honesty, is properly to be seen as reasonably appropriate and adapted to the protection of reputation ...*
>
> *... Given these considerations and given, also, that the requirement of honesty of purpose was developed in relation to more limited publications, reasonableness of conduct seems the appropriate criterion to apply when the occasion of the publication of defamatory matter is said to be an occasion of qualified privilege solely by reason of the relevance of the matter published to the discussion of government and political matters.*

314. In the second reading speech for the *Defamation Amendment Bill 2020*, the Attorney-General referenced a concern that s 30 of the Act "*does not adequately protect publication regarding matters of public interest*", noting that "*the absence of any successful defence on this ground by a mass media publication suggests that the defence does not achieve the object of facilitating discussion on matters of public importance*": Hansard (Legislative Assembly, 29 July 2020) page 2870.

315. In fact, the assertion by the Attorney that s 30 had not been successfully argued by a mass media defendant since it was introduced was not factually accurate: *Feldman v Polaris*

Media Pty Ltd (No. 2) [2018] NSWSC 1035 at [294]-[332] per McCallum J (appeal dismissed in *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733 and special leave refused [2020] HCA trans 162); *Bailey v WIN Television NSW Pty Ltd* [2020] NSWSC 232 at [125]-[143] per Fagan J (appeal dismissed in *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541 and special leave refused on the papers). Media also had success under the predecessor to s 30, s 22 of the 1974 Act, which was in substantially similar terms to s 30 by 2002: see for example *Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257.

316. Nor can the failure of the defence, in many other cases, be attributed to the imposition of unrealistically stringent and onerous standards of reasonableness. Many of the unsuccessful mass media s 30 cases were not even close. For example:

(a) In *Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2022] FCA 47, the journalists deliberately distorted and misrepresented the facts as known to them and systematically misquoted source documents. In putting questions to Mr Duma prior to publication, they failed to give him fair notice of what they intended to publish and did not fairly report the responses he was able to give.

(b) In *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336, the s 30 defence succeeded at trial but was overturned on appeal because the book carried serious imputations that the author did not believe to be true, he failed to include exculpatory material in the chapter about which he was aware and neglected to put the allegations to the applicants before publication.

(c) In *Fairfax Media Publications Pty Ltd v Chau* [2020] FCAFC 48, the journalist was found to have made up a source. Although the allegations were put to the applicant, his responses were included in the publication in an unfair manner.

(d) In *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, the publisher put questions to Mr Hockey prior to publication but did not give him notice of the actual allegation they intended to publish (an allegation of corruption). In any event, malice was proved because the editor of *The Sydney Morning Herald* had admitted in a text message that he wanted to "*nail him to the cross*", speaking of Mr Hockey.

317. It can readily be accepted, as the Court observed in *Palmer v McGowan (No. 5)* [2022] FCA 893 at [195], that "*Submissions as to reasonableness in defamation cases… often seem to lose sight of the overwhelming importance of context and a consideration of all relevant circumstances, and revert to a form of 'checklist' approach*". This, however, was always an incorrect approach to the s 30 defence: *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733 at [100]-[104] per White JA; *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541 at [89] per Simpson AJA.

318. It can also readily be accepted that the legislature intended that such an approach would not be taken to s 29A, given the clear terms of s 29A(4). A "*broad and bespoke evaluative assessment grounded in all the circumstances of the case*" is precisely what is required by s 29A: compare *Palmer* at [216].

319. It would not, however, be right to conclude from these observations that s 29A was intended to redress perceived shortcomings in the s 30 defence (or the erroneous application of that defence) by shifting the primary focus away from the publisher's conduct, or by denuding the concept of reasonableness of practical force and lessening its role as a standard of conduct for publishers.

320. While the list of factors in s 29A(3) certainly must not be deployed as a checklist, the fact is that the legislature still considered it appropriate and necessary to include such a list in the section. This is in contrast to s 4 of the UK Act, on which s 29A was otherwise expressly modelled. In *Serafin v Malkiewicz* [2020] 1 WLR 2455 at [57]-[66], Lord Wilson summarised the legislative history of s 4. Notably, the original draft Bill included a subclause which listed eight matters which the court might have regard to in determining whether the defence was established: at [57]. This list of factors was deleted in the version ultimately passed due to concerns that it would be implemented as a "*checklist*": at [63]. The fact that the NSW legislature, by contrast, retained the list in s 29A(3) reinforces the inference that these factors should be taken as a primary indicator of what Parliament considered to be relevant to whether it is reasonable to believe that a publication is "*in the public interest*" for the purposes of s 29A(1)(b).

321. It is not without significance that the factors listed in s 29A(3) were substantially transposed from s 30(3) as it stood prior to 1 July 2021. All of those factors, except for s 29A(3)(d) and (i), focus attention squarely on the publisher's conduct.

322. Nor does *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 support a different view of the concept of reasonableness. While it is true that the Court in *Lange* did not refer to or endorse the "*checklist*" of factors first proposed in *Morgan v John Fairfax & Sons Pty Ltd (No. 2)* (1991) 23 NSWLR 374 at 387-388 per Hunt J, and later embodied in s 22 of the 1974 Act and s 30 of the 2005 Act, (see *Palmer* at [214]-[215]), the Court expressly described the criterion for the operation of the extended category of common law qualified privilege as "*reasonableness <u>of conduct</u>*": at 572-573.

323. The Court referred at 573 (footnote 291) to the test of reasonableness described in the joint judgment in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 136-137. At 137 in that case, Mason CJ, Toohey and Gaudron JJ held:

> *For that reason the defendant should be required to establish that the circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false. The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or such steps as were adequate. ...*
>
> *In other words, if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e. not caring whether the matter was true or false), and that the publication was reasonable in the sense described.*

324. In *Lange* at 574, the Court described the requirements of reasonableness in substantially the same terms:

> *Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond*

325. It is clear from these passages that when the High Court spoke of "*reasonableness of conduct*" as the criterion for the operation of the expanded common law qualified privilege defence, it was invoking a substantive standard of conduct for publishers, particularly in

relation to taking steps to verify the accuracy of the defamatory material and seeking comment from the person defamed. Given that the Court in *Lange* concluded that such a standard was appropriate and adapted to balancing the protection of reputation with the constitutional requirement of free communication about government and political matters, meaningful and rigorous examination of the quality of a publisher's pre-publication conduct should not be seen as incompatible with proper recognition of the importance of freedom of expression about matters of public interest.

326. In *Theophanous* at 137 (in the passage adopted in *Lange* at 573), Mason CJ, Toohey and Gaudron JJ said:

> *… [I]t cannot be said to be in the public interest or conducive to the working of democratic government if anyone were at liberty to publish false and damaging defamatory matter free from any responsibility at all in relation to the accuracy of what is published.*

This is fully consistent with the view of the public interest expressed by Lord Griffiths in *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 317, an appeal from New South Wales concerning s 22 of the 1974 Act (emphasis added):

> *When a journalist wishes to make such a trenchant and potentially damaging attack* ***it is in the interests of society that he should be expected to take all reasonable steps to ensure that he has got his facts right****. The media has enormous power both for good and ill and it would be a sorry day if newspapers were encouraged to believe that under the shield of qualified privilege the reputations of individuals could be attacked by slip-shod journalism that would provide no defence of comment because the facts on which the attack was based were not true.*

***Reynolds* and s 4 of the *Defamation Act 2013* (UK)**

327. In the second reading speech for the *Defamation Amendment Bill 2020*, the Attorney-General said, in relation to s 29A, that the Bill "*seeks to introduce a new public interest defence modelled on section 4 of the United Kingdom Defamation Act 2013*": Hansard (Legislative Assembly, 29 July 2020) page 2870. The explanatory note states that s 29A "*provides for a comparable defence to the defence in the UK Defamation Act*".

328. Section 4 of the *Defamation Act 2013* (UK) relevantly provides:

> *(1) It is a defence to an action for defamation for the defendant to show that –*

(a) the statement complained of was, or formed part of, a statement on a matter of public interest; and

(b) the defendant reasonably believed that publishing the statement complained of was in the public interest.

(2) Subject to subsections (3) and (4), in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.

...

(4) In determining whether it was reasonable for the defendant to believe that publishing the statement complained of was in the public interest, the court must make such allowance for editorial judgment as it considers appropriate.

...

(6) The common law defence known as the Reynolds defence is abolished.

329. The reason for s 4(6) is that the statutory defence replaced a common law defence of responsible journalism which had its genesis in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. The explanatory note to the 2013 Act recorded that it was "*based on the existing common law defence*" established in *Reynolds* and "*intended to reflect the principles established in that case and in subsequent case law*". In *Serafin v Malkiewicz* [2020] 1 WLR 2455 at [72], Lord Wilson cautioned that "*the elements of the statutory defence [cannot] be equiparated with those of the* Reynolds *defence*". Even so, his Lordship accepted that the rationale for the s 4 defence was not materially different from the rationale for the *Reynolds* defence, and the principles which underpinned the *Reynolds* defence remained relevant to the interpretation of the statutory defence: at [68].

330. In *Reynolds*, the House of Lords was confronted with a submission that statements of fact made in the course of political discussion should be free from liability if published in good faith. The defendant contended that the common law should recognise a new occasion of privilege based on subject matter alone, namely political information. This submission was rejected because the House considered that a test of honesty alone would provide insufficient protection against false statements of fact, particularly given (a) the severity of the damage likely to be caused by mass media publications and (b) the fact that a journalist's refusal to disclose his or her sources would make it practically impossible for a plaintiff to prove malice in most cases: at 201 per Lord Nicholls (Lords Cooke and Hobhouse agreeing), 210 per Lord Steyn, 234-235 per Lord Hope.

331. A majority of the House held instead that whether a publication on a matter of public interest was privileged should depend on all the circumstances of the case. At 205, Lord Nicholls (Lords Cooke and Hobhouse agreeing) illustrated the factors which may be taken into account for the purposes of this circumstantial test as follows:

> *1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual is harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information which others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.*

It will be noted that the factors identified by Lord Nicholls bear close similarity to the factors listed in s 30(3) of the NSW Act (prior to 1 July 2021) and s 29A(3) of the NSW Act (after 1 July 2021).

332. At 238, Lord Hobhouse related the test of responsible journalism to the public interest:

> *The liberty to communicate (and receive) information has a similar place in a free society but it is important always to remember that it is the communication of information not misinformation which is the subject of this liberty. There is no human right to disseminate information which is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the public being informed not misinformed. Misleading people and the purveying as facts [of] statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed.*

333. These observations were echoed in *Bonnick v Morris* [2003] 1 AC 300 at 309, where Lord Nicholls said (emphasis added):

> *Stated shortly, the* Reynolds *privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals.* ***Maintenance of this standard is in the public interest*** *and in the interests of those*

> *whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege.*

334. To the same effect, see *Loutchansky v Times Newspapers Ltd (Nos. 2-5)* [2002] QB 783 at [36], and *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 at [32] per Lord Bingham, [53]-[54] per Lord Hoffmann, [147]-[149] per Baroness Hale.

