

## Confidential Exhibit Certificate

No. NSD 689, 690 and 691 of 2023

Federal Court of Australia

District Registry: New South Wales

Division: General

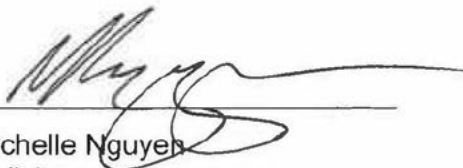
**Ben Roberts-Smith VC MG**

Appellant

**Fairfax Media Publications Pty Limited** and others

Defendants

This is the confidential exhibit marked '**NM-2**' now produced and shown to Nicholas David McKenzie at the time of affirming his affidavit on 14 April 2025 before me:



Michelle Nguyen  
Solicitor

Filed on behalf of (name & role of party)	Fairfax Media Publications Pty Ltd and others, the Respondents
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**From:** Nick McKenzie <nmckenzie@theage.com.au>  
**Sent:** Monday 22 March 2021 11:47 AM  
**To:** Dean Levitan; Peter Bartlett  
**Subject:** Over view of USB -prepared for RS litigation

Legally privileged - prepared for litigation- factual analysis.

Hi Dean,

Here is my factual analysis. Draft.

Nick

RECEIVING MULTIPLE USBs- BURYING USBs IN BACK YARD- IGADF OBLIGATIONS- AFP ISSUES- DISCOVERY ISSUES- DRILLING A LAPTOP

- D is adamant (150 % sure) that RS sought USBs from his SASR mates prior to his first visit to IGADF in around Early Dec 2018. D says that RS was sweating on the arrival of these USBs. Once he got them, he selected certain images to pass to the IGADF.
- RS provided only 17 images to IGADF. The IGADF process involves persons most likely stating on oath that the documents/images they have provided subject to order represents the total in their possession.
- D believes that RS buried the USBs in mid 2019 fearing they would be discovered if the AFP raided his house. (It was around the 27th of July when he copied the financial files onto the USB, on 31 July MOB sent RS an email about the Mick Keelty issue and that authorities wish to speak to him about misconduct involving a senior AFP officer).
- USBs were buried in a lunchbox. ERS was aware he had buried something but thought it was money or something else. It was buried under garden house holder behind the office/BED 5.
- On 16 March 2020, ERS and D dug them up and copied them. They then returned them to the lunch box and buried it again.
- D provided the USBs to the federal police in around November 2020.
- In June 2020, RS wrote to ERS by email "Access to Ilkley" saying he needed to come to property to pick up certain items, including his gun.
- Using the pretence of picking up other items, he arrived at the house. He dug them up on 2 or 5 June 2020 (need to check date) and removed them from his house. It is unknown where they were taken. On the 5 June 2020, ERS photographed the site where the USBs were buried. It was under a garden hose holder.
- On 5 June 2020, ERS wrote to D: "maybe he is going to Sydney and knew he had to get the lunch box. Before we sold." D : "yeah most likely". "Who knows what that dodgy cunt thinks." Having seen some

of the files, ERS by this stage knew it contained photos and financial records. ERS wrote to D: "I'm still laughing. I don't think it's Rs Group financials... he could get that info from the mutt.... it's got to be the photos. Or he thinks I'm unpredictable. Do I stay poker face?? I think he doesn't think I'm smart enough to go and dig for it."

- There was 5 USBs in the lunchbox.

- Early analysis of the USBs suggests the below images, documents, etc are relevant to our case. Those underlined should have been disclosed.

- They contain a variety of operational photos from Rotation 9 (2019), Rotation 12 (2010), and Rotation 18 (2012).

- "New folder"- "USB Drive"This folder also contains dozens of photos of persons drinking the boot at the Fat Lady's Arms in 2009. They include persons named in our case. They include BRS posing with the boot.

- Toshiba USB: - 2009- contains several images of Whiskey 108 operation. P4120015, P4120014, P4120016. The metadata of these photos shows they were taken on 12/4/009. However, the metadata of at least on the these pics shows that they were modified on 13/6/2018.

- Toshiba: - "New folder"- "USB Drive" 2010- has two photos of the generator room operation. P5140202, 203. Dated 14.05.2010.

- Toshiba- 2012- contains 2 picks of Person 93 bleeding incident 11 October 2012 (586, 584), two pics of Sola incident 31 August 2012 P3810176, P8310180, 3 Pics of Tezac 2, 20 Sep 2012 PSCNO374, IMG0021, IMG0018), 12 October Chenartu (P14 incident) DSCN0474, 478, IMG0554, PA120330, 335. 20 October Operation (P66 Incident) video DSCN0764, DSCN0510, DSC0511, 512.

