

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 3/05/2021 5:23:10 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Dated: 4/05/2021 10:05:51 AM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 59
Rule 29.02(1)

Open Affidavit of Assistant Commissioner Scott Lee

No. NSD1485 of 2018
NSD1486 of 2018
NSD1487 of 2018

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others
Respondents

Affidavit of: Assistant Commissioner Scott Lee
Address: 47 Kings Avenue, BARTON ACT 2600
Occupation: Assistant Commissioner, Counter Terrorism and Special Investigations
Command
Date: 3 May 2021

I, Scott Lee, of the Australian Federal Police (**AFP**), Edmund Barton Building, Kings Avenue, Barton, in the Australian Capital Territory, say on oath:

1. I hold the position of Assistant Commissioner, Counter Terrorism and Special Investigations Command of the AFP.
2. I am authorised to swear this affidavit on behalf of the Commissioner of the AFP (the **Commissioner**).
3. I make this affidavit from my own knowledge, and where stated, on the basis of information provided to me which I believe to be true. Where I express an opinion it is based on my background and experience.

Filed on behalf of the Commissioner of the Australian Federal Police

Prepared by: Jessica Parker
AGS lawyer within the meaning of s 551 of the *Judiciary Act* 1903

Address for Service:
The Australian Government Solicitor,
4 National Circuit, Barton, ACT 2604

File ref: 21000717
Telephone: 02 6253 7000
Lawyer's Email: Jessica.parker@ags.gov.au

PURPOSE OF THIS AFFIDAVIT

4. This affidavit (along with my confidential affidavit made today) has been prepared in support of claims of public interest immunity (**PII**) made by the Commissioner over:
 - 4.1 documents that are otherwise required to be produced by the AFP in response to the subpoena issued at the request of the Applicant, dated 23 December 2020 (**the AFP subpoena**); and
 - 4.2 documents responsive to the subpoenas issued to Persons 1, 4, 6, 7, 14, 18 and 21, each dated 18 December 2020 (**the SOCOMD subpoenas**).
5. **Annexure SL-1** to this affidavit is a copy of the AFP subpoena.
6. **Annexure SL-2** to this affidavit are copies of the SOCOMD subpoenas.

MY BACKGROUND AND EXPERIENCE

7. I commenced in the position of Assistant Commissioner, Counter Terrorism and Special Investigations in January 2020. In this role I am responsible for the investigations of domestic and international terrorist activity, espionage and foreign interference, and special investigations. Notably, the special investigations teams I am responsible for investigate alleged war crimes.
8. I was promoted to Assistant Commissioner in November 2014. In July 2015, I commenced as the Assistant Commissioner responsible for the AFP's International Operations to disrupt crime offshore and ensure regional security and stability.
9. I have been a member of the AFP for 35 years. Since joining in 1985, I have been responsible for criminal investigations and intelligence operations in combatting terrorism, organised crime, money laundering, organised fraud, human trafficking, child sex offences and people smuggling.
10. I have significant experience with international investigations, having been deployed to Indonesia following the October 2002 Bali bombing. As the Forward Commander leading the Australian contingent deployed as part of Operation Alliance, I assisted the Indonesian National Police with the investigation into the terrorist attacks and the Disaster Victim Identification process.
11. In 2005, I was posted to the AFP Bangkok Office as the Senior Liaison Officer, working closely with the Royal Thai Police in the investigations of the Bangkok New Year's Eve 2006 bombings, counter terrorism investigations in South Thailand, child protection, people smuggling and narcotics investigations.

THE AFP'S ROLE

12. The role of the AFP is to enforce Commonwealth criminal law, contribute to combating complex, transnational, serious and organised crime impacting Australia's national security, and to protect Commonwealth and national interests from criminal activity in Australia and overseas.

13. The AFP's functions and powers are conferred by legislation, including the *Australian Federal Police Act 1979 (Cth) (AFP Act)*, which prescribes the constitution of the AFP and sets out its functions.
14. Section 8(1)(b) of the AFP Act provides, in part:
the provision of police services in relation to:
 - (i) *laws of the Commonwealth*
 - (ii) *property of the Commonwealth (including Commonwealth places) and property of authorities of the Commonwealth; and*
 - (iii) *the safeguarding of Commonwealth interests.*
15. The AFP's priorities are informed by the Ministerial Direction issued under section 37(2) of the AFP Act. The Ministerial Direction sets out an expectation the AFP delivers all functions under section 8 of the AFP Act and identifies the expected focus areas for the AFP. One of those areas is contributing to Australia's international law enforcement interests.
16. As a state party to the Rome Statute, Australia has a general obligation to cooperate fully with the International Criminal Court's (**ICC**) investigations and prosecutions. The ICC's jurisdiction includes war crimes committed after the Rome Statute entered into force. The full and thorough investigation of alleged war crimes committed by Australian Defence Force (**ADF**) members in Afghanistan is an obligation of Australia's robust criminal justice system, which is capable of doing so.
17. In explaining the basis for the PII claims, I am mindful of the role and functions of the AFP.

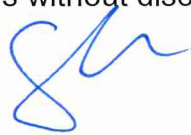

PUBLIC INTEREST IMMUNITY CLAIMS

Background

18. In 2016, the Department of Defence commissioned an independent inquiry after rumours and allegations emerged relating to possible breaches of the Law of Armed Conflict by members of the Special Operations Task Force Group in Afghanistan over the period 2005 to 2016 (**the Afghanistan Inquiry**). On 6 November 2020, the Inspector-General of the Australian Defence Force provided the Afghanistan Inquiry report to the Chief of the Defence Force, which detailed his findings.
19. In summary, the Afghanistan Inquiry found there was credible information relating to 23 incidents of the alleged unlawful killing of 39 individuals. The Afghanistan Inquiry recommended 36 matters for criminal investigation by the AFP.
20. The AFP is currently conducting criminal investigations into three matters arising from the Afghanistan Inquiry.

Basis upon which claims are made

21. I am only able to explain, in this affidavit, in a general way the basis of the AFP's PII claims without disclosing the very information that the AFP seeks to protect.

22. In summary, the PII claims are being made by the AFP to ensure that its ongoing criminal investigations are not prejudiced by the disclosure of information in the Federal Court defamation proceedings, contrary to the public interest. Specifically, the integrity of the criminal investigation process is protected and not compromised by:
- 22.1 the availability of reliable witness evidence;
 - 22.2 revealing details of evidence and lines of enquiry currently being explored during the AFP's investigative process; and
 - 22.3 evidence contamination which cannot be eliminated by the orders currently made in the proceedings under the *National Security Information (Criminal and Civil Proceedings) Act 2004*.
23. The AFP has previously produced some documents in response to the subpoena issued at the request of the Respondents dated 7 May 2020 that related to its ongoing criminal investigations. This is because the AFP did not consider disclosure of that material to be prejudicial to those investigations, or otherwise contrary to the public interest.
24. In my view, the public interest in maintaining the confidentiality of the AFP's ongoing criminal investigations outweighs the public interest in disclosure in these civil proceedings.
25. I have also made a separate confidential affidavit of today's date which provides further explanation about harm to the public interest that would arise if the information the subject of the PII claims was disclosed. That affidavit includes a confidential annexure containing copies of the documents responsive to the AFP subpoena over which the PII claims have been made.
26. In making these PII claims, I have considered whether the risk of harm could be ameliorated by orders made under the NSI Act, or other non-publication or non-disclosure orders. However, I do not consider any such arrangements sufficient. The reasons for this are detailed in my confidential affidavit.

Sworn by the deponent
at Barton
in the Australian Capital Territory
on 3 May 2021.

Signature of deponent

ASSISTANT COMMISSIONER.
CTSI.

Before me:

Signature of witness

Shelley Louise Miller, Legal Practitioner
Name and qualification of witness

Annexure SL-1

No. NSD1485 of 2018
NSD1486 of 2018
NSD1487 of 2018

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

The following 9 pages is the annexure marked SL-1, referred to in the open affidavit of Scott Lee sworn 3 May 2021, before me:


.....
Signature

Shelley Louise Miller, Legal Practitioner
.....

Name and qualification

Form 44
Rule 24.21

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 9216 9827
Fax	-
Email	mark.obrien@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐**All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐**Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by Australian Federal Police
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/12/2020 4:04:55 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 23/12/2020 4:12:04 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

LAST DATE OF SERVICE IS 2 FEBRUARY 2020



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: The Proper Officer
Australian Federal Police
Information Law Team
c/- GPO Box 401
Canberra City ACT 2601

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer) Monica Allen
Law firm (if applicable) Mark O'Brien Legal
Tel +61 2 9216 9898 Fax -
Email mark.obrien@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service Level 19, 68 Pitt Street, Sydney, New South Wales 2000
(include state and postcode)

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: mark.obrien@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising a record of interview, notes of interview or transcript of interview concerning the AFP's investigation into Ben Roberts-Smith's (**the Applicant**) alleged conduct in Afghanistan on or around 12 April 2009 and/or on or around 11 September 2012, with the following individuals:
 - a. Person 4;
 - b. Person 6;
 - c. Person 7;
 - d. Person 13;
 - e. Person 14;
 - f. Person 16;
 - g. Mohammed Hanifa (an Afghan national);
 - h. Man Gul (an Afghan national);
 - i. Shahzad Aka (an Afghan national);
 - j. Bora (an Afghan national).
2. One copy of all documents comprising a statement or statements provided by the any of the individuals in paragraph 1 above to the AFP in relation to the AFP's investigation into the Applicant's alleged conduct in Afghanistan on or around 12 April 2009 and on or around 11 September 2012.

**Notes****Last day for service**

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.
- 9A. The copy of a document may be:
- (a) a photocopy; or
 - (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 22 December 2020

Annexure SL-2

No. NSD1485 of 2018
NSD1486 of 2018
NSD1487 of 2018

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BEN ROBERTS-SMITH

Applicant

FAIRFAX MEDIA PUBLICATIONS PTY LTD and others

Respondents

The following 328 pages is the annexure marked SL-2, referred to in the open affidavit of Scott Lee sworn 3 May 2021, before me:


.....
Signature

Shelley Louise Miller, Legal Practitioner

Name and qualification

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 9216 9827
Fax	-
Email	mark.obrien@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

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Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:34:51 PM AEDT

Registrar

Important Information

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Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 1
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9898
Fax	-
Email	paul.svilans@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney NSW 2000



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (*See Notes 5–9*)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,

referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.

3. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,

for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

4. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs



[17]-[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.
- 9A. The copy of a document may be:
- (a) a photocopy; or
 - (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
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5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
- (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
- (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the *Defamation Act* 2005 (NSW) (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) **Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan.

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
- (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
- (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
- (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, *inter alia*, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (Common Article 3).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

(31) ~~In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

(32) ~~Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starrng again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", ~~and attempted to walk away.~~ The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

***Prosthetic leg***

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, ~~and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.~~

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.÷
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) was communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
 - (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~—a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was *hors de combat*, and had been questioned by the Applicant
~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~-compound and kicked off the ~~small~~-cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

(122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.

(122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.

(122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIA's".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

- (130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.
- (131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.
- (132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.
- (133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.
- (134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.
- (135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.
- (136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.
- (137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim
 - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra" (Imputation 7)* is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim
 - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman" (Imputation 8)* is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim
 - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol" (Imputation 9)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim
 - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off" (Imputation 10)* is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim
 - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat" (Imputation 11)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim
 - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence" (Imputation 12)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim
 - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's" (Imputation 13)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim
 - *"The Applicant assaulted an unarmed Afghan in 2012" (Imputation 14)* is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, appearing to read "Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.



Certificate of lawyer

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "P. Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 9216 9827
Fax	-
Email	mark.obrien@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:35:01 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 4
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9898
Fax	-
Email	paul.svilans@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney NSW 2000

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and the Australian Federal Police concerning the Australian Federal Police's investigation into Ben Roberts-Smith VC MG's (**the Applicant**) alleged conduct in Afghanistan on or around 12 April 2009 and/or on or around 11 September 2012.
3. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.
4. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,



for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

5. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.
- 9A. The copy of a document may be:
- (a) a photocopy; or
 - (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1485/2018
File Title: BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD
(ACN 003 357 720) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
Prepared by	Peter Bartlett		
Law firm	Minter Ellison		
Tel	+61 3 8608 2037	Fax	+61 3 8608 1088
Email	Peter.Bartlett@minterellison.com		

Address for service

Level 23, Rialto Towers, 525 Collins Street
Melbourne VIC 3000



5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
- 10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
- 11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
- 12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
 - (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
- 13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
- 14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
 - (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)**

Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
 - (b) **Contextual truth – section 26 of the *Defamation Act***
 - (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan.

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
- (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
- (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
- (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, *inter alia*, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (Common Article 3).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

~~(31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

~~(32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", ~~and attempted to walk away.~~ The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

***Prosthetic leg***

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention, or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.



Statement to Person 7

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) ~~was~~ communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement, amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
- (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~, a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was *hors de combat*, and had been questioned by the Applicant ~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

- (122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.
- (122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.
- (122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIAs".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

(128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.

(a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~

(b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~

(129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

(130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.

(131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.

(132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.

(133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.

(134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.

(135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.

(136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.

(137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra" (Imputation 7)* is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman" (Imputation 8)* is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol" (Imputation 9)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off" (Imputation 10)* is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat" (Imputation 11)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence" (Imputation 12)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's" (Imputation 13)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim - *"The Applicant assaulted an unarmed Afghan in 2012" (Imputation 14)* is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	<u>Ben Roberts-Smith VC MG, Applicant</u>		
Prepared by (name of person/lawyer)	<u>Monica Allen</u>		
Law firm (if applicable)	<u>Mark O'Brien Legal</u>		
Tel	<u>+61 9216 9827</u>	Fax	<u>-</u>
Email	<u>mark.obrien@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au</u>		
Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales, 2000</u>		

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:35:19 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 6
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is

2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9898
Fax	-
Email	paul.svilans@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney NSW 2000

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices and any documents referring to and/or evidencing the weapons transported by you into Afghanistan during SOTG Rotation XVIII in 2012.
2. One copy of all communications and documents passing between you and the Australian Federal Police concerning the Australian Federal Police's investigation into Ben Roberts-Smith VC MG's (**the Applicant**) alleged conduct in Afghanistan on or around 12 April 2009 and/or 11 September 2012.
3. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 26 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.
4. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,



for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

5. One copy of all communications and documents passing between you and any of the following:

- (e) Nick McKenzie; and/or
- (f) Chris Masters; and/or
- (g) any other person,

concerning the appearance by you on 60 Minutes broadcast on 22 September 2019, including the details of any payment received by you and/or anyone or any entity on your behalf in relation to that appearance.

6. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.
7. One copy of the complaint submitted by you on or about 6 June 2014 concerning the Applicant's Commendation for Distinguished Service.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

- 9A. The copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
Prepared by	Peter Bartlett		
Law firm	Minter Ellison		
Tel	+61 3 8608 2037	Fax	+61 3 8608 1088
Email	Peter.Bartlett@minterellison.com		

Address for service

Level 23, Rialto Towers, 525 Collins Street
Melbourne VIC 3000



5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
- 10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
- 11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
- 12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
 - (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
- 13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
- 14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
 - (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) **Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. ★

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
 - (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
 - (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
 - (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
 - (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
 - (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, inter alia, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (Common Article 3).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

~~(31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

~~(32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", ~~and attempted to walk away~~. The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.



Prosthetic leg

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) ~~was~~ communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement, amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
 - (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~—a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was *hors de combat*, and had been questioned by the Applicant ~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

(122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.

(122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.

(122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIs".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

- (130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.
- (131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.
- (132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.
- (133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.
- (134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.
- (135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.
- (136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.
- (137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra" (Imputation 7)* is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman" (Imputation 8)* is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol" (Imputation 9)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off" (Imputation 10)* is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat" (Imputation 11)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence" (Imputation 12)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's" (Imputation 13)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim - *"The Applicant assaulted an unarmed Afghan in 2012" (Imputation 14)* is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, appearing to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 9216 9827
Fax	-
Email	mark.obrien@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:36:38 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 7
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer) Monica Allen
Law firm (if applicable) Mark O'Brien Legal
Tel +61 2 9216 9898 Fax -
Email paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode) Level 19, 68 Pitt Street, Sydney NSW 2000

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (*See Notes 5–9*)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and the Australian Federal Police concerning the Australian Federal Police's investigation into Ben Roberts-Smith VC MG's (**the Applicant**) alleged conduct in Afghanistan on or around 11 September 2012.
3. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.
4. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,



for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

5. One copy of all communications and documents passing between you and any of the following:

- (e) Nick McKenzie; and/or
- (f) Chris Masters; and/or
- (g) any other person,

concerning any appearance by you on 60 Minutes broadcast on 22 September 2019, including the details of any payment received by you or anyone or any entity on your behalf in relation to that appearance.

6. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

- 9A. The copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
Prepared by	Peter Bartlett		
Law firm	Minter Ellison		
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Address for service Level 23, Rialto Towers, 525 Collins Street
Melbourne VIC 3000



5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
- (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
- (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. ★

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
- (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
- (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
- (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, inter alia, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (Common Article 3).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. ~~In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.~~
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

~~(31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

~~(32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", ~~and attempted to walk away.~~ The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

***Prosthetic leg***

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second In Command.
- (57) ~~In~~ On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.:-
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) ~~was~~ communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
- (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~—a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was *hors de combat*, and had been questioned by the Applicant
~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

(122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.

(122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.

(122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIAS".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

- (130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.
- (131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.
- (132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.
- (133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.
- (134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.
- (135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.
- (136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.
- (137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra"* (**Imputation 7**) is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman"* (**Imputation 8**) is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol"* (**Imputation 9**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off"* (**Imputation 10**) is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat"* (**Imputation 11**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence"* (**Imputation 12**) is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's"* (**Imputation 13**) is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim - *"The Applicant assaulted an unarmed Afghan in 2012"* (**Imputation 14**) is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, appearing to read "Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	<u>Ben Roberts-Smith VC MG, Applicant</u>		
Prepared by (name of person/lawyer)	<u>Monica Allen</u>		
Law firm (if applicable)	<u>Mark O'Brien Legal</u>		
Tel	<u>+61 9216 9827</u>	Fax	<u>-</u>
Email	<u>mark.obrien@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au</u>		
Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales, 2000</u>		

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐ **Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:36:51 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 14
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9898
Fax	-
Email	paul.svilans@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney NSW 2000

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and the Australian Federal Police concerning the Australian Federal Police's investigation into Ben Roberts-Smith VC MG's (**the Applicant**) alleged conduct in Afghanistan on or around 12 April 2009 and/or on or around 11 September 2012.
3. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.
4. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,



for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

5. One copy of all communications and documents passing between you and any of the following:

- (e) Nick McKenzie; and/or
- (f) Chris Masters; and/or
- (g) any other person,

concerning any appearance by you on 60 Minutes broadcast on 22 September 2019, including the details of any payment received by you or anyone or any entity on your behalf in relation to that appearance.

6. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

- 9A. The copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1485/2018
File Title: BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD
(ACN 003 357 720) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
Prepared by	Peter Bartlett		
Law firm	Minter Ellison		
Tel	+61 3 8608 2037	Fax	+61 3 8608 1088
Email	Peter.Bartlett@minterellison.com		

Address for service

Level 23, Rialto Towers, 525 Collins Street
Melbourne VIC 3000



5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
- 10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
- 11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
- 12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
 - (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
- 13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
- 14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
 - (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) **Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. ★

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
- (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
- (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
- (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, *inter alia*, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (**Common Article 3**).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. ~~In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.~~
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

~~(31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

~~(32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", ~~and attempted to walk away.~~ The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.+
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.+
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

***Prosthetic leg***

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt. ★

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention, or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.÷
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention, or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) ~~was~~ communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
 - (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~, a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was hors de combat, and had been questioned by the Applicant
~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

(122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.