335. One of the last appellate considerations of the *Reynolds* defence before the passage of the 2013 Act was *Flood v Times Newspapers Ltd* [2012] 2 AC 273. That case concerned newspaper article which reported allegations of corruption against a serving police officer. The trial judge had held that the defendant was not required to take steps to verify the truth of these allegations because it was in the public interest to publish the fact that the allegation had been made. This was rejected by the Supreme Court. At [77]-[79], Lord Phillips held:

> *Reportage is a special, and relatively rare, form of* Reynolds *privilege. It arises where it is not the content of a reported allegation that is of public interest, but the fact that the allegation has been made. It protects the publisher if he has taken proper steps to verify the making of the allegation and provided that he does not adopt it. …*
>
> *The position is quite different where the public interest in the allegation that is reported lies in its content. In such a case the public interest in learning of the allegation lies in the fact that it is, or may be, true. It is in this situation that the responsible journalist must give consideration to the likelihood that the allegation is true.* Reynolds *privilege absolves the publisher from the need to justify his defamatory publication, but the privilege will normally only be earned where the publisher has taken reasonable steps to satisfy himself that the allegation is true before he publishes it. …*
>
> *Thus verification involves both a subjective and an objective element. The responsible journalist must satisfy himself that the allegation that he publishes is true. And his belief in its truth must be the result of reasonable investigation and must be a reasonable belief to hold.*

336. At [113], Lord Brown summarised the test posed by *Reynolds* in the following terms:

> *In deciding whether* Reynolds *privilege attaches… the judge, on true analysis, is deciding but a single question: could whoever published the defamation, given what they knew (and did not know) and whatever they have done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?*

337. At [123], Lord Mance held that:

> *It will not be, or is unlikely to be, in the public interest to publish material which has not been the subject of responsible journalistic enquiry and consideration*.

338. The first appellate consideration of the statutory defence in s 4 of the 2013 Act appears to have been in *Economou v de Freitas* [2018] EWCA Civ 2591. At trial, Warby J had suggested that "*It seems hard to describe a belief as reasonable if it has been arrived at without care, in the absence of any examination of relevant factors, and without engaging in appropriate enquiries*": *Economou v de Freitas* [2016] EWHC 1853 at [239]. He went on to hold at [241]:

> *I would consider a belief to be reasonable for the purpsoes of s 4 only if it is one arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case. Among the circumstances relevant to the question of what enquiries and checks are needed, the subject-matter needs consideration, as do the particular words used, the range of meanings the defendant ought reasonably to have considered they might convey, and the particular role of the defendant in question.*

On appeal, Sharp LJ (Lewison and Ryder LJJ agreeing) held (*Economou v de Freitas* [2018] EWCA Civ 2591) at [86]:

> *The statutory formulation in s 4(1) obviously directs attention to the publisher's belief that publishing the statement complained of is in the public interest, whereas the* Reynolds *defence focused on the responsibility of the publisher's conduct. Nevertheless… it could not sensibly be suggested that the rationale for the* Reynolds *defence and for the public interest defence are materially different, or that the principles that underpinned the* Reynolds *defence… are not also relevant when interpreting the public interest defence.*

At [99]-[105], she substantially approved Warby J's statements at [239]-[241].

339. The next appellate consideration of the s 4 defence was in *Serafin v Malkiewicz* [2020] 1 WLR 2455. As noted above, at [72], Lord Wilson cautioned against "*equiparating*" the elements of the statutory defence with those of the *Reynolds* defence. Nevertheless, in substance he approved the statements of principle in *Economou v de Freitas* [2016] EWHC 1853 at [239]-[241] per Warby J, and in *Economou v de Freitas* [2018] EWCA Civ 2591 at [86], [101], [110] per Sharp LJ: *Serafin v Malkiewicz* [2020] 1 WLR 2455 at [67]-[69] per Lord Wilson.

340. Most recently, the defence has been considered in *Banks v Cadwalladr* [2022] 1 WLR 5236. At [107]-[111], Steyn J summarised the relevant law, noting that "*the focus must be on the things the defendant said or knew or did, or failed to do, up to the time of publication*". Her

Honour observed that highly relevant factors included (a) whether the defendant believed at the time of publication that the statement complained of was true, (b) the steps taken by the defendant to verify the matter, and (c) whether comment was invited from the plaintiff prior to publication. Her Honour quoted Warby J's statement in *Economou* at [241], noting that it was approved by the Court of Appeal in *Economou* and by the Supreme Court in *Serafin*.

341. The points of difference between s 4 of the UK Act and s 29A of the NSW Act reinforce, rather than weaken, the proposition that s 29A(1)(b) should be construed as requiring that the defendant's conduct in publishing the defamatory was reasonable.

342. First, as has already been noted, the UK Act does not include a list of factors which may be taken into account in determining whether the defence is established – indeed, such a list was deleted from the Bill during the parliamentary process – whereas s 29A retains a list of factors repurposed from the s 30 defence.

343. Second, s 4(4) of the UK Act also expressly directs the court to make allowance for "*editorial judgment*". In *Serafin* at [64], Lord Wilson observed that the inclusion of this requirement was likely inspired by what Lord Mance had said in *Flood* at [137] about a line of authority holding that courts should give weight to editorial judgment as to whether it was necessary to name an individual in a defamatory publication.

344. It is significant that in a section otherwise expressly modelled on s 4, the NSW legislature did not see fit to include anything comparable to s 4(4) of the UK Act. That is not to say that a court applying s 29A would err in making some allowance for editorial judgment – the generally accepted practices and standards of the journalistic profession are part of "*all of the circumstances of the case*" – but the fact that the legislature has not directed the court to make allowance for editorial judgment reinforces that s 29A turns on an objective standard of reasonableness.

Ongoing publication and change of circumstances

344A. English authorities have recognised that, even if the defendant reasonably believed that publication was in the public interest at the time of initial publication, the defence may be lost if circumstances change, such that the defendant no longer holds the belief or the belief is no longer reasonable: *Flood v Times Newspapers Ltd* [2009] EWHC 3275 at [249] per Tugendhat J; *Flood v Times Newspapers Ltd* [2011] 1 WLR 153 at [78] per Lord Neuberger

MR; *Lachaux v Independent Print Ltd* [2021] EWHC 1797 at [159] per Nicklin J; *Banks v Cadwalladr* [2022] 1 WLR 5236 at [135] per Steyn J.

344B. There is no reason in the text or context of s 29A of the NSW Act why the same reasoning should not also apply to that defence.

344C. At RS [335], the respondents suggest that Mr Russell has abandoned this submission. This is not correct – it is pleaded in the Reply to the Amended Defence (was the subject of later correspondence) and is maintained in the Agreed Issues document: CD.2 [19], [23]. The existence of the respondents' belief that the publication is in the public interest, and the reasonableness of that belief, are ongoing requirements for as long as the publications remain online. If there is ongoing publication and the circumstances change, such that the respondents no longer hold the belief, or the belief is no longer reasonable, the protection of the defence may be lost. Each of the November Article and Linked Article remain online as of the date of these submissions.

344D. The onus is on the respondents to each establish their ongoing reasonable belief for the purposes of s29A. Given the non-existent pleading of ongoing belief and the evidence of a series of events that would constitute change in circumstances, the applicant elected to await the respondents' submissions on this question before responding

344E. The changes in circumstances in this case have included:

(a) Mr Russell's press release on 23 November 2021 (CB.240);

(b) Department of Defence statement on 24 November 2021 (see CB.245);

(c) Media Watch on 6 December 2021 pointing out that Josh allegation is made against November Platoon on any reading of the articles (CB.275-276);

(d) Finding in March 2022 of no basis to make allegation against November Platoon;

(e) Finding on 1 February 2023 that imputations were carried (CA.13); and

(f) Strike out of particulars of truth on 24 March 2023.

344F. The respondents have not adduced evidence to satisfy their onus that they each had an ongoing belief that the publication of the November Article and the Linked Article was in the public interest and that such belief was reasonable.

Summary on construction of s 29A

345. In opening, senior counsel for the respondents summarised his clients' position on the proper construction of s 29A in the following terms (Tcpt 139.15-20):

> *And it would be, we say, a profound mistake… to regard trials in which the question of the public interest of a publication is in issue as being defined by reference to degrees of departure from the question of truth, nor would it be appropriate, we say, to regard it as in substance… something akin to an inquiry into the question of negligence on the part of the journalists.*

346. It is right to say that the operation of s 29A does not depend on whether the defamatory publication is substantively true, and that the social function of journalism cannot be reduced to the reporting the truth "*as it would be determined ultimately by a court of law*" (Tcpt 139.5). This, however, can hardly mean that the reporting of true facts is not a primary objective of journalism – none of the respondents' witnesses, at any rate, were prepared to suggest otherwise. Nor could journalism which did not involve a meaningful attempt to publish true facts seriously be regarded as in the public interest.

347. What the s 29A defence in this case turns on is whether it was reasonable for the respondents to believe that it was in the public interest to make the publications. This depends primarily on the information which was available to them at the time of publication, the adequacy of the steps they took to verify and test that information and the way in which they represented (or misrepresented) the information available to them in the publications. To describe this as "*something akin to an inquiry into the question of negligence on the part of the journalists*" is rhetorical, but it is submitted that it does require a meaningful assessment of the standard of the respondents' conduct prior to publication. This is supported by the text of s 29A (particularly the factors which Parliament has chosen to illustrate the operation of the defence in s 29A(3)) and by analogy with how s 4 of the UK Act (on which the legislature expressly modelled s 29A) has been construed by English courts.

348. This is not to deny that the assessment of what constitutes a "*reasonable*" belief that publication is in the public interest depends on all the circumstances of the case and must be a "*broad and bespoke evaluative assessment*": *Palmer v McGowan (No. 5)* [2022] FCA 893 at [216]. Cases will come before the courts where a close evaluation of the publisher's pre-publication conduct would not be appropriate. *Palmer* itself is a good example of such a case, for the reasons given by the Court at [195].

349. This, however, is a case about professional, investigative journalism. It is the kind of case to which the factors typically used to assess the reasonableness of a publisher's conduct, and which are still embodied in s 29A(3), are most directly relevant.