- VERBATIM USB Contains the video of P17 being surveilled by ex cop John McLeod on BRS orders. Metadata dated 3/6/2018.

- VERBATIM USB Contains two Defence Department (likely classified) reports ON WHISKEY 108 OPERATION IN 2009. JTACT MISRERW0108 F-18. This was altered on 6/7/19. The second W108 file is the Post Operation Report. It was altered 7/7/2019.

- USB New Folder (3). "Photos from [REDACTED]": This USB contains NO365 Pic of Tezac 2 Operation. It also contains multiple pics of piss up with the Boot in 2012 at fat Lady's Arms.

- Photos from [REDACTED] critically contain a photo of a dead insurgent from Tezac 2 incident with SASR coins placed on his eyes, This is a likely war crime. It is unlawful to interfere with a corpse this way. The photos suggest that it was RS patrol that took this photo. It appears to be P4 foot in the photo (was he doing the SSE and had the camera?). We need to find a way to exploit RS having this photo. This requires further discussion.

- USB New Folder (3). "Rot 9". This contains a number of pictures of the Whiskey 108 operation 12.4.2009.

- The USBs and the burying of them raise several serious legal issues for RS. It appears to be not only a calculated effort to avoid disclosure in our case, but to place evidence in our case in a manner designed to pervert the course of justice, destroy evidence. By burying it under the ground, it may be

tantamount to destruction. It also is likely that RS may have lied on oath to the IGADF about the documents he provided or withheld from IGADF inquiry. Furthermore, he appears to have lied in his interrogatories about the P17 video, which was clearly in his possession.

- It is an offence to communicate or possess Commonwealth files, including classified files. ie. Former Cwth official Roger Uren was charged by AFP with possessing Cwth documents and convicted. Other ex Cwth officials have also been convicted over similar offences.

- files held by D reveal that BRS was sent Cwth (Defence Department) files on W108 operation. These include a JTAC report (a defence briefing created by the air attack specialist attached to SASR) detailing the bombing of W108. The also include a POST OPERATION REPORT, a typical report produced after an SASR operation. Both documents are the property of the C'wth. They are also almost certainly classified. It is likely an offence to possess them and transmit them.

- D has evidence of files showing that P5 likely sent RS a Commonwealth document that contained a briefing of W108 operation. This appears to have been sent via encrypted means (the service VIBER). The author of the file is US based ex patrol commander (and witness in our case). 3/7/19 is when it was created, according to metadata. A few hours later on the same day it was modified by BRS. On the 3/7/19 it was emailed by BRS to Person 29.

- a second file "W108 copy" appears to have been created by RS on 16/1/2020. The file was created and modified on this day.

- The above conduct needs also to be viewed in addition to his threatening of witnesses (Letters issues) and decision to lie in court documents and instruct ERS to lie in respect of the question of separation.

- ERS also has evidence that RS put a drill through a laptop.

#### **MEETING WITH Person 29 AND MONICA ALLEN**

**-ERS has knowledge that BRS met with Person 29 and Monica on December 4 2019 to pass to him documents to help P29 prepare for his IGADF interview. Must discuss with ERS.**

#### **MEETING WITH BRS AND P11**

**- ERS has information that BRS met with P11 at beach in Perth and spoke to him in the water to ensure he was not wearing a wire. Must discuss with ERS.**

#### **LETTERS SENT TO P18**

**- 2 letters were P18 anonymously In June 2018. The second letter was sent after it was reported in the media that the first letter had been sent and the ADF had called in the AFP to investigate.**

**- At the time that these letters were sent, RS feared that P18 would be a witness against him in respect of war crimes matters before the IGADF, AFP and also in connections to matters that RS was intending to sue us over. It is important to note that by early 2018, we had been given legal threats by RS that he would sue us if we reported war crimes issues.**



- D has stated that John Mcleod on behalf of RS sent a letter to Perth. JM disclosed to ERS and D at a cafe in Brisbane in February 2020 that he was given the letter and told to send it. JM disclosed that he drove a couple of hours away from RS address to do this. D recalls it was two hours north. However, ERS recalls that it might have been northern NSW.

- ERS has disclosed that BRS told her he also sent a letter to Perth. He purchased the stamps from several different outlets. He printed out the letter at the Channel 7 Maroochydore office. He drove to the Northlakes Post Office to send it.