(122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.

(122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIAs".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention, or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

- (130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.
- (131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.
- (132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.
- (133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.
- (134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.
- (135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.
- (136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.
- (137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim*
 - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra" (Imputation 7)* is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim
 - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman" (Imputation 8)* is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim
 - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol" (Imputation 9)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim
 - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off" (Imputation 10)* is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim
 - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat" (Imputation 11)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim
 - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence" (Imputation 12)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim
 - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's" (Imputation 13)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim
 - *"The Applicant assaulted an unarmed Afghan in 2012" (Imputation 14)* is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in dark ink, appearing to read "Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	<u>Ben Roberts-Smith VC MG, Applicant</u>		
Prepared by (name of person/lawyer)	<u>Monica Allen</u>		
Law firm (if applicable)	<u>Mark O'Brien Legal</u>		
Tel	<u>+61 9216 9827</u>	Fax	<u>-</u>
Email	<u>mark.obrien@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au</u>		
Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales, 2000</u>		

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐**All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐**Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:37:06 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 18
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party)	Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer)	Monica Allen
Law firm (if applicable)	Mark O'Brien Legal
Tel	+61 2 9216 9898
Fax	-
Email	paul.svilans@markobrienlegal.com.au ; monica.allen@markobrienlegal.com.au
Address for service (include state and postcode)	Level 19, 68 Pitt Street, Sydney NSW 2000

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and the Australian Federal Police concerning the Australian Federal Police's investigation into Ben Roberts-Smith VC MG's (**the Applicant**) alleged conduct in Afghanistan on or around 12 April 2009 and/or 11 September 2012.
3. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,

referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.

4. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,



for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

5. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]–[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

- 9A. The copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1485/2018
File Title: BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD
(ACN 003 357 720) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
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5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
- 10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
- 11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
- 12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
 - (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
- 13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
- 14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
 - (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) **Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. ★

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
- (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
- (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
- (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and

- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, inter alia, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (**Common Article 3**).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

~~(31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

~~(32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", and attempted to walk away. The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.



Prosthetic leg

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
 - (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.★

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].

- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.÷
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention, or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) was communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement, amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
 - (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~, a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



- (109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.
- (110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).
- (110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:
- (a) in the radio communication referred to in paragraph 110 above;
 - (b) in post mission de-briefs and reports; and
 - (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).
- (110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.
- (111) It may be inferred that Ali Jan was not a spotter in circumstances where:
- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was hors de combat, and had been questioned by the Applicant ~~was retrieved from the centralised holding compound by the Applicant;~~
 - (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
 - (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
 - (d) no spotter was seen by the Apache helicopter or overwatch patrol;
 - (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) In his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

- (122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.
- (122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.
- (122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIA's".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

(128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.

(a) ~~Articles 3 and 13 of the Third Geneva Convention, or~~

(b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~

(129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

(130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.

(131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.

(132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.

(133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.

(134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.

(135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.

(136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.

(137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra"* (**Imputation 7**) is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman"* (**Imputation 8**) is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol"* (**Imputation 9**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off"* (**Imputation 10**) is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat"* (**Imputation 11**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence"* (**Imputation 12**) is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's"* (**Imputation 13**) is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim - *"The Applicant assaulted an unarmed Afghan in 2012"* (**Imputation 14**) is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, appearing to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	<u>Ben Roberts-Smith VC MG, Applicant</u>		
Prepared by (name of person/lawyer)	<u>Monica Allen</u>		
Law firm (if applicable)	<u>Mark O'Brien Legal</u>		
Tel	<u>+61 9216 9827</u>	Fax	<u>-</u>
Email	<u>mark.obrien@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au</u>		
Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales, 2000</u>		

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐ **All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

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Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:37:13 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 21
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer) Monica Allen
Law firm (if applicable) Mark O'Brien Legal
Tel +61 2 9216 9898 Fax -
Email paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service Level 19, 68 Pitt Street, Sydney NSW 2000
(include state and postcode)

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and the Australian Federal Police concerning the Australian Federal Police's investigation into Ben Roberts-Smith VC MG's (**the Applicant**) alleged conduct in Afghanistan on or around 12 April 2009 and/or 11 September 2012.
3. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,

referring to and/or evidencing any allegation that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.

4. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,



for the period 1 January 2016 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

5. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes, bullying conduct and/or any of the other matters particularised by the Respondents in paragraphs [17]-[129] on pages 8 to 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

- 9A. The copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1485/2018
File Title: BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD
(ACN 003 357 720) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
Prepared by	Peter Bartlett		
Law firm	Minter Ellison		
Tel	+61 3 8608 2037	Fax	+61 3 8608 1088
Email	Peter.Bartlett@minterellison.com		

Address for service

Level 23, Rialto Towers, 525 Collins Street
Melbourne VIC 3000



5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
- 10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
- 11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
- 12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
 - (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
- 13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
- 14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
 - (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) **Justification – section 25 of the *Defamation Act 2005* (NSW) (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) **Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. ★

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
 - (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
 - (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
 - (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
 - (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
 - (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, inter alia, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (**Common Article 3**).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

~~(31) In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

~~(32) Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault on Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", and attempted to walk away. The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

***Prosthetic leg***

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then★ after a period of time repeated the attempt.

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.÷
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) ~~was~~ communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement, amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
 - (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~—a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, ~~then~~ performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was *hors de combat*, and had been questioned by the Applicant
~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

- (122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.
- (122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.
- (122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about ~~5 November 21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIAs".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

- (130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.
- (131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.
- (132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.
- (133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.
- (134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.
- (135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.
- (136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.
- (137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim*
 - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra" (Imputation 7)* is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim
 - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman" (Imputation 8)* is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim
 - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol" (Imputation 9)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim
 - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off" (Imputation 10)* is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim
 - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat" (Imputation 11)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim
 - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence" (Imputation 12)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim
 - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's" (Imputation 13)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim
 - *"The Applicant assaulted an unarmed Afghan in 2012" (Imputation 14)* is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, which appears to be "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

**Subpoena – Declaration by addressee
Notice to addressee**

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others

Respondents

The **addressee** is the person to whom the subpoena is addressed, and who will be the recipient of the subpoena.

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form that the issuing party (the party that issued the subpoena) has indicated to you will be acceptable.

You must complete the Declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, a Registrar may, without further notice to you, destroy the copies after the expiry of 4 months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

Filed on behalf of (name & role of party)	<u>Ben Roberts-Smith VC MG, Applicant</u>		
Prepared by (name of person/lawyer)	<u>Monica Allen</u>		
Law firm (if applicable)	<u>Mark O'Brien Legal</u>		
Tel	<u>+61 9216 9827</u>	Fax	<u>-</u>
Email	<u>mark.obrien@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au</u>		
Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales, 2000</u>		

Declaration by addressee (subpoena recipient)

[tick the relevant option below, (provide your address as appropriate), sign and date]

☐**All copied documents**

All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.

☐**Some original documents**

Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address:

Date:

Signed by [Name of addressee]
Addressee

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 18/12/2020 9:54:48 AM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Subpoena to Produce Documents - Form 43B - Rule 24.13(1)(b)
File Number:	NSD1485/2018
File Title:	BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720) & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Return of Subpoena
Time and date for hearing:	10/02/2021, 9:30 AM
Place:	Court Room 19B, Level 17, Law Courts Building 184 Phillip Street Queens Square, Sydney



Sia Lagos

Dated: 18/12/2020 3:37:30 PM AEDT

Registrar

Important Information

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

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 43B
Rule 24.13(1)(b)

Subpoena to produce documents

No. NSD. 1485 of 2018

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

Ben Roberts-Smith VC MG

Applicant

Fairfax Media Publications Pty Ltd ACN 003 357 720 and others named in the schedule
Respondents

To: Person 66
C/- Secretary, Department of Defence
Special Air Services Regiment
Campbell Barracks
Swanbourne, Western Australia 6010

You are ordered to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents. See next page for details.

Failure to comply with this subpoena without lawful excuse is a contempt of court and may result in your arrest.

Please read Notes 1 to 13 at the end of this subpoena.

The last date for service of this subpoena is 2020 (See Note 1)

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Applicant
Prepared by (name of person/lawyer) Monica Allen
Law firm (if applicable) Mark O'Brien Legal
Tel +61 2 9216 9898 Fax -
Email paul.svilans@markobrienlegal.com.au; monica.allen@markobrienlegal.com.au
Address for service Level 19, 68 Pitt Street, Sydney NSW 2000
(include state and postcode)

[Version 3 form approved 3/09/2014]



Issued at the request of Ben Roberts-Smith VC MG, whose address for service is:

Place: c/- Mark O'Brien Legal, Level 19, 68 Pitt Street, Sydney, New South Wales, 2000

Email: monica.allen@markobrienlegal.com.au

Details of subpoena

You must comply with this subpoena:

- (a) by attending to produce this subpoena or a copy of it and the documents or things specified in the Schedule of documents below at the date, time and place specified for attendance and production; or
- (b) by delivering or sending this subpoena or a copy of it and the documents or things specified in the Schedule of documents below to the Registrar at the address below, or if there is more than one address below, at any one of those addresses, so that they are received not less than 2 clear business days before the date specified for attendance and production. (See Notes 5–9)

Date, time and place at which you must attend to produce the subpoena or a copy of it and documents or things, unless you receive a notice of a later date or time from the issuing party, in which case the later date or time is substituted:

Date:

Time: 9.30am

Place: Federal Court of Australia, Law Courts Building, Queens Square, Sydney NSW 2000

Address, or any address, to which the subpoena (or copy) and documents or things may be delivered or posted:

The Registrar
Federal Court of Australia
New South Wales District Registry
Locked Bag A6000
Sydney South NSW 1235



Schedule of documents

The documents and things you must produce are as follows:

1. One copy of all documents comprising your record of service long, your personnel record, your medical records including psychiatric assessments, your disciplinary records including any show cause notices.
2. One copy of all communications and documents passing between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,

referring to and/or evidencing any allegation that the Applicant engaged in war crimes and/or any of the other matters particularised by the Respondents in paragraphs [122A]-[122H] on pages 24 and 25 of their Amended Defences filed on 8 September 2020 (a copy of which is annexed and marked "A"), including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.