349A. To be clear, none of this is to suggest that s 29A should be approached by way of a "checklist" (RS [45]) – a notion specifically disclaimed at AS [308], [320] – or that a journalist is expected to engage in "*a form of fact-finding that is functionally equivalent to the judicial process*" (RS [46]), or that the standard of reasonableness is directed towards "*a question for the truth as it would be found by a Court*" (RS [53]). These characterisations, with respect, are a travesty of the applicant's case. Rather, the point is this:

349B. As much as the respondents' publications may have concerned issues of public interest, it is not in the public interest for the national broadcaster to publish articles carrying such serious allegations without making a meaningful effort to report accurate information. An important thing to recognise is that this is how the respondents themselves see their own role as investigative journalists (AS [22]-[28]) – a fact with which the respondents' submission on s 29A simply does not engage. The respondents at RS [54], by reference to *Palmer v McGowan*, invoke the underlying principle of balance between freedom of discussion of government and political matters and reasonable protection of the individual articulated by the High Court in *Lange*. What their argument fails to recognise is that even the constitutional authorities on the implied freedom of political communication recognise that the public interest is not served – indeed, it is harmed – by the publication of misinformation: *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 137 per Mason CJ, Toohey and Gaudron JJ.

Did the respondents believe that publication was in the public interest?

350. Mr Willacy, Mr Robertson and Ms Puccini each gave evidence that they believed, as of 19 November 2021, that the November publications were in the public interest, but their evidence on this issue should not be accepted for the following reasons (explained in more detail above):

Mr Willacy

(a) A person of Mr Willacy's claimed experience in war reporting must have recognised that the allegations of an "*ear witness*" were inherently unreliable.

(b) Mr Willacy must have known that Josh had never implicated the Australian commandos, or Rotation XVIII, or November Platoon.

(c) He must have recognised that the information he had made it more likely that if the helicopter incident took place at all, it involved Rotation XVII.

(d) Mr Willacy knew that Josh had repeatedly expressed concerns about the quality and utility of his own memory.

(e) He must have recognised a discrepancy between Josh's claim that he never saw the DEA working with the Australians he was with, and Mr Willacy's own belief that the commandos were working with the DEA at that time.

(f) He knew that he had been unable to verify or corroborate Josh's allegations.

(g) By his own admission, the October Article was published to put the allegations out there and to see what came back, and by 19 November 2021, nothing had come back. Indeed, this was a source of frustration for Mr Willacy.

(h) On 18 November 2021, he had a conversation with Bret Hamilton in which Mr Hamilton contradicted the allegations about November Platoon which had been published in the October Article and were republished in the November Article and Linked Article.

(i) Mr Willacy substantially wrote the November Article, but was not prepared to put his name on it and take responsibility for it. His stated reasons for doing so were spurious and ought not to be accepted.

(j) Mr Willacy drafted the FOI application and submitted it knowing that it would almost certainly receive a negative response. He admitted that he did so for the purpose of generating a story.

(k) His interpretation of Defence's response to the FOI application was inherently implausible and he must have known that it was unreasonable and wrong.

(l) He must have known that the representation in the November Article's headline that Defence had "*confirmed*" an investigation was misleading and wrong.

(m) It is to be inferred that the true purpose for publishing the November Article was to vindicate Mr Willacy against earlier criticism of the October Article.

Mr Robertson

(a) Mr Robertson must have appreciated that he had not checked anything himself and that he knew little or nothing about the underlying allegations and the information emanating from Josh.

(b) His interpretation of Defence's response to the FOI application was inherently implausible and he must have known that it was unreasonable and wrong.

(c) He must have known that the representation in the November Article's headline that Defence had "*confirmed*" an investigation was misleading and wrong.

(d) It is to be inferred that the true purpose for publishing the November Article was to vindicate Mr Willacy against earlier criticism of the October Article.

Ms Puccini

(a) A person of Ms Puccini's experience as an editor must have recognised that the allegations of an "*ear witness*" were inherently unreliable.

(b) Ms Puccini knew as early as October 2020 that Josh had never implicated November Platoon, and expressed concerns at the time that the October Article as drafted by Mr Willacy could be read as imputing that November Platoon was responsible for the killing, an allegation which she did not believe was supported by the information from Josh.

(c) She knew that Mr Willacy had been unable to verify or corroborate Josh's allegations.

(d) A person of her experience as an editor must have recognised that Mr Robertson's interpretation of Defence's response to the FOI application was inherently implausible and that it was unreasonable and wrong.

(e) A person of her experience as an editor must have known that the representation in the November Article's headline that Defence had "*confirmed*" an investigation was misleading and wrong.

(f) It is to be inferred that the true purpose for publishing the November Article was to vindicate Mr Willacy against earlier criticism of the October Article.

351. As to the ABC's corporate belief that the publications were in the public interest, the evidence was that the person who ultimately decided that the November Article should be published was John Lyons, not Ms Puccini. Mr Lyons was not called to give evidence and it should be inferred that his evidence would not have assisted the ABC.

352. In those circumstances, the ABC has not adduced sufficient evidence to establish that it, as a corporate entity, believed that the publications were in the public interest for the purposes of s 29A(1)(a).

If the respondents did believe that publication was in the public interest, their belief was not reasonable

353. The reasonableness of any belief that publications were in the public interest ought to be considered in the context of the following three matters:

(a) First, the respondents were professional journalists who held themselves out to be investigative journalists. While there will be cases, such as *Palmer v McGowan*, where a rigorous analysis of pre-publication conduct would be inappropriate, professional investigative journalism is the one situation where the considerations set out in s 29A(3) have their fullest relevance. Professional investigative journalists ought to be held to a higher standard of conduct in terms of using reliable sources, corroborating those sources, checking the accuracy of their allegations, and seeking comment.

(b) Second, the publications did not concern breaking news. They related to something which had allegedly happened 9 years beforehand. The only suggested urgency for the making of the November publications was the supposed risk that another media organisation might gazump the ABC on the reporting of Defence's response to Mr Willacy's FOI application if they read about it on Defence's disclosure log. This supposed concern was spurious, for reasons given elsewhere, and the Court would not accept that it was genuinely held, but even if it was genuinely held, the "urgency" was of a purely commercial nature and not of a kind relevant to s 29A(3)(d). Given the lack of any genuine urgency, the respondents ought to have taken time to attempt to verify the allegations and seek corroboration.

(c) Third, the publications have been found to convey extremely serious imputations. It was always foreseeable that such imputations would be carried, and indeed, Ms Puccini herself recognised that risk prior to publication. The risk of such serious imputations being carried necessitated more rigorous attempts to verify the allegations, fact-checking, and more scrupulous fairness to Mr Russell and November Platoon.

354. Any belief by the respondents that the making of the publications was in the public interest cannot be sustained for the following reasons, in addition to those set out above:

(a) The October Article was based almost entirely on the allegations of Josh. From the outset, Josh was clearly and by his own admission not a reliable source. He was blunt about the deficiencies of his own recollection.

(b) Josh's self-evident deficiency as a reliable source meant that a reasonable journalist in the respondents' position would have recognised the need for corroboration of his allegations. Ms Puccini herself recognised this need. No reasonable steps, however, were taken by the respondents to corroborate the allegations.

(c) There were three obvious sources of potential corroboration:

(i) Other American servicemen: Mr Willacy's attempt to pursue this line of enquiry was half-hearted at best.

(ii) Australian servicemen: No attempt was made to contact anyone from November Platoon. Mr Oakes contacted two former members of Oscar Platoon, but he put Josh's allegations to them at a very high level of generality and did not disclose the "ear witness" nature of the source. Otherwise, Mr Willacy's only attempt to seek corroboration from any Australian source was a conversation with Confidential Source A, who was not in Afghanistan at all in 2012 and merely said, in effect, that Josh's allegation was the sort of thing which could have happened. No reasonable journalism could have regarded the information from Confidential Source A as "corroboration" of Josh.

(iii) Afghan sources: No attempt at all appears to have been made to pursue this line of enquiry.

(d) By her own evidence, Ms Puccini recognised the problems with relying on Josh as a source and the need to corroborate his allegations. She did not explain in her evidence how she was satisfied that it was reasonable to publish the October Article, notwithstanding that by the time of publication, Mr Willacy had plainly failed to do what she had advised him to do.

(e) Otherwise, the respondents' only attempt to "verify" Josh's allegations consisted of deputising Mr Oakes to do a "ring around" of his sources to obtain quotes. Mr Oakes undertook this task on 11 and 12 October 2020 only and had two very brief conversations. The quotes he obtained concerned an unrelated allegation that the DEA was unwilling to work with November Platoon because of alleged poor behaviour.

(f) This, and a suggestion from Confidential Source A that the IGADF was examining November Platoon because of the unrelated allegations concerning Soldier X, was the totality of the information Mr Willacy had when he published the October Article. No reasonable journalist would have considered this an adequate basis on which to make the serious allegations conveyed by the article.

(g) In the October Article, Mr Willacy significantly misrepresented the information available to him in two major ways:

(i) First, by reporting that Josh had implicated commandos, when in fact Josh had said no such thing, and had said repeatedly that he did not know which Australian unit(s) he was working with. Even if Mr Willacy had a basis for inferring that the allegation related to commandos (which is not conceded), he falsely presented it in the October Article as a fact communicated to him by his source, rather than his personal suspicion (see s 29A(3)(b)).

(ii) Second, Mr Willacy implied that there was some connection between Josh's allegations and the unrelated allegations sourced by Mr Oakes about the DEA's supposed unwillingness to work with November Platoon. There was no basis in the source material for Mr Willacy to associate these two allegations with each other.

(h) Mr Willacy anonymised Josh in the October Article (at least somewhat), but had no adequate reason for doing so, because in his email communications, Josh had only asked for his identity not to be disclosed in a half-hearted way, and had not made the provision of his information conditional on confidentiality. Compare s 29A(3)(f).

(i) The respondents made no attempt to seek comment from Mr Russell or anyone else in November Platoon prior to the publication of the October Article, even though they knew who Mr Russell was and the fact that he was the commander of the platoon at the relevant time.

(j) By the time Mr Willacy came to publish the November Article, the only additional information he had was the following:

(i) His conversation with Confidential Source B in November 2021, an obviously unreliable source described to him by another confidential source as a "*bottom of the list, wanker, signaller, show pony, way with words*". Mr Willacy himself accepted that Confidential Source B had serious mental health issues.

(ii) His email correspondence and conversation with Bret Hamilton on 17 and 18 November 2021, which were entirely destructive of one of the main allegations in the October Article, namely the allegation that the DEA was unwilling to work with November Platoon because of misconduct by November Platoon.