- It is clearly of interest to our case that P18 has been threatened by BRS via this means.

- We need to subpoena AFP and Aus Post for relevant materials.

#### EMAILS SENT TO AFP AND MEDIA TO EFFECT RAID ON Person 6

- In October 2017, a person using a fake email account sent a number of emails to AFP and/or politicians and media alleging that Person 6 had unlawfully possessed weapons and was at risk of shooting dead innocent persons in a massacre in Perth. This prompted a WA police raid of Person 6 home. No weapons were located. The complaint was false. It is an offence to make a false complaint to the AFP.

- The person who sent the emails was Nathan Richter, a QLD photographer. He disclosed that did so on behalf of a person close to an SASR member, namely BRS.

- John McLeod is an associate of Nathan Richter. ERS understands that Mcleod introduced BRS to Richter who then sent the emails on behalf of BRS,

- If it can be shown that BRS used suspect means to lodge a false police complaint to intimidate Person 6, it would aid our case in multiple ways and also involve a possible criminal offence.

#### COVER UP OF PERSON 17 AFFAIR- LIE- THREATS TO LIE- ASSAULT OF P17- PREGNANCY- VIDEO SURVEILLANCE- EMAILS FROM BRS TO D ABOUT WRITING THE DK EMAILS- NEW EVIDENCE PROVIDED BY SOURCES

- D has message sent by ERS to D that states that, by 14/1/2018, ERS was seeking counselling and had disclosed that BRS was an alcoholic. ERS by this stage suspected an affair but did not know for sure. On the 17/1/18 ERS asked D "you still don't think he's seeing someone else huh? I cant see how he could manage it but you just never know." Other messages show that ERS was pushing BRS for counselling and that he had said "bad shit" to her. (see messages in January 2018).

- 30/1/18 ERS suspects that BRS has two phones. Message to D: "I thought I heard another phone ring when I was on the phone to him, surely he's not running 2 phones." We know separately from Person 17 that BRS did have multiple burner phones.

-Evidence shows that RS asked ERS to lie to the media and in court proceedings that she was separated from RS at the time of affair with P17. (see family court affidavit)

-P17 arrived at ERS house and revealed affair on 6 April 2018.

- on 8/4/18 - Post the discovery, ERS states in message to D that "well at least i Know, Tim wife didn't and she was using 7 money" in reference to Tim Worner Channel 7 affair. In this message strand, D suggests that ERS could "always say that you were separated at the time to take the sting out of it." ERS replies: "Nup. No more lies.... I'm dealing with enough lies already... he will have to wear that.'

- on 8/4/18, after P17 visit, ERS wrote to D: "I kind of want KS to privately know in case but then it wont look good if he knows and she doesn't do anything. I feel sick that she might be pregnant. I don't think I could deal with a step kid."

- ERS writes to D "I happened to ask if she ever flew with him places and he said last year yes, that hurt again. I said I need to know where my husband was for six months, because he wasn't with me. he's told me how badly he's fucked up and how he's ruined what we had." Messages also mention how he is trying to repair relationship.

- 22 APRIL 2018, BRS writes to dscott@bigpond.com, subject is "gmail", and the email is signed "regards BRS". But in the email, BRS has composed the email that "Danielle kennedy" would send P17. So this shows that RS did write the DK emails. P17, My name is danielle Kennedy and I represent Mr and Mrs Roberst-Smith... [see file to see text]... Danielle."

- 24 April 2018, BRS again emails dscott@bigpond, subje is "2nd letter". "Hi Dan, as discussed; P17, .... Danielle Kennedy." Happy for you to amend if required. BRS."

-on 26/4/18 - messages show the affair was discovered by ERS when ERS and RS were actually together. Messages to D from ERS states that ERS was shocked to discover affair : (messages 26/4/18: "I honestly don't think anything else can shock me", "I'd imagine personally I've had the worst of it actually finding out"; "But that's the reality of having an affair with a profile.")

- D has disclosed that E was warned by RS to lie about affair or else she would lose kids, lose everything. (This needs to be checked with ERS.)

- D has photos discovered in BRS trash can of 17 in bed with icepack on her head. I believe these have been discovered.