3. One copy of your mobile telephone records evidencing any communications between you and any of the following:
 - (a) Nick McKenzie; and/or
 - (b) Chris Masters; and/or
 - (c) David Wroe; and/or
 - (d) any other person,

for the period 1 January 2019 to date. In the event that you do not have mobile telephone records to produce, one copy of any document identifying your mobile telecommunications provider(s) during the specified period.

4. One copy of all documents evidencing and/or referring to any complaint or allegation and/or record or notation by you that the Applicant engaged in war crimes and/or any of



the other matters particularised by the Respondents in paragraphs [122A]-[122H] on pages 24 and 25 of their Defences, including but not limited to video recordings, audio recordings, text messages, digital images, Telegram messages, WhatsApp messages, Signal messages, statements, file notes, emails and any other documents.



Notes

Last day for service

1. You need not comply with the subpoena unless it is served on you on or before the date specified in the subpoena as the last date for service of the subpoena.

Informal service

2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last date for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Conduct money

4. You need not comply with the subpoena in so far as it requires you to attend to give evidence unless conduct money sufficient to meet your reasonable expenses of attending as required by the subpoena is handed or tendered to you a reasonable time before the date your attendance is required.

Production of subpoena or copy of it and documents or things by delivery or post

5. If this subpoena requires production of the subpoena (or a copy of it) and a document or thing, instead of attending to produce the subpoena (or a copy of it) and the document or thing, you may comply with the subpoena by delivering or sending the subpoena (or a copy of it) and the document or thing to the Registrar:
 - (a) at the address specified in the subpoena for the purpose; or
 - (b) if more than one address is specified - at any of those addresses;so that they are received not less than 2 clear business days before the date specified in the subpoena for attendance and production, or if you receive notice of a later date from the issuing party, before the later date or time.
6. If you object to a document or thing produced in response to this subpoena being inspected by a party to the proceeding or any other person, you must, at the time of production, notify the Registrar in writing of your objection and of the grounds of your objection.
7. Unless the Court otherwise orders, if you do not object to a document or thing produced by you in response to the subpoena being inspected by any party to the proceeding, the Registrar may permit the parties to the proceeding to inspect the document or thing.

**Production of a number of documents or things**

8. If you produce more than one document or thing, you must, if requested by the Registrar, produce a list of the documents or things produced.

Production of copy instead of original

9. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

- 9A. The copy of a document may be:

- (a) a photocopy; or
- (b) in an electronic form in any of the following electronic formats:
 - .doc and .docx – Microsoft Word documents
 - .pdf – Adobe Acrobat documents
 - .xls and .xlsx – Microsoft Excel spreadsheets
 - .jpg – image files
 - .rtf – rich text format
 - .gif – graphics interchange format
 - .tif – tagged image format

Applications in relation to subpoena

10. You have the right to apply to the Court:
- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
 - (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

11. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to conduct money and any witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court - arrest

12. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
13. Note 12 is without prejudice to any power of the Court under any rules of the Court (including any rules of the Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

**Schedule**

No. NSD. 1485 of 2018

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

Respondents

Second Respondent: Nick McKenzie

Third Respondent: Chris Masters

Fourth Respondent: David Wroe

Date: 17 December 2020



NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 8/09/2020 1:54:03 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Defence - Form 33 - Rule 16.32
File Number: NSD1485/2018
File Title: BEN ROBERTS-SMITH v FAIRFAX MEDIA PUBLICATIONS PTY LTD
(ACN 003 357 720) & ORS
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Dated: 8/09/2020 1:54:07 PM AEST

Registrar

Important Information

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

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Amended Defence to Statement of Claim

No. NSD1485 of 2018

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

Ben Roberts-Smith

Applicant

Fairfax Media Publications Pty Limited and others

Respondents

The Respondents rely upon the following facts and assertions in answer to the Statement of Claim filed by the Applicant on 17 August 2018 (the **Statement of Claim**):

1. The Respondents admit the allegations contained in paragraph 1 of the Statement of Claim.
2. In answer to paragraph 2 of the Statement of Claim, the First Respondent:
 - (a) admits the allegations contained in sub-paragraphs (a) and (b); and
 - (b) do not admit the allegations contained in sub-paragraph (c).
3. The Respondents admit the allegations contained in paragraph 3 of the Statement of Claim.
4. In answer to paragraph 4 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on 9 June 2018 they published the first matter complained of;
 - (b) deny that the first matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 4.

Filed on behalf of	Fairfax Media Publications Pty Limited, Nick McKenzie, Chris Masters and David Wroe, Respondents		
Prepared by	Peter Bartlett		
Law firm	Minter Ellison		
Tel	+61 3 8608 2037	Fax	+61 3 8608 1088
Email	Peter.Bartlett@minterellison.com		

Address for service

Level 23, Rialto Towers, 525 Collins Street
Melbourne VIC 3000



5. In answer to paragraph 5 of the Statement of Claim, the Respondents deny that the first matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 5 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 5 of the Statement of Claim or otherwise.
6. In answer to paragraph 6 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on about 8 June 2018 they published the second matter complained of;
 - (b) deny that the second matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 6.
7. In answer to paragraph 7 of the Statement of Claim, the Respondents deny that the second matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 7 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 7 of the Statement of Claim or otherwise.
8. In answer to paragraph 8 of the Statement of Claim, the First, Second and Third Respondents:
- (a) admit that on 10 June 2018 they published the third matter complained of;
 - (b) deny that the third matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 8.
9. In answer to paragraph 9 of the Statement of Claim, the Respondents deny that the third matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 9 of the Statement of Claim; or



- (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 9 of the Statement of Claim or otherwise.
- 10. In answer to paragraph 10 of the Statement of Claim, the First, Second and Third Respondents:
 - (a) admit that on about 9 June 2018 they published the fourth matter complained of;
 - (b) deny that the fourth matter complained of was of and concerning the Applicant; and
 - (c) otherwise do not admit the allegations contained in paragraph 10.
- 11. In answer to paragraph 11 of the Statement of Claim, the Respondents deny that the fourth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 11 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 11 of the Statement of Claim or otherwise.
- 12. In answer to paragraph 12 of the Statement of Claim, the Respondents:
 - (a) admit that on 11 August 2018 they published the fifth matter complained of; and
 - (b) otherwise do not admit the allegations contained in paragraph 12.
- 13. In answer to paragraph 13 of the Statement of Claim, the Respondents deny that the fifth matter complained of, in its natural and ordinary meaning:
 - (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 13 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 13 of the Statement of Claim or otherwise.
- 14. In answer to paragraph 14 of the Statement of Claim, the Respondents:
 - (a) admit that on about 10 August 2018 they published the sixth matter complained of; and



- (b) otherwise do not admit the allegations contained in paragraph 14.
15. In answer to paragraph 15 of the Statement of Claim, the Respondents deny that the sixth matter complained of, in its natural and ordinary meaning:
- (a) was reasonably capable of conveying, or in fact conveyed, any of the imputations set out in paragraph 15 of the Statement of Claim; or
 - (b) was reasonably capable of being, or was in fact, defamatory of the Applicant, in the sense alleged in the imputations set out in paragraph 15 of the Statement of Claim or otherwise.
16. The Respondents deny the allegations contained in paragraph 16 of the Statement of Claim.
17. The Respondents deny that the Applicant is entitled to the relief claimed in paragraph 17 of the Statement of Claim or any relief at all.
18. Further and in the alternative, the Respondents say that insofar as, and to the extent that, it may be found that the first matter complained of, the second matter complained of, the third matter complained of, the fourth matter complained of, the fifth matter complained of and/or the sixth matter complained of (collectively, the **matters complained of**) were published of and concerning the Applicant and to be defamatory of him in their natural and ordinary meaning, or as bearing one or more of the imputations in paragraphs 5, 7, 9, 11, 13 or 15 of the Statement of Claim (which is denied), but otherwise without admission, the Respondents rely on the following defences:
- (a) Justification – section 25 of the *Defamation Act 2005 (NSW)* (Defamation Act)**
- Each of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) and 15(h) of the Statement of Claim is substantially true.
- (b) Contextual truth – section 26 of the *Defamation Act***
- (i) The third, fourth, fifth and sixth matters complained of each carried the following other imputations in addition to the Applicant's imputations (**Contextual Imputations**):
 - (A) The Applicant broke the moral and legal rules of military engagement and is therefore a criminal.



(B) The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan. ★

- (ii) Each of the Contextual Imputation is substantially true.
- (iii) By reason of the substantial truth of the Contextual Imputation, each of the imputations pleaded by the Applicant which are found to have been conveyed as alleged by the Applicant, defamatory of him and not substantially true do not further harm the reputation of the Applicant.

19. Further and in the alternative, if (which is denied) the Applicant suffered any damage as a result of the publication of the matters complained of and/or the imputations pleaded in paragraphs 5, 7, 9, 11, 13 and 15 of the Statement of Claim, then the Respondents intend to rely upon the following facts and matters in mitigation of such damage:

- (a) the substantial truth of the imputations in sub-paragraphs 5(a), 5(b), 5(c), 7(a), 7(b), 7(c), 9(a), 9(b), 9(c), 9(d), 11(a), 11(b), 11(c), 11(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 15(a), 15(b), 15(c), 15(d), 15(e), 15(f), 15(g) of the Statement of Claim and the Contextual Imputations (or so many of them as are established by the Respondents to be substantially true);
- (b) the Applicant's general bad reputation within the Special Air Service Regiment (**SASR**) of the Australian Defence Force (**ADF**), being that of:
 - (i) a person who broke the moral and legal rules of military engagement;
 - (ii) a bully;
 - (iii) a hypocrite in that he held himself out publicly in a manner not consistent with how he conducted himself within the SASR; and
 - (iv) a person not deserving of the good reputation he enjoyed publicly.
- (c) the facts, matters and circumstances proven in evidence in support of the defences pleaded in this Defence;
- (d) the circumstances in which it is proved the matters complained of were published;
- (e) the background context to which (a) to (d) above comprised.