(iii) His conversations with the OSI. The significance Mr Willacy placed on these conversations was unwarranted, given it is apparent from the transcript of the meeting that the OSI was only interested in speaking to him because they had been given to understand (by the October Article) that Josh had implicated November Platoon.

(iv) Defence's response to his FOI application. For the reasons given elsewhere, the interpretation placed on that response by the respondents was plainly unreasonable.

(k) Mr Robertson took no further steps to verify any of the allegations in the November Article.

(l) Despite the fact that he contacted Mr Russell prior to publication, Mr Robertson failed to inform him of the actual allegations which the respondents were going to publish about him and his platoon, and thereby deprived him of any fair opportunity to respond to those allegations.

(m) No reasonable journalist would have considered the material available to the respondents prior to the publication of the November publications an adequate basis on which to make the serious allegations conveyed by them, let alone to republish the October Article, which had been entirely undermined by the information conveyed by Mr Hamilton.

(n) The respondents breached several of the ABC's own practice standards in the preparation and publication of the matters.

355. On this issue there is a very real problem when it comes to the reliability of the evidence adduced by the respondents, who bear the onus. Mr Willacy's unreliable recollections, which are inconsistent with his notes, is a problem for the respondents, especially given his own evidence that he only recorded negative information. If the Court is of the view that it is not satisfied that it has been provided with the information that the respondents had at the time of publication relevant to the assessment of the reasonableness of the belief, then the defences must fail by reason of the absence of proof.

355A. At RS [81]-[82], the respondents contend that the degree of public interest in the subject matter is relevant in the determination of the defence. That is obvious from s 29A(3)(i) of the Act and is uncontroversial, but it is only one factor to be weighed against others.

355B. For example, at RS [158] the respondents submit that the public interest in the matters is sustained not just by the precise detail of the events in question, but by the larger questions to which they give rise, such that (so the respondents say) the public interest in the reporting would be unaffected whether Josh's allegation related to November Platoon, or some other platoon of 2 CDO REGT, or even some other unit of the Australian Army. What such an argument implies, however, is that it may be justifiable or at least excusable to sacrifice the reputation of individuals wrongly implicated in an extremely serious allegation to the broader public interest in issues defined at a level of generality as high as "*The conduct of Australian soldiers in war*" (RS [80(a)]) or Australia's relations with foreign militaries and civilians (RS [80(b)]). In some cases that might be so, but it is clearly a very harsh

conclusion to draw. That is why, it is submitted, s 29A focuses attention on whether the respondents' belief that publication was in the public interest was *reasonable*, and why the determination of reasonableness (as s 29A(3) shows) requires consideration of the steps taken by the respondents prior to publication to verify the allegations.

355C. In other words, factual mistakes might be excusable in the public interest, even though they cause serious harm to an individual's reputation, but only if the publisher has made a meaningful attempt to ensure that he or she did not get the facts wrong.

355D. This accords with the respondents' own self-proclaimed attitude to their role as investigate journalists. For example:

(a) The evidence summarised at AS [22] above;

(b) The ABC Code (AS [27] above) which includes accuracy as one of the "*fundamental journalistic principles*";

(c) The ABC's editorial policy on Accuracy (CB.3), which states that "*The ABC has a statutory duty to ensure that the gathering and presentation of news and information is accurate according to the recognised standards of objective journalism*";

(d) The principles set out in the ABC's guidance note on Accuracy (CB.6), including at (CB.6, p20), "*Accuracy is fundamental to credibility for a media organisation*" and is "*also relevant for other important editorial standards, such as impartiality and fair dealing*", because "*an important part of treating people fairly and presenting content impartially involves getting the facts right*"; and

(e) The MEAA Code (CB.459), which relevantly states that "[r]*espect for truth*" is a fundamental principle of journalism and that journalists must strive for accuracy.

355E. The argument which the respondents now make also sits uncomfortably with the fact that each of the journalists gave evidence that they did not intend to defame Mr Russell in the manner which the Court has found that they did.

a. Mr Willacy believed that the October Article did not assert that the November Platoon was responsible for anything referred to by Josh including the Helicopter Incident and that Mr Russell was not mentioned or referred to at all and did not have any basis to believe that he was or might be connected in any way to the conduct

referred to in the October Article: CC.40, p345 at [162]; CC.40, p348 at [182]. He denied that he intended readers to understand that Josh's allegation was about November Platoon (T284.40-41), let alone about Mr Russell.

b. Mr Robertson accepted that he understood the October Article was alleging that the November Platoon was responsible for the Josh allegations in the November Article (see RS [152]) but not Mr Russell.

c. Ms Puccini claimed to have not intended to connect November Platoon with the Josh allegations, although her evidence was discreditable and should not be accepted.

If this evidence were to be accepted, it would mean that an experienced editor and two experienced journalists published seriously defamatory allegations about Mr Russell without intending to do so, even though the imputations carried were clear and central to the publications. It follows that none of them could have believed that the imputations found to be carried were in the public interest. That is a relevant consideration in assessing whether they have established "*reasonable belief*" that it was in the public interest to publish what they did.

Conclusions on public interest

356. This was a particularly unattractive case in which to test the s 29A defence. It is hard to imagine a less responsible approach to the publication of imputations as serious as those conveyed by the November publications than that adopted by the respondents.

357. The publications were based almost entirely on a source who was manifestly and by his own admission unreliable. The attempts made by the respondents to verify or corroborate his information were rudimentary at best (and in the case of Mr Hamilton, produced information which actually contradicted their claims) and they misrepresented what little information was available to them in their publications. Basic fairness to Mr Russell and the members of November Platoon was entirely lacking.

358. The respondents' defence pursuant to s 29A should be rejected.

E. RELIEF

General damages – Legal principles

359. The three purposes of an award of general damages are consolation for hurt feelings, recompense for damage to reputation, and vindication of reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [60] per Hayne J (Gleeson CJ and Gummow J agreeing).

360. The extent of the publication and the seriousness of the defamatory sting are relevant considerations in assessing damages: *Bauer Media Pty Ltd & Anor v Wilson (No 2)* (2018) 56 VR 674 at [165].

361. The Court is required by s 34 of the Act to ensure that there is an appropriate and rational relationship between the harm sustained and the amount of damages.

362. However, the law places a high value on reputation, and the level of damages awarded should reflect this: *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195 per Mahoney ACJ; *John Fairfax Publications Pty Ltd v O'Shane (No. 2)* [2005] NSWCA 291 at [3] per Giles JA (Ipp JA agreeing); *Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2023] FCA 47 at [436] per Katzmann J.

363. The size of the damages award must be sufficient to serve as vindication of the applicant's reputation. It should be a sum "*sufficient to convince a bystander of the baselessness of the charge*": *Cassell & Co Ltd v Broome* [1972] AC 1027 at 1071; *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 at [70]-[78]. In *Chau v Australian Broadcasting Corporation (No 3)* [2021] FCA 44 at [132]-[133], Rares J explained (in awarding general damages in excess of the cap) the importance of the "*headline*" result in damages in providing vindication to applicants because the general public will mainly ask "*how much did he get?*":

> *The public are interested in what amount the Court awards, not the dross of legal reasons or, as Lord Macnaghten once remarked in another context: "Thirsty folk want beer, not explanations": Montgomery v Thompson [1891] AC 217 at 225.*

364. Allowance should be made for the "grapevine effect" (which recognises that the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published); the tendency of the poison in the defamatory publications to percolate through underground passages and contaminate hidden springs or to be driven

underground only later to emerge from their lurking place: *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [786] per Wigney J; *Webster v Brewer (No 3)* [2020] FCA 1343 at [44] per Gleeson J; *Duma (No. 3)* [2023] at [437] per Katzmann J.

365. Pursuant to s 35(1) of the Act, general damages are capped at an indexed sum, which is currently $459,000 (as of 1 July 2023).

366. The *Defamation Amendment Act 2020* introduced two significant changes to the operation of the cap in s 35.

367. First, s 35(2) now provides that "*The maximum damages amount is to be awarded only in a most serious case*". The accepted construction of s 35 prior to the amendment was that the cap was only a "*cut off amount*" and did not require the Court to engage in a scaling exercise: *Cripps v Vakras* [2014] VSC 279 at [599]-[609] per Kyrou J; *Bauer Media Pty Ltd v Wilson (No. 2)* (2018) 56 VR 674 at [209]-[213]; *Rush (No. 7)* at [671] per Wigney J.

368. The fact that s 35(2) directs the Court to award the maximum amount for general damages "*only in a most serious case*" clearly now requires some comparative evaluation of the relative seriousness of different cases. It is necessary, however, to consider more closely what is meant by "*a most serious case*". The phrase is equivalent to the language used in other statutory schemes which impose caps on awards of general damages, such as s 16(2) of the *Civil Liability Act 2002* (NSW) ("*the maximum amount is to be awarded only in a most extreme case*") and ss 79 and 79A of the *Motor Accidents Act 1988* (NSW). In those contexts, attention has been drawn to the legislature's use of the indefinite article. In *Matthews v Dean* [1990] Aust Torts Reports 81-007 at 68,018, Grove J said in relation to the motor accidents legislation:

> *... No doubt Parliament recognised that comparisons of the extent of bodily injury must be odious, hence the choice of language "A most extreme case", which avoids any requirement to apply the superlative by imagining the most extreme case and put that at the top of some grisly table of catastrophes.*

This passage was cited with approval in *Dell v Dalton* (1991) 23 NSWLR 528 at 531 per Handley JA (Kirby P and Priestley JA agreeing). At 533, his Honour held that the word "*most*", in the context of this phrase, effectively meant "*very*", as in the phrases "*you are most welcome*" or "*this is a most unfortunate occurrence*". He said:

> *The use of the indefinite article in the subsection… provides for the creation of a class of "most extreme" cases which necessarily means that the cases may be different, and some may be worse than others.*

369. This means that, in order to award the maximum amount of damages allowed by s 35(1), the Court need not characterise the case as *the* most serious case imaginable, but only as falling within a class of "*most serious*" cases. This avoids the need to make invidious comparisons between incommensurables, such as whether it is worse to be called a corrupt politician (*Barilaro, Duma*), a sex offender (*Rush*), or a war criminal (this case); or between the degree and nature of the hurt and distress experienced by different individuals. Each can be classified as within the range of "*most serious*" cases.

370. Second, s 35(2B) mandates that awards of aggravated damages be made separately to awards of damages for non-economic loss. Prior to the amendment, the conventional approach was to award a single sum of damages for non-economic loss, taking account of both general damages and any aggravated damages: *Nationwide News Pty Ltd v Rush* [2020] FCAFC 432 at [380]. If the Court considered that an award of aggravated damages should be made, the effect of s 35(2) as it stood prior to the amendment was that the cap did not apply at all, and the Court was empowered to lift both pure compensatory damages and aggravated compensatory damages above the cap: *Wilson* at [243]; *Rush (No. 7)* at [671]-[672].