- Monica writes to ERS seeking proof of the separation. "i don't know what they will subpoena from you, but if I was them, I would ask you for all documents evidencing or referring to: the separation- when it started and when it ended; - living arrangements during the separation; who you told you were separated; your knowledge of person 17 and when you found out about her. If or when you get subpoenaed, we will have an "independent barrister" act on your behalf in relation to the subpoena to make any objections you may have the right to make as a subpoenaed party and we will represent Ben re any objections he may wish to make as a party to the proceedings. Anyway, don't worry about that for now. Counsel would just like to see a couple of examples. unflattering is fine. It lends weight to the fact you guys were estranged.``

- Monica writes to ERS: "Hi Em, we met with Matthew Richardson this morning about the various categories for discovery and interrogatories to be answered by Ben. I mentioned that while Ben deletes everything, I understand that you had a couple of messages that evidence that: - you were separated; and - that at some point you became aware of [picture of bunny, ie bunny boiler], so while we don't have evidence to produce from Ben, we will have when they issue a subpoena to you. Matthew said he would like an example of what you have- just so we know

what we have to use in the future. So just a couple of examples of any messages would be great. It is not urgent."

- On RS buried USBs is the video of P17 being surveilled exiting hospital and entering a cab outside the Greenslopes hospital

- John McLeod writes to D about surveilling P17 attend hospital. This is in 2018 after defamation launched. D was asked to get video by BRS. D: "told lots of untruths". JM: "That's who she is. I was one step ahead the whole day." D: "Do you think the entry and exit to the premises was staged it appears that way to me" [background to D's view is that P17 looked too well dressed to have had an abortion and her belief that the hospital does not offer abortions]. JM: "She thought someone was picking her up so she had to be there. She fucked up on the hospital. Instead of going to the procedure clinic, she went to green slopes hospital which I have a voice recording of them saying they don't do that procedure. She told others that she had just had teh procedure and needed picking up thinking they would come. I knew she wasn't at the clinic as I and two others that work for me sta off the clinic for 6 hrs. So i thought, she's fucked up and is down at greenslopes. so we bolted down there and I filmed her their getting into a cab."

- On 17 August 2018, BRS emailed ERS a photo of a message he photographed and which P17 sent on April 6. This includes information that shows that he was not separated from ERS, that she had not discovered the affair prior to April6 visit, and makes reference to other key matters. (We have this message provided by P17 to us). An extract states: "the benefit of seeing what you were capable of a few weeks back & knowing the threats you've made to me sense is that I immediately put in place "insurance" in the event that anything should happen to me or my family..."

- On 17 August 2018, BRS also emailed Emma a photo of medication he photographed from P17 handbag. He has not discovered this photo. He also emailed ERS on teh same day the diary notes from P17 hand bag.

#### AFFAIR WITH MONICA- NEEDS TO BE REVIEWED RE TENDENCY EVIDENCE-

- This may be important. Monica was conducting an affair with RS at the time she was a preparing a case that argued that he did not conduct an affair with P17. The conduct outlined below is tendency evidence: it shows that RS was calculating in his use of communications and deceit to disguise his affair with Monica. She was writing affidavits to court about the stress he was suffering (need to check dates of this). And yet we now know that some of his stress was due to the suspected Monica affair and ERS pushing BRS to tell the truth. This is a gross conflict of interest.

- On 5/1/2020, ERS wrote to D: "I think Ben is cheating with Monica. Do you still have the text and photos of his recent selfies." D wrote back: "sorry this is happening to you again." ERS: "I don't know if he's with her but shit went down i the states that I wasn't happy about."

- D has photo discovered in RS trashcan of a disappearing message from BRS to Monica (it appears he has accidentally photographed this message while using his phone and then binned the photo). It states "You are the most wonderful person Monica... I just love being with you. Have a great day (two emojis blowing love heart kisses)." This was sent at 7.55 am. It suggests that it was sent after RS spent the night with MA at her apartment. Date it was photographed was 29 October 2019. ERS believes that the second affair (BRS and MA) had begun at this time. It

was trashed alongside multiple selfies that RS had taken of himself. It may be that RS was taking pics of himself to send to Monica.

- In Feb 2020 or earlier (date a little fuzzy), Joel TOZER, producer at 60 minutes and resident of Potts Point apartment block where Monica lives encountered RS exiting the building lift in the morning wearing his gym gear. It appears he was leaving to go to the gym, as opposed to using the gym in the building. (note: possible to subpoena the apartment block to get surveillance vision of RS leaving and coming.)