PARTICULARS OF TRUTH

The Applicant

- (1) The Applicant was formerly a member of the SASR.
- (2) The Applicant's final rank within the SASR was Corporal.
- (3) As a member of the SASR the Applicant conducted six operational tours to Afghanistan including:
 - (a) rotation 3 from about May to September 2006;
 - (b) rotation 9 from about March to July 2009;
 - (c) rotation 12 from about March to July 2010;
 - (d) rotation 18 from about June to November 2012.

The Geneva Conventions

- (4) At all material times the Commonwealth of Australia has been a High Contracting Party to the Geneva Conventions, including the conventions entitled:
 - (a) "Convention relative to the Treatment of Prisoners of War" (the **Third Geneva Convention**); and
 - (b) "Convention Relative to the Protection of Civilian Persons in Time of War" (the **Fourth Geneva Convention**).
- (4A) The Third and Fourth Geneva Conventions are codified in Australian domestic law through Division 268 of the *Commonwealth Criminal Code*.
- (5) The Respondents rely upon the terms of the Third Geneva Convention and the Fourth Geneva Convention for their full force and effect.
- (6) Article 3 of the Third Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (7) Article 3 of the Third Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with



respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and
 - (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (8) ~~Article 4 of the Third Geneva Convention provides, in substance, that prisoners of war in the sense of the Third Geneva Convention, are persons who have fallen into the power of the enemy belonging to certain categories including (amongst others) members of the armed forces of a party to the conflict, members of militias or volunteer corps.~~
- (9) ~~Article 13 of the Third Geneva Convention provides, in substance, that prisoners of war must at all times be treated humanely, and that any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war will be regarded as a serious breach of the Convention.~~
- (10) ~~Article 13 of the Third Geneva Convention further provides, in substance, that prisoners of war must at all times be protected, particularly against acts of violence or intimidation.~~
- (11) ~~Article 17 of the Third Geneva Convention provides that no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatsoever and that prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.~~
- (12) Article 3 of the Fourth Geneva Convention provides, in substance, that persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed out of action due to sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely.
- (13) Article 3 of the Fourth Geneva Convention further provides, in substance that the following acts (amongst others) are prohibited at any time any in any place with respect to persons taking no active part in hostilities, including those persons referred to in the preceding paragraph:
- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; and



- (b) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
- (14) ~~Article 4 of the Fourth Geneva Convention provides, in substance, that the persons protected by the Fourth Geneva Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict.~~

Rules of Engagement

- (15) At all material times the members of the ADF serving in Afghanistan were bound by the Rules of Engagement issued by the Chief of the Defence Force to the Chief of Joint Operations relating to the conflict in Afghanistan (**ROE**). The ROE are classified as protected information of the Commonwealth and accordingly their precise terms are not known to the Respondents.
- (16) The ROE define, *inter alia*, the circumstances under which ADF personnel are permitted to use force, including lethal force, and are consistent with the minimum guarantees set out in Article 3 of the Third and Fourth Geneva Conventions referred to above (Common Article 3).

Bullying of Person 1

- (17) At all material times prior to the deployment of rotation 3, the Applicant was acrimonious towards Person 1, who was a small and quiet soldier, as the Applicant did not consider Person 1 to be capable of performing as a water operator within the SASR.
- (18) On about 31 May 2006 the Applicant and the patrol of which he was a member were conducting a mission overwatching the Chora Pass for a larger American mission.
- (19) The purpose of an overwatch mission is to remain in place undetected in order to observe and provide intelligence.
- (20) During the mission, on about 2 June 2006, Person 1 and Person 2 were stationed at the observation post (**OP**). The Applicant and the remainder of the patrol were in the laying up position (that is an area behind the OP where the patrol members eat, perform administration etc).
- (21) Whilst Person 1 and Person 2 were stationed at the OP they noticed an unarmed teenage boy of about 13 or 14 walking along a goat track about 70 metres below the OP. Person 2 whispered into his radio, in substance "all call signs, single individual, moving from right to left in front of the OP". The boy then picked up a sack and



moved back in front of the observation post. Person 2 sent another whispered message on the radio, in substance "all call signs, same male, now moving from left to right in front of the OP". Person 1 and Person 2 considered that the boy had not seen them and that the observation post had not been compromised.

- (22) At or about this time the Applicant and the late Matt Locke ran towards the OP and said to Person 1 and Person 2 in substance "why the f*** didn't you shoot him? Which way did he go?" The Applicant and Matt Locke then ran after the boy and shot him.
- (23) The shots caught the attention of Taliban fighters and shortly after Taliban fighters started patrolling out of the valley below to get up the hill. A fierce gun battle between the Applicant's patrol and a number of Taliban fighters followed.
- (24) During the battle Person 1 engaged an enemy insurgent. The first two times Person 1 attempted to fire his gun the belt had not been seated in the feed plate properly and it did not fire. After re-cocking the gun it fired on the third attempt.
- (25) The fact that the OP was compromised as a result of the Applicant's involvement in chasing and shooting the teenage boy reflected poorly on the Applicant.
- (26) The Applicant has subsequently falsely alleged, in substance, that the reason he was required to engage so fiercely was because Person 1 was unprepared for battle. The Applicant made these allegations to detract attention for his own conduct on the mission. In particular, the Applicant has alleged, in substance, that Person 1 had not oiled his gun.
- (27) Shortly after the Chora Pass battle the Applicant said to members of his patrol, in substance "[Person 1] better be careful because there may be a mistake out there [on a mission in the battlefield] and he gets a bullet in the back of his head".
- (27A) After the Chora Pass battle the Applicant said to Person 1, in substance "next time we go out on patrol, if your performance doesn't improve I will shoot you in the back of the head".
- (28) From at least the time of the Chora Pass battle the Applicant has treated Person 1 with a high degree of contempt including by ostracising him, being openly rude and dismissive towards him and saying negative things about him to others including, in substance:
 - (a) "He's a coward".
 - (b) "He's not up to the standards of being an SAS soldier"
 - (c) "He's undeserving of his position as a water operator".



(29) Further to the particulars in the preceding paragraph, from at least the time of the Chora Pass battle the Applicant consistently made insulting and threatening remarks to Person 1, including in substance:

- (a) "We're going to f*** you off out of the unit".
- (b) "You're not going to be a water operator anymore".
- (c) "You better watch your back".
- (d) "Get over here you f***head".

(30) Further to the particulars in the preceding two paragraphs, from at least the time of the Chora Pass battle the Applicant, on more than one occasion, approached Person 1 in an aggressive manner and made a gun gesture toward Person 1 by putting two fingers into the side of Person 1's head.

(30A) During the time Person 1 was in the Applicant's patrol the Applicant would reach from the back seat of the vehicle and hit Person 1 in the head whilst he was driving.

(30B) During the time Person 1 was in the Applicant's patrol Person 1 was excluded from the group and often had meals by himself, was not invited to contribute to discussions and was not included in the team culture.

(31) ~~In or about late 2006 or early 2007 the Applicant approached Person 1 at a pub in Cottesloe, WA, grabbed him and held him by the throat up against a wall and said in substance that he wanted him out of his patrol.~~

(32) ~~Shortly after the incident in the preceding paragraph Person 1 was transferred to another patrol.~~

(33) During rotation 12 in 2010, Person 1 was standing outside the ready room (an area where soldiers keep their armour, gear and weapons on base) when the Applicant exited the ready room and aggressively pushed Person 1 in the chest with his gear and said to Person 1 in substance "'get out of my way you c*** or I'll f***ing kill ya".

(33A) On or around the beginning of 2012 the Applicant said to Person 7 in substance "I heard f***ing Person 1 is starring again. He is always f***ing up and never meets the standards."

(34) The Applicant's conduct in respect of Person 1 constituted bullying.

(35) The Applicant's bullying of Person 1 continued up until about 2013. In about 2013 Person 1 filed a complaint with ADF authorities in relation to the Applicant's conduct



towards him, which resulted in a mediation being arranged between and attended by Person 1 and the Applicant.

- (36) It may be inferred that the Applicant's conduct in respect of Person 1 was, in part, to detract attention from the Applicant's own responsibility for directing the Taliban's attention towards the observation post by shooting the teenager.

Rotation 9

- (37) During rotation 9 the Applicant held the position within his patrol of Second in Command.

Assault of Person 3

- (38) Prior to the deployment of rotation 9 the Applicant came to believe that Person 3 said something offensive about the Applicant's wife.
- (39) In or about April 2009 the Applicant encountered Person 3 in the hallway of the base in Tarin Kowt, Afghanistan. The Applicant said to Person 3 in substance "What did you say about my missus?" Person 3 replied, in substance "What are you talking about?" or "It wasn't like that", ~~and attempted to walk away.~~ The Applicant then then struck/shoved Person 3 with an open hand hard in the jaw punched Person 3 in the back of the head.

Incident on Easter Sunday 2009

- (40) On or about 12 April 2009 the Applicant and the troop of which he was a member conducted a mission providing commentary and sniper support to the infantry who were trying to get across a river.
- (41) In or about the late afternoon the Applicant and the troop of which he was a member were instructed to assault a compound code-named Whiskey 108. The Applicant's patrol was one of the patrols responsible for conducting the assault.

"Blooding the rookie"

- (42) Rotation 9 was Person 4's first deployment. Person 4 was a member of the Applicant's patrol.
- (43) At various times throughout rotation 9 the Applicant and his patrol commander, Person 5, made statements, in substance that they needed to "blood the rookie" (referring to Person 4).
- (44) "Blooding" refers to initiating a person in the practice of killing, or giving them the taste for killing.