371. The introduction of s 35(2B) means that general damages must be assessed, up to but no higher than the cap (in "*a most serious case*"), and any award of aggravated damages must be made separately. The approach to calculating aggravated damages under this new regime is discussed in more detail below.

Aggravated damages – Legal principles

372. The modern law on the issue of aggravated damages in defamation starts with *Praed v Graham* (1889) 24 QBD 53 at 55, where Lord Esher MR (Lindley and Lopes LJJ agreeing) held that the rule was that:

> *[T]he jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial.*

373. This statement of principle was cited by Dixon, Williams, Webb and Kitto JJ in *Triggell v Pheeney* (1951) 82 CLR 497 at 513. At 514, their Honours added the qualification that

conduct justifying an award of aggravated damages must be improper, unjustifiable and lacking in bona fides. This is for the plaintiff to prove.

374. The House of Lords gave extended consideration to the issue of aggravated damages in *Broome v Cassell & Co* [1972] AC 1027. At 1085, Lord Reid said:

> *[A] jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation.*

This statement was cited with approval in *Carson v John Fairfax & Sons Pty Ltd* (1993) 178 CLR 44 at 71 per Brennan J.

375. The basic proposition at common law was therefore that evidence "*from the time the libel was published*" until verdict was potentially relevant to aggravation of damages, provided the defendant's conduct was unjustifiable, improper and lacking in bona fides.

376. This principle was assumed by s 35(2) of the Act prior to 1 July 2021, which provided:

> *A court may order a defendant in defamation proceedings to pay damages for non-economic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that* ***the circumstances of publication of the defamatory matter*** *to which the proceedings relate are such as to warrant an award of aggravated damages.*

377. The words in bold above have been construed as meaning that the aggravating factors sufficient to render the cap inapplicable must constitute "*circumstances of publication*", and that the conduct of litigation, although a basis for the award of aggravated damages, was not sufficient to lift the cap: *Forrest v Askew* [2007] WASC 161; *Rayney v State of Western Australia (No. 9)* [2017] WASC 161 at [844]-[856].

378. As amended, however, s 35(2A) provides only that:

> *Subsection (1) does not limit the court's power to award aggravated damages if an award of aggravated damages is warranted in the circumstances.*

The Act now draws no distinction between aggravating circumstances which are part of the circumstances of publication and those which are part of the conduct of litigation.

379. As the Full Court observed in *Nationwide News Pty Ltd v Rush* at [380], the reason aggravated damages are conventionally not awarded separately from general damages is that both are compensatory, and the assessment of a sum sufficient to compensate the plaintiff for the totality of the non-economic loss he or she has experienced is "*the product of a mixture of inextricable considerations*". This is especially the case for the tort of defamation because of the basis on which general damages are awarded, in particular because hurt feelings are always one of the major components in any award of damages for defamation. In *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1125-1126, Lord Diplock said:

> *The tort of defamation… has special characteristics which may make it difficult to allocate compensatory damages between head (1) [i.e. general damages] and head (2) [i.e. aggravated damages]. The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages under head (1) itself even in cases in which there are no grounds for "aggravated damages" under head (2). Again the harm done by the publication, for which damages are recoverable under head (1), does not come to an end when the publication is made… So long as its withdrawal is not communicated to all those whom it has reached it may continue to spread. I venture to think that this is the rationale of the undoubted rule that persistence by the defendant in a plea of justification or a repetition of the original libel by him at the trial can increase the damages. By doing so he prolongs the period in which the damage from the original publication continues to spread and by giving to it further publicity at the trial… extends the quarters that the poison reaches.*

380. These observations are well illustrated by the cases in which the manner of committing the tort is an aggravating factor. For example, aggravated damages have been awarded where the defendant was reckless in publishing the matter and failed to make proper enquiries: *Andrews v John Fairfax & Sons Ltd* [1980] 2 NSWLR 225 at 243-244 per Hutley JA; *E Hulton & Co v Jones* [1910] AC 20 at 24 per Lord Loreburn LC. In *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1 at [402], Gillard AJA said:

> *It was then submitted that the proprietor's failure to have effective editorial control over Mr Bolt cannot go to aggravate the hurt. The question arose as to whether it was a reckless publication. It my opinion, the failure to investigate a reckless publication or failure to exercise editorial control may in the circumstances constitute unjustifiable conduct and may aggravate the damages, especially when no evidence was called by the proprietor as to the steps taken to consider a journalist's article.*

381. Aggravating conduct by the defendant in the circumstances of publication is part of the whole continuum of conduct which involves the commission of the tort. Poor journalistic

conduct may be a direct reason why the publication is defamatory in the first place, why it is indefensible, and therefore why the plaintiff is entitled to any damages at all. At one end of the scale, the conduct may be merely incompetent. In those circumstances, it would not warrant an award of aggravated damages, but it may still be something which hurts the plaintiff's feelings and can be taken into account as part of the assessment of general damages. At the other end of the scale, however, the defendant's conduct may be so bad that it is "*improper, unjustifiable or lacking in bona fides*", such as to warrant an award of aggravated damages. The difference between these two ends of the scale is a question of degree, rather than a qualitative distinction.

382. A defendant's conduct since publication, including during the litigation, can also be seen as part of the same continuum of conduct, because as Lord Diplock explained in *Broome*, the harm in a defamation case continues as long as the defamatory allegation is not retracted. Aggravating conduct such as repetition of the libel, refusal to take down online publications, or the maintenance of unmeritorious defences is not a new and separate injury, but a continuation of the same ongoing injury, which all contributes to the global sense of hurt and distress felt by the plaintiff at the totality of the defendant's conduct.

383. In addition to compensating the plaintiff's hurt feelings, damages in defamation are also awarded to vindicate his or her reputation. Improper, unjustifiable or non-bona fide conduct by a defendant in the course of litigation may have the practical effect, or even the deliberate intent in some cases, of delaying or undermining the plaintiff's vindication. Correspondingly, there is the need for a higher award of damages to secure adequate vindication for the plaintiff's reputation.

384. Against this background, what approach should be taken to quantifying aggravated damages as a separate sum, as now required by s 35(2B) of the Act?

385. An award of aggravated damages should not merely be a token sum. The purpose of awarding aggravated damages is not to mark the fact that improper conduct has occurred or to record the Court's disapproval, but to compensate the plaintiff in a substantive way for an integral part of the continuum of tortious conduct. The compensatory purpose of the award means that the sum awarded should be substantial and not merely nominal, sufficient to compensate the plaintiff for what may be a major component of his or her overall hurt and a major reason for the need for vindication.

Extent of publication

386. The evidence as to the extent of publication is as follows (at CD.12-14 and Ex.X):

(a) November Article: A total of **87,340** unique views, comprising:

(i) 86,847 unique page views (as defined at CD.12.p128, [2]) between 19 November 2021 and 5 October 2022: CD.12.p128, [4];

(ii) 493 unique views (as defined in the Second Further Supplementary Statement as to Extent of Publication' (**2FSS**) at [3]; Ex.X) between 6 October 2022 and 27 July 2023: 2FSS at [5].

(b) Linked Article: A total of **1,387** unique clickthrough page views, comprising:

(i) 1,362 unique clickthrough page views (as defined at CD.12.p131, [11]) between 19 November 2021 and 5 October 2022;

(ii) 16 unique clickthrough page views (as defined in the 2FSS at [9]) bewteen 6 October 2022 and 27 July 2023: 2FSS at [9].

(c) TV Broadcast: A total audience of approximately **194,072** people, comprising:

(i) 182,171 people, being the total national audience projection (as defined at CD.13.p135, [2]) of the live TV Broadcast;

(ii) 11,901 total plays of the TV Broadcast on ABC iView: CD.13.p136, [5].

(d) Radio Broadcast: A total audience of more than **139,070** people, noting:

(i) The respondents have said they are unable to provide precise audience data for specific dates and time slots (CD.14.p138, [3]), but that the average estimated radio audience for the relevant time slot during the relevant period was a total of 127,335 people: CD.14.pp138-139, [4]. The actual audience of the Radio Broadcast will be greater than this, because the respondents also acknowledge that 19 November 2021 was not covered by a regional survey data period, and the figures therefore do not include audiences in centres such as Wollongong, Newcastle, Hobart, Darwin and Gold Coast: CD.14.p139, [5].

(ii) The total number of users live-streaming the Radio Broadcast on the ABC Listen app at the relevant times was 11,735: CD.14.p139, [6]. That figure does not include users who streamed the relevant stations on 19 November 2021 from the Illawarra region or the Gold Coast: CD.14.p139, [7].

387. In Mr Russell's submission, the likelihood is that publication was even higher than these already substantial figures. Although the 2FSS was filed and served on 4 August 2023, it only included figures up to 27 July 2023, the day before the first day of the hearing. Given the significant publicity generated by the trial, it is likely that there was a surge of hits on the November Article and the Linked Article.

388. Moreover, the figures provided by the respondents for the Linked Article only capture unique page views generated by clicking through to the October Article from the three hyperlinks included in the November Article: CD.12.p131, [11]. As defined in the Statement of Claim at [9], the Linked Article is "*the November Article read together with the October Article*". The respondents' publication figures capture only one way in which that could occur. Other ways include:

(a) searching for the October and November Articles after watching the TV Broadcast or listening to the Radio Broadcast;

(b) accessing the articles via the hyperlinks to each of them in the ABC's press statement on 19 November 2021 (CB.225);

(c) accessing the October and November Articles via hyperlinks to each of them in the December Article (CB.269);

(d) searching for the October and November Articles after watching the *Media Watch* story on 6 December 2021 (CB.276);

(e) accessing the articles via the hyperlinks to each of them in the ABC's press statement on 30 March 2022 (CB.329).

389. There is evidence that the articles have been republished on other websites. For example, Mr Sudweeks saw them on a Facebook page which regularly posts articles about the ADF: CC.28.p170, [4]. This kind of republication is the natural and probable consequence of the ABC's publication of the articles (noting, for example, that a bar near the top of the page

invites readers to "*Share this article*" and "*Copy Link*"), and it should be held liable for it.

390. In addition, there is evidence that the publications have been read overseas. For example, Mr Dennis gives evidence of reading the October Article and the November Article while he was in the US: CC.11.p86, [11].