- D has messages between BRS and ERS where ERS confronts him about her suspicion that he is in an inappropriate relationship with MA. She confronts him: "Show me the screen shot where you've asked her." BRS replies "I don't know what to say other than there is nothing going on and Im really embarrassed that I asked Her to reply. She does nit have the chat chain because I deleted it as I do but she sent this to help show that it was just an office catch up with paul and Ark not just me." "Seriously babe it's not right, I love you and there is no issue. I really can't deal with this right now!"

- 30 March 2020. RS ordered some airpods to Monica apartment in potts point using his velocity frequent flyers. By now, he had been booted out of his home.

- In August 2020, The Herald Sun photographed RS and Monica leaving BRS Brisbane apartment in the morning, holding hands. Prior to this Monica had flown to Brisbane and was staying in RS apartment.

- That RS was conducting an affair with his lawyer at the very same time he was denying conducting an affair (maintaining in our proceeding he had never conducted an affair) with MA appears relevant, tendency evidence.

- D has information that MA was providing informal advice to RS about ERS decision to initiate family court proceedings. This has been confirmed by McKenzie. Given MA was not the family court lawyer in this matter, there may be no privilege attached?

- ERS and BRS trade messages about counselling and monica. ERS writes "it's not about attacking you, its about unfucking our marriage. It's about regaining trust which I have lost again. I no longer believe a word you say in regards to your relationship with Monica. There's just been too many lies, promises broken and no longer a situation I can deal with. I'm broken, I'm angry and I'm hurt. You need to help!" BRS responds: "What are you talking about. You have worked yourself up about nothing."

- ERS write sto BRS (date unclear) stating "... caught up with someone when I asked you not to. There's a reason why upu didn't tell me, you didn't want me to know. So that's rather embarrassing! You wouldve told me if you had nothing to hide. That's why I'm angry and teh funny thing about it, I actual;y had a feeling today you were catching up! You must think I'm a fool!! I've been down this road before and I didn't trust my instinct... I wont do that again." BRS: "Emma oit's not a real issue I don't know what to say." "There's nothing you can say! I've been played like a fool and I'm not doing that again. She is a clinger, unprofessional and no doubt thinks I'm an idiot! I've been doing humiliated before and it's horrible!"

- Monica writes to ERS seeking proof of the separation. "i don't know what they will subpoena from you, but if I was them, I would ask you for all documents evidencing or referring to: the separation- when it started and when it ended; - living arrangements during the separation; who

you told you were separated; your knowledge of person 17 and when you found out about her. If or when you get subpoenaed, we will have an "independent barrister" act on your behalf in relation to the subpoena to make any objections you may have the right to make as a subpoenaed party and we will represent Ben re any objections he may wish to make as a party to the proceedings. Anyway, don't worry about that for now. Counsel would just like to see a couple of examples. unflattering is fine. It lends weight to the fact you guys were estranged.` `

- Monica writes to ERS: "Hi Em, we met with Matthew Richardson this morning about the various categories for discovery and interrogatories to be answered by Ben. I mentioned that while Ben deletes everything, I understand that you had a couple of messages that evidence that: - you were separated; and - that at some point you became aware of [picture of bunny, ie bunny boiler], so while we don't have evidence to produce from Ben, we will have when they issue a subpoena to you. Matthew said he would like an example of what you have- just so we know what we have to use in the future. So just a couple of examples of any messages would be great. It is not urgent."

#### MESSAGES FROM KERRY STOKES TO BRS AND ERS

- D has this message from KS to ERS and BRS sent Dec 18, 2019. "Ben glad you guys are there and teh snow is good. Don't worry about any of the rubbish back home. They are on the run !! Stay safe and Happy. Kerry."

- D has message from ERS to KS. Appears this may be after discover of Monica affair. "Hi Kerry, I was wondering if there was a convenient time I could please call you in confidence? It's not urgent. Emma."

#### MULTIPLE PHONES- FAILURE TO DISCOVER PHONE RECORDS- EXISTENCE OF PHONES

- We know from DRS that as he was preparing to launch litigation/after he launched litigation against us, he purchased four phones in Danielle's name or her husband's name to communicate to persons without trace.

Nick

On Wed, 10 Mar 2021 at 09:29, Nick McKenzie <[nmckenzie@theage.com.au](mailto:nmckenzie@theage.com.au)> wrote:  
Legally privileged- prepared for RS litigation

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

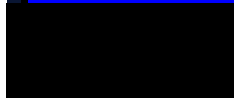


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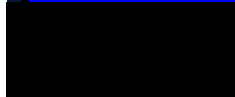


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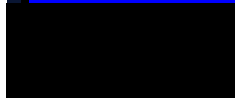


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