- (45) During the mission in relation to Whiskey 108 an Afghan male (**Afghan Male 1**) was detained.
- (46) In the presence of the Applicant Person 5 ordered Person 4 to execute Afghan Male 1. Pursuant to that order Person 4 placed Afghan Male 1 on his knees and shot him in the back of the head. Person 4 was ordered to execute Afghan Male 1 so that he could be "blooded". The Applicant did not say or do anything to encourage Person 5 to withdraw the order or to stop Person 4 following the order. In these circumstances, and in the circumstances set out in particular 43 above, it may be inferred that the Applicant was complicit in and approved of the order.
- (47) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (48) In the circumstances, by his conduct with respect to Afghan Male 1, the Applicant was complicit in and responsible for murder.

Murder of Afghan Male 2

- (49) After the assault was complete and the patrols were conducting SSE (sensitive site exploitation, being a process post-assault where a detailed and thorough search of the site is performed in order to gather intelligence) the Applicant carried an Afghan male with a prosthetic leg (**Afghan Male 2**) outside the compound and threw him on the ground. The Applicant then shot Afghan Male 2 approximately 10-15 times with a F89 LSW. A F89 LSW is a light machine gun.
- (50) Afghan Male 2 was a "PUC" (person under control) who posed no imminent threat, particularly given that Afghan Male 2 was physically impaired and the Applicant was able to carry him outside of the compound and throw him to the ground.
- (51) In the circumstances, by his conduct with respect to Afghan Male 2, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (52) In the circumstances, the Applicant's conduct with respect to Afghan Male 2 constituted murder.

***Prosthetic leg***

- (53) After Afghan Male 2 had been killed by the Applicant, Person 6 retrieved the prosthetic leg and brought it back to base. To the Applicant's knowledge the prosthetic leg was subsequently:
- (a) brought back to the SASR base in Australia;
 - (b) mounted and framed;
 - (c) used as a prop in photographs; and
 - (d) used as a beer drinking vessel by members of the troop, including the Applicant.
- (54) By drinking from the prosthetic leg the Applicant, as a senior member of the troop, encouraged and contributed to a culture within the troop in which it was acceptable to drink from the prosthetic leg.
- (55) The Applicant's conduct in drinking from the prosthetic leg and in encouraging and contributing to the culture referred to in the preceding paragraph was callous and inhumane.

Assault of an unarmed Afghan male during rotation 12

- (56) During rotation 12 the Applicant held the position within his patrol of Second in Command.
- (57) ~~In~~On or about 15 March 2010 the Applicant and the troop of which he was a member conducted a mission in an area named Deh Rafshan targeting a medium value Taliban leader.
- (58) The target fled from the compound as the helicopters were landing.
- (59) As they were clearing the target compound Person 7 and Person 8 came across an Afghan male (who was not the target) (**Afghan Male 3**). Afghan Male 3 was sitting cross-legged in a carpeted room in the compound and was not armed. It was the intention of Person 7 and Person 8 to "PUC" (meaning arrest; "PUC" meaning "person under control") Afghan Male 3 for questioning. After Person 7 and Person 8 directed Afghan Male 3 to stand up and put his hands behind his back, Afghan Male 3 moved himself into the foetal position and made a whimpering sound. Afghan Male 3 was not exhibiting any threatening conduct but rather was exhibiting signs of fear.
- (60) Person 7 and Person 8 attempted to place Afghan Male 3's hands behind his back so that they could be handcuffed (with plastic cables), however, exhibiting signs of fear, Afghan Male 3's body was stiff and he remained in the foetal position. Person 7 and



Person 8 let go of Afghan Male 3 in the hope that he would relax his body and then after a period of time repeated the attempt.

- (61) As Person 7 and Person 8 were attempting to arrest Afghan Male 3 in the manner described in the preceding paragraph the Applicant entered the room wearing Kevlar gloves. The Applicant walked up to where Person 7 and Person 8 were attempting to arrest Afghan Male 3, got down on one knee and drove several punches hard into Afghan Male 3's face around his cheek bone and eye. A lump/swelling appeared in the area around Afghan Male 3's cheek bone and eye socket almost instantly. The Applicant then drove his knee into Afghan Male 3's abdominal area two to four times. As the Applicant did this Afghan Male 3 made a sound as though the wind had been knocked out of him. Person 7 said to the Applicant words in substance "Whoa, whoa, whoa what are you doing? Get out of here we are looking after this!" The Applicant then left the room.
- (62) In the circumstances, by his conduct with respect to Afghan Male 3, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment. ÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention, or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (63) In the circumstances, the Applicant's conduct with respect to Afghan Male 3 constituted an unlawful assault.

Rotation 18

- (64) During rotation 18 the Applicant held the position within his patrol (Gothic 2) of Patrol Commander.

Mock execution in pre-deployment training for rotation 18

- (65) In or about May 2012 the Applicant and the troop of which he was a member engaged in a training exercise at the Lancelin Defence Training Area, Perth. At about the conclusion of that training exercise the exercise involved a scenario that a compound had been cleared and a detainee had been taken. The detainee, being played by Person 9, was squatted in a corner of the compound with handcuffs on. The Applicant then walked to the other end of the room, grabbed Person 10, who was preparing for his first deployment, and brought him back to where the detainee was squatting. The Applicant said to Person 10, in substance, "kill him". Person 10 looked taken aback, however he complied with the order and jokingly simulated killing the detainee by gesturing and saying "bang" to indicate he had shot the detainee. The Applicant then



grabbed Person 10 by the shoulder and said in substance "You good with that? Because that's how it's gonna be when we get over there."

- (66) In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Articles-3 in that it would constitute murder, and 13 of the Third Geneva Convention, or alternatively Article 3 of the Fourth Geneva Convention.

Informal discussion about SSE during pre-deployment training for rotation 18

(66A) In or about June 2012 in a short period of time between mock attacks in a training exercise there was an informal discussion between the Applicant's patrol and a patrol under the command of Person 31, in one of the fake 'Afghan compounds'. The discussion involved general conversation about the process involved in conducting such attacks. Part of that discussion involved discussion of the process for gathering evidence where a "bad guy" had been killed. The Applicant did most of the talking in this part of the discussion. During the discussion the Applicant said words in substance:

"If we catch someone who is guilty we will shoot them. We will place weapons on them and take photos. Officers should be kept away from the compounds until we have set up the crime scene and the photos have been taken. Then once everyone is happy, that's when the officers will be brought in and told what happened."

(66B) The ROE would not allow someone who had been "caught" to be shot in the sense that that person was not playing an active part in hostilities. In the circumstances, in the event that this scenario was real, the Applicant's conduct would constitute a breach of Common Article 3 in that it would constitute murder.

(66C) The weapon of the kind referred to in the statement in (66A) is sometimes referred to as a "throw-down". A "throw-down" is an item of military equipment including a weapon, radio or chest webbing carried by a friendly force or found on site and placed with the body of a deceased during SSE to use as evidence that the deceased was armed or otherwise an active participant in hostilities. This practice was used in an attempt to make a killing look legitimate within the ROE and the Geneva Conventions.

Kill board

- (67) Throughout rotation 18 the Applicant maintained a "kill board" on the back of the door to his patrol room (which he shared with the other members of his patrol). The kill board comprised of tally marks made on the back of the door corresponding to the number of people members of the patrol had killed on rotation 18.

**Statement to Person 7**

- (68) On or about 2 July 2012 Sergeant Blaine Flower Diddams was killed during an engagement with insurgents on operations in Afghanistan.
- (69) On or about 5 or 6 July 2012 the Applicant and Person 7 were in the ready room and the Applicant said to Person 7 in substance "I'm going to talk the talk, make sure I walk the walk. Before this trip is over I'm going to choke a bloke to death and watch the life drain out of his eyes."

Bullying of Person 10

- (70) Rotation 12 was Person 10's first deployment. At the commencement of the rotation Person 10 was a member of the Applicant's patrol.
- (71) On about 15 July 2012 the Applicant and the troop of which he was a member conducted a mission in the Chora Valley. The mission was planned by the Applicant.
- (72) The mission involved the Applicant's patrol (Gothic 2) and another patrol (Gothic 3)... [set out in the Confidential Annexure to the Defence].
- (73) On the way to the ambush positions on or about 14 July 2012 Person 10's radio failed such that Person 10 had no communications for the remainder of the mission. When the Applicant's patrol moved into their positions at the ambush position the Applicant positioned Person 10 in a position pointed towards an aqueduct. Prior to the mission the troop had been informed of intelligence to the effect that the Taliban use the aqueduct system to move around.
- (74) Gothic 3 were located near the aqueduct in the direction (from Gothic 2) in which the Applicant had pointed Person 10.
- (75) At about 6:05am on about the morning of 15 July 2012, a member of Gothic 3 (positioned near the aqueduct) engaged an armed fighting aged male, that is, fired his weapon. The shot from Gothic 3 impacted near a member of Gothic 2. Person 10 believed the shots came from an enemy insurgent using the aqueduct and shot two short bursts of two to three shots each from his weapon in accordance with standard training. The Applicant yelled out "check fire" and Person 10 stopped firing.
- (76) As the shots fired by the member of Gothic 3 and Person 10 were fired in the direction of another patrol the incidents were "blue on blue incidents" (that is, an attack by one's own side that has the potential to harm one's own forces). Nobody was injured or harmed as a result of the blue on blue incidents.
- (77) Shortly after Person 10 stopped firing a woman and child walked into the vicinity of the ambush positions at a distance of about 200-300 metres.



- (78) The mission was deemed a failed mission.
- (79) As the patrol commander responsible for planning the mission, the fact that the mission failed and that it involved a blue on blue incident reflected poorly on the Applicant.
- (80) After the troop returned to base, the Applicant called his patrol into the patrol room. The Applicant came into the patrol room and shut the door behind him. Person 10 was sitting on a chair. The Applicant directed Person 10 to stand up, which he did. After Person 10 stood up the Applicant punched Person 10 hard in the face, belittled him and verbally abused him in front of the patrol. After assaulting Person 10, the Applicant said to him in substance "not a word of this [referring to the assault that had just occurred in the room] is to leave this room".
- (81) In debriefing meetings and in an investigation into the blue on blue incident the Applicant falsely alleged, in substance, that Person 10 was overwhelmed in the situation and fired shots in an uncontrolled manner whilst ignoring commands from the Applicant.
- (82) As a result of the Applicant's claims in relation to Person 10, Person 10 was placed on administrative duties and was restricted from going outside the wire (that is, outside of the base on operational missions).
- (83) On or about 14 February 2013 the Applicant threatened Person 10, in substance, that if he reported the assault or did not support the Applicant's version of the blue on blue incidents the Applicant would (falsely) report Person 10 to the Hague for war crimes for firing at women and children.
- (84) The Applicant's conduct in respect of Person 10 constituted bullying.
- (85) It may be inferred that the Applicant's conduct in respect of Person 10 was to detract attention from the Applicant's own responsibility for planning a tactically flawed mission which contributed toward the blue on blue incident.