Evidence of damage to reputation

391. It is not in dispute that Mr Russell enjoyed a high reputation prior to the publications on 19 November 2021.

392. Amongst Mr Russell's family and friends, the evidence was as follows:

(a) Barbara Russell, Mr Russell's mother, gave evidence that he had always been popular, socially and professionally, is very loyal to his friends and loves his family, that he is patriotic and loves Australia, and that he is passionate about the ADF, took great pride in the work he did, and became a Commando because he wanted to protect Australia: CC.25.p153,[4]-[5]. She gave evidence that people greatly respected Mr Russell prior to the publications, gravitated towards him, loved him, and regarded him "*as a true Australian who stood up for others*": CC.25.p153,[6].

(b) Jile Russell, Mr Russell's older brother, gave evidence that he had a reputation within his family for being a highly driven and motivated person: CC.26.p160, [3].

(c) Tarlee Russell, his younger sister, gives evidence that he was a natural leader who put others before himself and valued doing the right thing as well as being part of something greater than himself: CC.27.p164, [4]. He had a reputation of being a decent, respected and dedicated soldier, friend and family member: CC.27.p164, [7].

(d) Sam Asser is Mr Russell's close friend and has worked with him in various roles since November 2019: CC.4.p43, [1]. Her circle of acquaintances includes people in politics, members and former members of the AFP, public servants, and members of the general community: CC.4.p43, [9]. Amongst those persons, Mr Russell had a reputation prior to the publications "*as an extremely likeable guy who commanded a presence*": CC.4.p43, [10]. People were impressed that she was working with him. He was a leader and natural speaker and he was excited and passionate to work with

veterans. During 2020 and into 2021, he was an upbeat advocate for veterans' and men's health: CC.4.p43, [11].

393. Mr Russell's reputation in the Australian Defence Force was unblemished and impressive:

(a) Timothy Bishop attended ADFA from 2005 to 2007, then the Royal Military College Duntroon in 2008, before serving as a Signals Officer in the ADF from 2009 until 2014: CC.6.p55, [3], [6]. Even during the time he was at ADFA and RMC, Mr Russell had a reputation for being driven, intelligent and super organised. He was well-liked by others. He was regarded as a vibrant and positive person who brought out the best in other people, and he had an excellent reputation: CC.6.p55, [5]. Prior to November 2021, Mr Russell was known within the ADF as a high-performing individual, very reliable, helping and inspiring others, and thoughtful and well-spoken: CC.6.p55, [9]. During his time with the ADF, he helped people achieve what they wanted to achieve, he was selfless, and he was known as having a genuine passion for serving others: CC.6.p56, [9].

(b) Martin Blandy served in the ADF in the 1st Commando Regiment from 1981 to 1985, having served in the New Zealand Police Force from 1974 to 1976, working as a Police Prosecutor in New South Wales from 1977 to 1990, and then working in a variety of roles including in the Commonwealth and Territory Public Services: CC.7.p61, [1]-[4]. Mr Blandy gave evidence that Mr Russell "*had a reputation for fearlessly advocating for veterans*"; CC.7.p61, [7]. He formed the view that Mr Russell was "*an exceptionally intelligent and articulate man who had a great passion for the welfare and well-being of veterans*"; CC.7.p61, [9]. As he engaged with Mr Russell throughout 2021, and interacted with others who knew him, he became aware of his reputation as an "*ethical soldier and a good operator*"; CC.7.p62, [11]. He had "*not heard anyone say anything negative about him*"; CC.7.p62, [11]. He believed Mr Russell "*to be a man of honour and integrity and to have had a reputation as such amongst those who knew him*": CC.7.p62, [12].

(c) Christopher Burson is a former ADF serviceman who worked as a loadmaster in the rear of Blackhawk helicopters before transitioning out of the ADF and into the Victorian Police: CC.8.pp65-66, [1]-[6]. Mr Burson gave evidence that Mr Russell had a reputation for being a vocal spokesperson, such as in relation to the Royal Commission into Veteran Suicide: CC.8.p66, [7].

(d) Brendan Chapman was in the ADF from August 2004 until September 2022: CC.9.p70, [1]. He was deployed to Iraq from September 2005 to March 2006, East Timor from September to December 2006 and again from March to September 2007, and Afghanistan between July 2009 and February 2010: CC.9.pp70-71, [2]. He served in 2 CDO REGT from 2011 until 2020, and served under Mr Russell from 2011 until 2014, including the deployment to Afghanistan in 2012: CC.9.p71, [3]-[4]. During the time Mr Chapman served with Mr Russell, he and others regarded Mr Russell as highly competent and inspirational. He was considered "*a young up and comer*", was "*very well respected by his peers*", he "*treated everybody fairly*", he genuinely cared about his men, as people not just as soldiers: CC.9.p71, [5].

(e) Andrew Cullen served in the ADF from 1996 until retiring as a Major in 2012, and is now the co-founder and secretary of a charity, PTSD Resurrected INC: CC.10.pp75-76, [1]-[6]. Mr Cullen gives evidence of becoming aware of Mr Russell in late 2019 or early 2020, at which time he knew he was the founder of a veteran organisation and saw videos about him which showed he was passionate and vocal about starting a Royal Commission into veteran deaths and suicides: CC.10.p76, [7]. He formed the view that Mr Russell was a great voice for the veteran community: CC.10.p76, [10]. He gives evidence that everyone he spoke to about Mr Russell was impressed by him and wanted to meet and speak with him; he was regularly asked to speak at events regarding veterans; he had an excellent reputation as a spokesperson for veterans and as a former soldier, including amongst ADF and former ADF personnel: CC.10.p76, [10]. He "*had a reputation for being a man of service – people respected him for his previous leadership position in the military, his valour that led to his medals; his work in relation to the Royal Commission, and his advocacy for veterans*": CC.10.p76, [10].

(f) Scott Evennett served in the ADF from January 2005 to October 2012, and in 2 CDO REGT from 2008 to 2012: CC.12.p89, [2]-[3]. He knows many current and former ADF personnel and their families, and deposed that, before November 2021, Mr Russell had in those circles "*an exceptional reputation as having earned his role as commander of November Platoon due to his commitment and consistent display of leadership; as being a good operator; as being utterly dedicated to those with whom he served; and as being ethical and honest*": CC.12.p89, [7].

(g) Dan Fortune served in the Australian Army from 1981 until he retired from fulltime service with the Army in 2017 as a Brigadier: CC.13.pp93-94, [1]-[6]. In 2006, Mr Fortune was Mr Russell's Commanding Officer at the RMC: CC.13.p94, [11]. He thought Mr Russell was "*a highly motivated and a patriotic Australian*" and that he "*showed real potential to become a leader*": CC.13.p94, [12]. His evidence was that, prior to November 2021, Mr Russell had a reputation "*as a talented and dedicated soldier and passionate advocate for veterans affairs*": CC.13.p94, [14].

(h) Mark Henneberry was a Warrant Officer in the Australian Army from 1988 until March 2011: CC.17.p111, [1]. He deposed that Mr Russell was "*highly regarded as a professional officer and leader*" and "*had a reputation for being affable and friendly but always looking out for people under his command*": CC.17.p112, [5]. Prior to November 2021, Mr Russell was regarded by those whom Mr Henneberry knew in the defence sector as being highly professional and with an unblemished record and reputation: CC.17.pp111-112, [1], [6].

(i) Cameron Niven served with the ADF from 2012 until 2014 and now practises as a lawyer in Queensland: CC.20.pp126-127, [1]-[6]. He deposed that, amongst people associated with the ADF and veterans charity organisations, Mr Russell had a reputation "*as a dedicated advocate for veterans who conducted himself in an ethical and forthright manner*": CC.20.p128, [10]. He described Mr Russell as "*a living example of 'good soldiering'*": CC.20.p128, [11].

(j) Scott McConnell served in the ADF from 2006 until November 2014: CC.21.p134, [1]. He began working directly with Mr Russell in 2011: CC.21.p135, [4]. In 2012, he deployed to Afghanistan and served as a radio operator for November Platoon: CC.21.p135, [5]-[6]. He served with November Platoon until 2013 and discharged from the ADF in November 2014: CC.21.p135, [7]. He gave evidence that, during the time he was with November Platoon, Mr Russell had an excellent reputation as commander of November Platoon amongst those in the platoon and the broader military personnel he interacted with, including from other nations: CC.21.p135, [11]-[12]. He said that prior to November 2021, Mr Russell had a reputation "*for being extremely intelligent, professional, a true leader and a friend*": CC.21.p135, [15]. He said he "*would happily deploy to any theatre with Heston again under his command without hesitation*": CC.21.p135, [15].

(k) Katrina Paterson is the mother of Scott Smith, who served in November Platoon and was killed in action in Afghanistan in October 2012: CC.23.p144, [1]. Ms Smith first met Mr Russell at the North Bondi RSL in late 2012 or early 2012 after Mr Russell had invited her and her daughter to a lunch to meet the men from November Platoon with whom Scott had served: CC.23.p144, [2]. She thought Mr Russell "*was an outstanding young man*" and gave evidence that he was caring and honest, showed great leadership, and was gentle, polite, and warm: CC.23.p145, [3]. He showed constant care for her and her daughter throughout the day. Ms Paterson has met other servicemen from the Commands and Special Operations Engineer Regiment (SOER) who know Mr Russell. Her evidence was that they "*never say a bad word about him*", that they describe him "*as an amazing leader and a wonderful human being*", and that they obviously respect him: CC.23.p145, [4]. She gave evidence that, prior to November 2021, Mr Russell had a reputation amongst members of the military and their families "*as a caring and competent leader, who was respected and admired*": CC.23.p145, [7].

(l) Danial Robinson joined the ADF in 2010 and in 2011 was selected to serve in 2 CDO REGT: CC.24.pp148-149, [2]. He met Mr Russell at that time and was in Alpha Company with him from 2011 until mid-2014, including the deployment to Afghanistan in 2012: CC.24.p149, [3]. During the time he served with Mr Russell, Mr Robinson regarded Mr Russell as capable, confident, energetic and positive: CC.24.p149, [5]. He was trusted by those around him and those under his command. He demonstrated the highest standard of leadership. His evidence was that Mr Russell was held in high regard by those with whom he served: CC.24.p149, [6].

(m) Jile Russell, who also served in the ADF from 2009 until 2022 as an Australian Light Armoured Vehicle crewman in the Royal Australian Armoured Corps, gave evidence that Mr Russell had a reputation for being hard working and leading by example: CC.26.p160, [4].

394. Russell also had an outstanding reputation amongst the American armed forces, which is important because of the allegations in the respondents' publications about that issue:

(a) Lee Ambrose is a former Lieutenant Colonel who served for over 20 years in the US Army, including deployments to Afghanistan and Iraq: CC.3.p38, [1]-[3]. In 2011, he was deployed to Afghanistan as the Aviation Battalion Task Force Operations

Officer supporting Taskforce 66: CC.3.p39, [3]. Mr Ambrose worked with the Commandos and flew on missions with Mr Russell: CC.3.p39, [6]-[7]. His evidence is that, amongst the Americans and others with whom he served in Afghanistan, Mr Russell had a reputation of being professionally competent, following all rules of engagement, and doing everything to the highest of standards: CC.3.p39, [10].

(b) Stephen Dennis is a Blackhawk Helicopter Pilot with the United States Army: CC.11.p84, [1]. He was deployed to Iraq from September 2002 to July 2010 and to Afghanistan from January to December 2012: CC.11.p85, [3]. In 2012, he was deployed to Afghanistan as part of the 25th Aviation Regiment, which provided support for the Australian Special Forces on combat missions: CC.11.p85, [5]. As the commander of November Platoon, Mr Russell was Mr Dennis' regular contact for missions: CC.11.p85, [5]. He gave evidence of working together with Mr Russell on at least 20 missions and that the Americans had "*an excellent working relationship*" with Mr Russell and November Platoon: CC.11.p85, [8]. He regarded Mr Russell as "*highly intelligent, operationally impressive and professional*" and said it was "*a pleasure to work with him*": CC.11.p85, [7]. He said that, during his time in Afghanistan, Mr Russell "*had an outstanding reputation amongst both Australian and US servicemen*", and "*he was highly respected by me and members of my unit*": CC.11.p85, [9]. Prior to November 2021, according to Mr Dennis, he had a reputation "*as a respected and trustworthy soldier and leader and a genuine advocate for veterans*": CC.11.p86, [10].

(c) James Nash served in the United States Marine Corps from 2009 until 2014: CC.19.p122, [1], [3]. He served alongside Mr Russell in Afghanistan in 2012 on a mission known as Operation Helmand Viper: CC.19.p122, [2]. He deposed that he found the November Platoon "*to be an extremely thorough and professional unit*" who "*were well organised, tactically and technically sound in their movements and impressive as a military unit*": CC.19.p122, [10]. Mr Russell presented similarly: CC.19.p123, [11]. Mr Nash gave evidence that "*Heston and his platoon had an excellent reputation amongst the US forces with whom [he] served in 2012*": CC.19.p123, [13].

(d) John 'Bret' Hamilton served with the Drug Enforcement Administration (**DEA**) from July 1995 until November 2018: CC.15.p103, [1]. He deposed that, while he

was serving in Afghanistan as a Team Leader with the DEA's Foreign-deployed Advisory and Support Team (**FAST**), he met Mr Russell: CC.15.p103, [2]. He led FAST on several operations with November Platoon in 2012, and also worked closely with Oscar Platoon: CC.15.p103, [4]. He said (CC.15.pp103-104, [6]):

> *My experience of the Australian Defence Force was overwhelmingly positive. It is very important to me that the Australian public know that I considered it an honour to work alongside the Australian Commandos. They had a reputation amongst those with whom I was deployed in Afghanistan as a professional group of soldiers who conducted themselves admirably*.

Mr Hamilton gave evidence that November Platoon were highly professional, and that was the view he held of Mr Russell, and that he never witnessed nor was told of any wrongdoing committed by Mr Russell or any member of November Platoon: CC.15.p104, [7].

395. Mr Russell also had high reputation in broader society:

(a) Alan Jones AO came to know Mr Russell because, in 2020 and 2021, Mr Russell appeared on Sky News, including on 1 February 2021 and 18 March 2021 to discuss the worsening mental health of many soldiers: CC.14.p99, [7]. Mr Jones deposed that he regarded Mr Russell as a passionate advocate for veteran health and mental health, that he held Mr Russell in high regard, and that he was aware that Mr Russell had "*an impressive reputation amongst other persons in the media as a spokesperson for veterans*": CC.14.p99, [10]-[12].

(b) Senator Hollie Hughes is a Senator for New South Wales: CB.18.p117, [1]. She deposed that, prior to meeting Mr Russell, she knew "*he was very well regarded in Defence circles and the wider community*" and "*had an excellent reputation as a former commando and commander*": CC.18.p118, [5]-[6]. Since meeting him in 2020, Senator Hughes knows people in politics, the media and the wider community who also know Mr Russell; CC.18.p118, [7]. She said that, prior to November 2021, he "*had a public reputation for being a high-profile war hero having made a very significant contribution to the war in Afghanistan*" and "*[h]e was also known for being active in his charitable endeavours for veterans*": CC.18.p118, [7].

(c) James Willis is a radio producer: CC.29.p175, [1]. He gave evidence that, prior to November 2021, Mr Russell had a reputation amongst the media as a vital and

effective advocate for veterans due to his impeccable defence and service record, and that he was known for his bravery in speaking out on behalf of fellow veterans: CC.29.p175, [6].

396. The respondents' publications caused very substantial damage to Mr Russell's reputation, as was inevitable, given the seriousness of the imputations carried by the publications, the large scale of the audience, and the credibility and authority leant to the publications by the fact that they were products of ABC Investigations.

397. The direct evidence about the effects of the publications on Mr Russell's reputation includes the following:

(a) Mr Russell gave evidence that, since the publications, people with whom he was previously in contact have avoided speaking to him: CC.1.p18, [142]. They have not responded to his attempts to contact them, whereas before the publications they had always been responsive: CC.1.p18, [142]. In May 2022, a person said to him "*I find it fascinating how you're able to run for politics whilst under investigation for war crimes*": CC.1.p19, [144]. He was mortified: CC.1.p19, [144].

(b) Ms Asser gave evidence about abusive and hateful emails and other messages sent to Mr Russell since the November Article: CC.4.p46 [30]-[37]. For example, she said that HestonRussell.com repeatedly received anonymous emails asserting that Mr Russell was a '*killer*' and a '*murderer*': CC.4.p46, [31]. The emails were heinous: CC.4.p 46, [32]. She gives evidence the AVP received emails saying things like '*Murderers like Heston Russell should burn in hell*' and '*Heston Russell murdered children'*: CC.4.p 43, [36].

(c) Mr Bishop gave evidence that he had calls from clients who "*asked what is happening with Heston*": CC.6, p57, [15]-[16]. His business partner asked if they wanted to be associated with '*a guy like Heston*': CC.6.p57, [14]. Clients would raise the allegations against Mr Russell and associate them with the allegations against Ben Roberts-Smith: CC.6.p57 [14].

(d) Mr Burson gave evidence that he spoke to a lot of people about Mr Russell and the allegations against him, and that most people who had not met him would refer to the October Article and the November Article: CC.8, p67, [15]-[17]. In November

2022, "*it didn't matter what he was advocating for, some people always asked him about the ABC article and the allegations within*": CC.8, p67, [22].

(e) Mr Chapman gave evidence that some of his friends had raised the allegations with him and insinuated they are murderers: CC.9.p72, [14]. One of them made a comparison between November Platoon and the notorious Tiger Platoon from the Vietnam War: CC.9.p72, [14]. He also gave evidence that he had observed that Mr Russell's reputation has been tarnished by the November Article even within Army circles, and that many people "*discuss the allegations in the November Article and whether they are true*": CC.9.p73, [20].

(f) Mr Cullen gave evidence that, although the allegations in the October Article "*seemed ridiculous*" to him in light of his experience as a former soldier, he thought it would present as plausible to civilians: CC.10.p77, [14]-[15]. A number of people in his professional and social circles spoke to him about the allegations: CC.10.p79, [31]. He would regularly be asked "*gossip style questions*" like "*What's the go with Heston?*", "*Did it happen?*" and "*Are the articles true?*": CC.10.p79, [32]. He gave evidence that the publications became a talking point during the AVP 2022 campaign (CC.10.p80, [39]):

> *I found myself constantly needing to publicly answer questions and defend Heston against the allegations against him in Afghanistan. This was difficult for my campaign, particularly since the campaign was built around Heston's solid, stand-up reputation as an individual who was there to fight for the community. The campaign showed that he had subsequently become infected; no one wanted to touch him and associate with him because they were scared it would personally impact them too*.

(g) Mr Evennett gave evidence that some of his family and friends, including his followers on social media, have asked him about the publications and whether they are true: CC.12.p91, [14].

(h) Mr Henneberry gave evidence that both people who know and people who do not know Mr Russell have raised the allegations in the November Article: CC.17.p114, [26]. This happens often: CC.17.p114, [26]. He said that "*The publications have impacted the way Heston is seen by people*", especially within the defence sector, where he was previously thought of highly: CC.17.p114, [26]. Mr Henneberry said that "*I think his name and brand has been damaged by the ABC reporting that in my*

view is irreparable regardless of the outcome": CC.17.p115, [29].

(i) Senator Hughes said that, after the publication of the November Article, she heard Mr Russell being discussed amongst her parliamentary colleagues: CC.18.p119, [14]. There were mixed views amongst her colleagues as to whether the allegations were correct: CC.18.p119, [14]. Some were more sceptical of Mr Russell because of the November Article: CC.18.p119, [14].

(j) Mr Niven deposed that he was approached by various members of the public about Mr Russell and that there were about 6 people who told him that Mr Russell was a '*war criminal*', a '*fucking despicable murder[er]*', and other similar descriptions: CC.20.pp131-132, [31].

(k) Brendan Paterson said that people in the Australian Commando Association talked about the November Article, including several in Canberra who were formerly in the platoon: CC.22.p141, [17]. It got attention amongst ADF members and former members and "*people were talking about it*": CC.22.p141, [17]. He said that the publications tarnished Russell's reputation amongst members of the Australian Commando Association and that they "*were advised to keep [their] distance from Heston by the national executive because of the allegations made by the ABC*": CC.22.p142, [23].

(l) Katrina Paterson said that the publications have been widely discussed amongst persons she knows who served with her son Scott: CC.23.p145, [11].

(m) Mr Robinson thought he saw the November Article while he was looking at the trending Google news on his phone CC.24.p149, [9]. He recalled that people he knew were talking and messaging about the allegations in it: CC.24.p149, [10].

(n) Barbara Russell gave evidence that, in the aftermath of the November Article, a number of her work colleagues approached her and asked her if what the ABC had alleged about Mr Russell was true. They asked whether a crime had been committed by him or November Platoon: CC.25.p154, [17]. She recalled seeing hateful messages and negative social media posts about him in November and December 2021 and even after that, including some calling him and his soldiers war criminals and murderers: CC.25pp154-155, [18], [28]. She said that he still receives messages

and comments from people who Google his name and find articles accusing him of being a war criminal in the top Google results: CC.25.p157, [36].