Assault of an unarmed Afghan male civilian

- (86) On about 29 August 2012 a member of the Afghan Army, Sergeant Hekmatullah (**Hekmatullah**), opened fire at Patrol Base Wahab killing three Australian soldiers and injuring two others.
- (87) In about the period 29 August 2012 to early September 2012 the Applicant and the troop of which he was a member conducted a mission in a village in the north-west of the Oruzgan province in search of Hekmatullah.
- (88) [Set out in the Confidential Annexure to the Defence].



- (89) [Set out in the Confidential Annexure to the Defence].
- (90) One of the detainees (**Afghan Male 4**) was a civilian who had a young girl with him. The Applicant asked Afghan Male 4 in substance if the girl was his daughter and what her name was. Afghan Male 4 responded in substance that the girl was his daughter but hesitated in giving her name. The Applicant then grabbed Afghan Male 4 by the front of his clothing, picked him up and forcefully pushed his head into the mud wall of the compound one or two times.
- (91) In the circumstances, by his conduct with respect to Afghan Male 4, the Applicant breached Common Article 3 in that his conduct constituted violence to the person and/or cruel treatment.
- (a) ~~Articles 3, 13 and 17 of the Third Geneva Convention, or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (92) In the circumstances, the Applicant's conduct with respect to Afghan Male 4 constituted an unlawful assault.

Darwan mission - 11 September 2012

- (93) On or about 11 September 2012 intelligence had been received to the effect that Hekmatullah was in, or had been at, a village named Darwan.
- (94) On or about 11 September 2012 the Applicant and the troop of which he was a member conducted a mission in Darwan in search of Hekmatullah (the **Darwan mission**).

Execution of an unarmed Afghan

- (95) Shortly after the commencement of the Darwan mission a member of the overwatch patrol, being a patrol stationed at a higher position to keep a watch over the mission, sent a message over the radio to the effect "We've got a squirter, he just ran out of the green and crossed the river and we can't see him anymore, he is on the other side to us." The message did not indicate that the 'squirter' was armed or (explicitly or impliedly by its terms or tone) that he was a threat. A 'squirter' is a person who leaves the scene of the mission when soldiers approach.
- (96) The Applicant responded to that message, in substance "Roger that, I'll look after it".
- (97) At some time after that radio communication the Applicant crossed the Helmand River in search of the 'squirter'. The Applicant located an Afghan male (**Afghan Male 5**) hiding amongst the rocks on the other side of the Helmand River, stood over him and shot him in the head from close range. At the time the Applicant shot Afghan Male



5 he was standing so close to Afghan Male 5 that the Applicant was splattered with his brain matter and some of it entered the Applicant's mouth.

- (98) It may be inferred that the 'squirter' and Afghan Male 5 (who may or may not have been the same person) were unarmed and/or posed no risk in circumstances where:
- (a) the overwatch patrol had not seen the 'squirter' carrying any weapon;
 - (b) the Applicant was prepared to go after the 'squirter' by himself without the assistance or protection from another member of his patrol;
 - (c) the Applicant was prepared to place himself in a vulnerable position by crossing the river to locate the 'squirter', in circumstances where he would have been at great risk of being shot if the 'squirter' were armed;
 - (d) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (e) the Applicant was able to get as close as he did to Afghan Male 5.
- (99) Further, it may be inferred that the Applicant would have been able to arrest Afghan Male 5 in circumstances where:
- (a) Afghan Male 5 was hiding amongst the rocks when located by the Applicant;
 - (b) the Applicant was able to get so close to Afghan Male 5.
- (100) In the circumstances, by his conduct with respect to Afghan Male 5, the Applicant breached Common Article 3 in that his conduct constituted murder.÷
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (101) In the circumstances, the Applicant's conduct with respect to Afghan Male 5 constituted murder.

Murder of Ali Jan

- (102) [Set out in the Confidential Annexure to the Defence].

(102A) Towards the end of the mission the Applicant and a number of soldiers including members of the Applicant's patrol were clearing compounds at the South-East end of the village. In one compound they located and detained (placed under control) three fighting aged males. The detention of these males rendered each of them hors de combat. One of them was an Afghan male named Ali Jan (Ali Jan). The other two were Person 62 and Person 63. The three Afghan men, including Ali Jan, were handcuffed and questioned. The Applicant questioned Ali Jan and Person 62.



- (103) Once the mission was complete a request for extraction (helicopters) ~~was~~ communicated.
- (104) [Set out in the Confidential Annexure to the Defence].
- (105) [Set out in the Confidential Annexure to the Defence].
- (106) [Set out in the Confidential Annexure to the Defence].
- (107) ~~At or about this time the Applicant retrieved an Afghan male who had been detained in the centralised holding compound (Ali Jan).~~ Towards the end of the interrogation referred to in (102A) above the Applicant moved Ali Jan, who was still handcuffed, to outside the compound. The Applicant caused Ali Jan to be placed at the edge of a small rocky cliff which was greater than 10m high, and forced him into a kneeling position. The Applicant then took a number of steps back before he moved back towards Ali Jan and kicked him hard in the midriff/abdomen causing him to fall back over the cliff and land in the dry creek bed below. The impact of the fall to the dry creek below was so significant that it knocked Ali Jan's teeth out of his mouth.
- (107A) It may be inferred from the Applicant's conduct in placing Ali Jan at the edge of the cliff and in kicking him off the cliff as particularised at paragraph 107 above, that the Applicant:
- (a) intended to kill Ali Jan; and/or
 - (b) acted with reckless indifference to Ali Jan's life.
- (107B) After Ali Jan had fallen the full height of the cliff down to the dry creek bed he was moved by two soldiers whose identity the Respondents do not know to the other side of the creek bed where there was vegetation. After he had been moved to that location Ali Jan was shot multiple times in the presence of the Applicant and Person 11. The shots were fired by either the Applicant or Person 11 (a soldier under the Applicant's command), or alternatively by both the Applicant and Person 11.
- (107C) Ali Jan died as a result of injuries sustained from the cliff fall particularised at paragraph 107, or the gunshot wounds particularised at paragraph 107B, or both.
- (108) The shooting of Ali Jan was a result of an understanding or arrangement, amounting to an agreement between the Applicant together with a number of soldiers under his command including Person 4, and Person 11, to ensure that Ali Jan was dead following the cliff kick. The existence of the agreement between the Applicant and Person 11 to kill Ali Jan may be inferred from all of the facts and circumstances, including:



- (a) Person 11, as a member of the Applicant's patrol, was stationed near the cliff before, during and after the kick particularised at paragraph 107, and was in a position to see any or all of the following:
 - (i) Ali Jan being placed in a kneeling position at the top of the cliff;
 - (ii) the Applicant kicking Ali Jan off the cliff;
 - (iii) Ali Jan falling down the cliff; and/or
 - (iv) Ali Jan's body resting at the base of the cliff;
- (b) after Ali Jan had fallen the full height of the cliff down to the dry creek bed, the Applicant and Person 11 walked down the cliff and conferred. The Respondents do not know the contents of the conversation;
- (c) the Applicant and Person 11 both observed Ali Jan's body after the cliff kick and were in a position to see the serious injuries Ali Jan had sustained including that his teeth had been knocked out as particularised at paragraph 107;
- (d) the Applicant and Person 11 both knew that Ali Jan was hors de combat at the time of the cliff kick particularised at paragraph 107, by reason of the matters particularised at paragraph 102A;
- (e) the Applicant and Person 11 were both present when Ali Jan was shot as particularised at paragraph 107B; and
- (f) the Applicant and Person 11's conduct in covering up the killing of Ali Jan as particularised in paragraphs 109 to 110A below.

(108A) The shooting of Ali Jan particularised in paragraph 107B was carried out pursuant to a joint criminal enterprise, being the understanding or arrangement amounting to an agreement between the Applicant and Person 11 to kill Ali Jan as particularised in paragraph 108 above.

(108B) The shooting of Ali Jan was carried out in furtherance of the Applicant's intention that was formed as set out in paragraph 107A above.

(108C) Further or alternatively to paragraphs 107A and 108B, the Applicant's intention to kill Ali Jan may be inferred from the Applicant's presence and/or conduct particularised in paragraph 107B and the agreement, knowledge and conduct referred to in paragraph 108 above.

~~, a member of the Afghan Partner Force, Person 12 and an interpreter, Person 13, then walked down into the creek bed to inspect Ali Jan, who was still alive. The Applicant directed a soldier under his command to kill Ali Jan, which he did.~~



(109) Person 4, a soldier under the Applicant's command and in Person 11's patrol, then performed SSE (sensitive site examination), that is, took photos of Ali Jan's body, before he and the Applicant returned to their patrol's helicopter landing zone for extraction. During the process of SSE Ali Jan's handcuffs were cut off him and a throw-down ICOM radio was placed next to Ali Jan for the purpose of the photographs, in an attempt to make it appear that Ali Jan was a spotter who was killed legitimately.

(110) The Applicant ~~then~~ sent a signal over the radio, in substance, "11, this is 211, we've just engaged a spotter, that is 1 EKIA" (enemy killed in action).