(o) Jile Russell said that, around the time the November Article was published, he received numerous calls, emails and texts from friends and colleagues who asked whether he had seen the allegations against Mr Russell. People would ask him what Mr Russell had done in Afghanistan, suggesting that he was responsible for some wrongdoing: CC.26.pp160-161, [10].

(p) Tarlee Russell said that, since November 2021, Mr Russell has lost a lot of good friendships and professional relationships, and that he has told her that many people do not return his calls and messages: CC.27.p166, [19]-[20]. She said she has scrolled through his Instagram several times since November 2021 and has seen threatening and hateful messages calling him a 'war criminal' or 'murderer' or similar: CC.27.p166, [22].

(q) Mr Sudweeks deposed that in 2022 he saw a lot of online criticism and hate being levelled at Mr Russell, particularly on Facebook, including people calling him a war criminal: CC.28.p171, [9]. In May 2022, he heard a woman referring to Mr Russell as either a 'criminal' or 'war criminal' and using some other slurs towards him. This confirmed his fear "*that many people, particularly those without a military background, would believe the allegations that had been reported by the ABC, which, by this stage… had been shared on social media by many people and pages*": CC.28.p171, [12]. He also gave evidence that, at around the time of the *Guardian* article in November 2022, "*there was a further tirade online of people denigrating Heston and calling him a criminal*": CC.28.p171, [14].

398. The Court should find that the damage to Mr Russell's reputation has been severe.

Evidence of hurt feelings

399. The evidence, from Mr Russell and others, is clearly to the effect that Mr Russell has suffered a substantial amount of subjective hurt as a result of the publications. Apart from some limited cross-examination of Mr Russell, all of that evidence was unchallenged.

400. Mr Russell's own evidence on this issue (summarised above) was corroborated by that of the other witnesses:

(a) Barbara Russell stated that when the November Article was published, Mr Russell was extremely angry and upset. He could not believe it had been published. He was extremely agitated and kept saying that the November Platoon had not even conducted missions during the dates published. He was frustrated and overwhelmed, and felt targeted by the ABC without having been given the chance to defend himself and his soldiers: CC.25.p154, [14]-[16].

(b) Jile Russell said that, after the November Article, Mr Russell often appeared tired due to a lack of sleep: CC.26.p160, [9]. He became very worried that Mr Russell might commit suicide: CC.26.p161, [11].

(c) Tarlee Russell said that, after the November Article, Mr Russell was "*plainly extremely distressed*": CC.27.p165, [16]. She said that his mental health has declined: CC.27.p165, [17]. He has told her he feels extremely low and isolated: CC.27.p165, [17]. She deposed that he stayed at home and was unusually inactive, which was a "*drastic change in his regular behaviour and personality*": CC.27.p166, [18]. His appearance became dishevelled "*and he looked like someone going through it*": CC.27.p166, [18]. He appeared defeated and lost: CC.27.p166, [21]. He is no longer the same person: CC.27.p166. [21]. She was scared he might hurt himself: CC.27.p166, [23].

(d) Ms Asser said that the publications devastated Russell: CC.4.p47, [38]. He was not sleeping: CC.4.p47, [39]. He would binge eat and then struggle with the body dysmorphia and guilt that came with that: CC.4.p47, [40]. She began noticing physical and behavioural changes in him: CC.4.p47, [41]. He became increasingly isolated and in need of constant distraction: CC.4.p47, [41]. She said that, despite him trying to remain positive and motivated to try and fight the ABC's allegations, there have been numerous occasions in which he appeared defeated and exhausted: CC.4.p47, [43]. After the November Article was published, he was at breaking point: CC.4.p47, [44]. In about May 2023, he "*had a full mental breakdown*" and for a week she was "*by his side as his friend whilst he cried and suffered*": CC.4.p49, [58]. She thinks "*his nervous system is hanging by a thread*": CC.4.p48, [53]-[54].

(e) Mr Bishop deposed that the publications have had a "*serious impact*" on Mr Russell's health and well-being. He said that he now looks "*unwell and tired compared to his usual self*", is "*upset, and also confused*" as to why he was targeted

like this, feels "*lost and empty*", "[h]*e doesn't feel like himself*", that he was previously an "*energetic and optimistic person but his tank is empty*", that "[h]*e feels like he has been ripped to shreds*", and that he is "*really struggling*": CC.6.pp57-59, [16]-[21]. He said that "[t]*he worst thing is to see how this has all dimmed his inner fire, causing a serious hit on what is a true heart-led mission to make a difference*" and that the allegations "*have set off a chain reaction for Heston of misery and pain*" which has "*affected him in a truly damaging way*": CC.6.p58, [20]-[21].

(f) Mr Burson said that after the publications, Mr Russell was more "*emotional, short tempered and distracted*", and that every time the ABC rang him "*he became upset or triggered at what they were asking him about due to his previous experiences with them*" and that he "*became paranoid at what they would write about*": CC.8.pp67-68, [20],[23].

(g) Mr Chapman said that Mr Russell is "*not the same person as before*", that he is "*not as cheerful and energetic*", that he is "*more introverted and withdrawn*", and that he "*seems tired and stressed*": CC.9.p73, [18]. He feels lost and that his identity has been questioned. He has not felt happy in a long time: CC.9.p73, [19].

(h) Mr Cullen gave evidence that Mr Russell initially felt some positivity because he had lodged his Editorial Complaint, and at that time was optimistic about getting a positive outcome: CC.10.p79, [28]. Over time, however, Mr Russell shared how the publications "*were really impacting him in a negative way*", and said he was "*struggling to reconcile and understand the reasoning behind the allegations*", that he was particularly hurt that he was named personally, and that the publications were causing him and his fellow members of November Platoon "*significant trauma*": CC.10.p79, [30]. He gave evidence about Mr Russell's anger and frustration about the outcome of his Editorial Complaint: CC.10.p77, [35]-[37]. He gave evidence of Mr Russell's frustration as to why the ABC "*won't admit they were wrong*" and that they persist in "*continuing to defend something that is untrue, regardless of the evidence that is presented to them*": CC.10.p81, [45]-[46].

(i) Mr Evennett said that, over the past 18 months, he has noticed "*physical and behavioural changes*" in Mr Russell. He often appeared "*defeated and depressed*": CC.12.p91, [15]. He could tell that Mr Russell was struggling: CC.12.p91, [15]. He said that Mr Russell became increasingly obsessive about the publications and has

"*put other things in his life on the back burner*". He has been "*on the defence*" ever since the November Article was published. "*He feels that he is under a spotlight*": CC.12.p91, [16]. He said (CC.12.p91, [18]):

> *I don't think Heston will ever fully recover psychologically from the allegations and articles about him. Nor do I think his reputation will fully recover. These are wounds which will never heal.*

(j) Mr Fortune said Mr Russell "*appeared…to be under siege and was feeling shame from the ABC publications*". "*It was like a death by 1000 cuts*". He said he could tell that Mr Russell "*saw the story as an overwhelming attack on himself, the Commandos, November Platoon and veterans generally*": CC.13.p95, [21].

(k) Mr Jones deposed that Mr Russell was distressed by the November Article and that he could "*tell that it definitely affected him as he said he considered the November Article linked him to war crimes and discredited him, his service and his platoon*": CC.14.p100, [14].

(l) Mr Henneberry said that the publications have had a significant effect on Mr Russell and his family, his ability to maintain relationships with former ADF members, and his capacity to develop new relationships with other people: CC.17.p114, [23]. He said that Mr Russell struggles to focus on other things: CC.17.p114, [23]. He gave the following evidence (CC.17.p114, [24]):

> *Since November 2021, Heston has been significantly affected emotionally by the ABC's publications. They have really knocked him about. He has suffered a lot. Heston has only tried to do good and these publications have debased and destabilised him. He's really struggling.*

(m) Senator Hughes gave evidence that Mr Russell was "*upset and angry at the November Article and was in disbelief at the treatment he had received at the hands of the ABC*": CC.18.p118, [13].

(n) Mr McConnell said that Mr Russell was upset by the November Article, that he was "*distressed*", that it upset him to see the ABC had published stories about the November Platoon that brought them into disrepute, and that the allegations in the November Article had "*caught him by surprise and that he was shocked considering all the public statements he had made in the year previously*": CC.21.pp136-137,

[18], [24]-[26]. He said (CC.21.p137, [29]):

> *The November Article had triggered Heston and he was really upset by this stain on his and our Platoon's reputation. Heston spoke with me openly about his anger and disappointment regarding these allegations. The fact that no one contacted him for a discussion prior to allegations being published really annoyed him. He was very proud of his service and title as the November Platoon Commando so I could tell he was definitely upset by these allegations.*

(o) Brendan Paterson deposed that Mr Russell said "*the story had pissed him off as it had put him and his men in disrepute and he intended to fight to clear the reputation of November Platoon*", and that he could tell Russell was feeling upset, "*pissed off*", and "*betrayed*": CC.22.p141, [19]-[20].

(p) Mr Robinson gave the following evidence (CC.24.p150, [14]):

> *I had previously seen Heston in his natural state prior to the publications - he was high performing and a well of positivity. Since then, I can see the toll the publications have taken on him. He has become much quieter and more anxious and defensive. Prior to the publications, he was a very trusting person; he would accept what people told him. To my observation, that is no longer the case. He has become less trusting and more reserved. His soul has taken a beating and this has weighed very heavily on him*

(q) Mr Willis deposed that Mr Russell has told him he feels "*that the ABC had derailed his life and his career*" and that "*he feels like he is fighting this on his own – one soldier against the ABC*": CC.29.p177, [29].

401. The Court should find that Russell has suffered a very high degree of subjective hurt by reason of the publications.

Aggravated damages

402. **Attached** to these submissions is the consolidated table of aggravated damages particulars with references to the supporting evidentiary material and submissions.

403. Most of these particulars were the subject of evidence by Mr Russell, but to the extent they were not, the Court should still infer that the matters particularised have aggravated his hurt: see *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 at [248].

403A. The respondents' submissions at RS [339] and their schedule on aggravated damages (which includes several rows claiming there is "*no evidence of aggravation*") ignore authorities which stand for the proposition that a plaintiff does not have to adduce direct evidence of the fact that the allegedly aggravating conduct has increased his or her sense of hurt. When circumstances of aggravation exist, an increase in the plaintiff's sense of hurt can be inferred from all the evidence: *Wagner v Harbour Radio Pty Ltd* [2018] QSC 201 at [743]; *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981 at [248]; *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 at [722].

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S T Chrysanthou SC
(02) 9132 5711
sue@chrysanthou.com.au

N G Olson
(02) 9151 2242
olson@level22.com.au

T Smartt
(02) 8915 2337
smartt@tenthfloor.org

Counsel for the Applicant