(110A) The Applicant and Person 4, Person 11 and Person 56 covered up the unlawful killing of Ali Jan by falsely alleging that Ali Jan was a spotter. The Applicant falsely alleged that Ali Jan was a spotter on at least the following occasions, relying upon the ICOM radio he knew had been placed next to Ali Jan as particularised in paragraph 109 above as the basis for his allegation that Ali Jan was a spotter:

- (a) in the radio communication referred to in paragraph 110 above;
- (b) in post mission de-briefs and reports; and
- (c) in his outline of evidence in reply in these proceedings (filed 12 July 2019).

(110B) It may be inferred from the Applicant's conduct in falsely alleging that Ali Jan was a spotter that he was conscious that the killing of Ali Jan was unlawful.

(111) It may be inferred that Ali Jan was not a spotter in circumstances where:

- (a) he had been located by the Applicant and his patrol in a compound and then detained and handcuffed by the Applicant or a soldier in his patrol, and consequently was *hors de combat*, and had been questioned by the Applicant
~~was retrieved from the centralised holding compound by the Applicant;~~
- (b) his hands were hand-cuffed when he was retrieved from the ~~holding~~ compound and kicked off the ~~small~~ cliff;
- (c) he was not seen to be using any mobile telephone or radio (which is a common feature identifying a spotter);
- (d) no spotter was seen by the Apache helicopter or overwatch patrol;
- (e) prior to Ali Jan's death the Applicant did not send any message to the effect that a spotter had been located so that the extraction could be aborted until it was safe;



- (f) in his radio communication sent after Ali Jan was killed the Applicant did not indicate any concern for who Ali Jan may have passed a message to (which is the threat a spotter poses) or give any indication that there was a threat such that the extraction should be aborted until it was safe;
 - (g) the mission was complete and it was unlikely a spotter would have approached the village or the compounds, which were under the control of Australian SAS soldiers, at that time;
 - (h) it was unlikely a spotter would have come within such a short distance of the village such that he was able to be killed in the manner he was (spotters ordinarily operate from several hundred (500-1000) metres away);
 - (i) it was unlikely a spotter would have come within such a short distance of the village such that the Applicant or any member of his patrol could get to his body to perform SSE and return to his patrol's helicopter landing zone within three minutes.
- (112) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill any spotter in an inhumane manner such as kicking them off a cliff.
- (113) Further, whilst it is permissible to kill a spotter under the ROE, it is not permissible to kill the spotter if the spotter is detained, hand-cuffed, unarmed and poses no threat or danger.
- (114) In the circumstances, by his conduct with respect to Ali Jan, the Applicant breached Common Article 3 in that his conduct constituted violence, cruel treatment and murder of the Fourth Geneva Convention.
- (115) ~~Alternatively, in the event that Ali Jan was a spotter (which is not accepted), the Applicant breached Articles 3 and 13 of the Third Geneva Convention.~~
- (116) In the circumstances, the Applicant's conduct with respect to Ali Jan constituted murder.
- (117) Alternatively, by his conduct with respect to Ali Jan the Applicant was complicit in and responsible for murder.

Execution of an unarmed Afghan in October 2012

- (118) On or about 12 October 2012 the Applicant and the troop of which he was a member conducted a mission in Khaz Oruzgan.
- (119) Towards the end of the mission the Applicant, together with his patrol, the interpreter Person 13 and a number of members of the Afghan Partner Force including Person



12 were questioning an Afghan male in a compound (**Afghan Male 6**) as they were waiting for the helicopters to extract them from the mission. Afghan Male 6 was not exhibiting any signs of being a threat or violent. Whilst the Applicant was questioning Afghan Male 6, Person 14, a member of the Applicant's patrol noticed an area in the wall of the compound which looked like a wall cache (being a false wall with a cavity behind it where items can be hidden). Person 14 kicked the wall cache and a number of weapons including rocket propelled grenades and warheads fell out. The Applicant saw the weapons fall out. He then said to Person 13, in substance "tell him [referring to Person 12] to shoot him or get his men to or I'll do it". Following instructions from Person 12, a member of the Afghan Partner Force then shot Afghan Male 6 four to six times.

- (120) It may be inferred that the Applicant was able to detain Afghan Male 6 in circumstances where:
- (a) Afghan Male 6 was not exhibiting any signs of being an imminent threat or violent;
 - (b) Afghan Male 6 was seriously outnumbered; and
 - (c) the Applicant had enough time to issue the direction referred to in the preceding paragraph.
- (121) In the circumstances, by his conduct with respect to Afghan Male 6, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder:-
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
 - (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (122) In the circumstances, by his conduct with respect to Afghan Male 6 the Applicant was complicit in and responsible for murder.

"Blooding" of Person 66

(122A) In or about 18-20 October 2012 the Applicant and the troop of which he was a member conducted an operation to catch or kill a target in an area called Syahchow.

(122B) Person 66 went out on the mission as part of the Applicant's patrol. Person 66 had not killed anyone prior to this mission. Person 67 was also on the mission.

(122C) During the mission the Applicant directed Person 66 to come with him into a compound. Inside the compound were a number of PUCs including two Afghan Males (**Afghan Males 7 and 8**).



(122D) Afghan Males 7 and 8 were removed from the compound by the Applicant and Person 66 and taken to a nearby field. The Applicant stood behind Person 66 and ordered him to shoot one of Afghan Males 7 or 8. Person 66 did so.

(122E) After the incident the Applicant said in substance, that he had blooded Person 66 (referring to him by his nickname).

(122F) In the circumstances, by his conduct with respect to Afghan Male 7 or 8, the Applicant breached Common Article 3 in that he was complicit in and responsible for murder.

(122G) In the circumstances, by his conduct with respect to Afghan Male 7 or 8 the Applicant was complicit in and responsible for murder.

(122H) A couple of days after the mission the Applicant was sitting at a table in the mess hall at Camp Russell with other soldiers including Person 67. The Applicant said to Person 67 in substance "Oh, yeah, you know, officers shouldn't be on the ground, you guys should be sitting on a hill away from it all. You know, we've got to do certain things, so, you know, you shouldn't be around".

Execution of an unarmed Afghan ~~male~~ Adolescent on about 5 November ~~21 October~~ 2012

(123) In or about late October or early November 2012 the Applicant said to the members of his patrol, in substance "Hey fellas, we're on 18, we need two more to get to 20". In saying this the Applicant was referring to the kill board.

(124) In or about late October or early November 2012 the Commanding Officer of the troop, Person 15 expressed concern to the troops that the number of persons killed in action during rotation 18 was too high.

(125) On or about ~~21 October~~ 5 November 2012, during the last mission conducted by the Applicant and the troop of which he was a member, a Toyota Hilux was intercepted by a number of members of the troop, including Person 16. The Hilux contained four Afghan males, including a male of approximately 15 to 18 years old (**Afghan Adolescent**). The Afghan Adolescent was searched and detained by Person 16 and then handed over to the Applicant's patrol for questioning, together with the other occupants of the Hilux. At the time the Afghan Adolescent was visibly extremely nervous.

(126) Shortly after the occupants of the Hilux were handed over to the Applicant's patrol the Applicant sent a radio communication, in substance, "two EKIAs".

(127) One or two days after the mission Person 16 said to the Applicant, in substance, "What happened to the young bloke who was shaking like a leaf?" The Applicant



responded, in substance, "I shot that c*** in the head. [Person 15] told me not to kill any c*** on that job so I pulled out my 9mm and shot him in the head. It was the most beautiful thing I've ever seen."

- (128) In the circumstances, by his conduct with respect to the Afghan Adolescent, the Applicant breached Common Article 3 in that his conduct constituted murder.
- (a) ~~Articles 3 and 13 of the Third Geneva Convention; or~~
- (b) ~~Alternatively, Article 3 of the Fourth Geneva Convention.~~
- (129) In the circumstances, the Applicant's conduct with respect to the Afghan Adolescent constituted murder.

Domestic violence

- (130) From about 2014 to 2017 the Applicant held the position of Chair of National Australia Day Council.
- (131) On 26 January 2015 Rosie Batty was awarded the 2015 Australian of the Year. Rosie Batty is a domestic violence campaigner. The Applicant publicly congratulated and supported Ms Batty on her award.
- (132) From about 13 October 2017 to 5 April 2018 the Applicant engaged in an extra-marital affair with Person 17.
- (133) On 28 March 2018 the Applicant attended a function for the Prime Minister's Veterans Employment Awards held at the Great Hall in Parliament House. The Applicant brought Person 17 as his guest to the awards and introduced her as a guest of his employer, Channel Seven.
- (134) During the function Person 17 became intoxicated and fell down the stairs leading into the underground carpark as she was leaving the function.
- (135) After the function the Applicant and Person 17 went to a room at the Realm Hotel. When they were in the hotel room an argument ensued between the Applicant and Person 17 as the Applicant was angry with Person 17 due to her behaviour at the function and his fear that she may have exposed the affair.
- (136) During the argument Person 17 said to the Applicant, in substance "my head hurts". The Applicant responded in substance "It's going to hurt more" or "I'll show you what hurt is" and punched Person 17 hard in her left eye with a clenched right fist. Person 17 sustained a black eye as a result of this punch.
- (137) On 30 May 2018, Person 17 approached the Australian Federal Police and complained about being assaulted by the Applicant.



- (138) On 24 August 2018, after seeking legal advice about the process of being involved in a criminal prosecution as a witness, Person 17 decided that she did not wish to proceed with a formal complaint to the AFP and notified the AFP accordingly.

Imputations

- (139) The imputation pleaded in sub-paragraphs 5(a), 7(a), 9(c) and 11(c) of the Statement of Claim - *"The Applicant while a member of the SASR, murdered an unarmed and defenceless Afghan civilian, by kicking him off a cliff and procuring the soldiers under his command to shoot him"* (**Imputation 1**) is substantially true by reason of the facts and matters set out in particulars 1-16, 64, 93-94 and 102-117 above.
- (140) The imputation pleaded in sub-paragraphs 5(b) and 7(b) of the Statement of Claim and in paragraph 18(b)(i)(A) above - *"The Applicant broke the moral and legal rules of military engagement and is therefore a criminal"* (**Imputation 2**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-52, 56-64 and 86 to 129 above.
- (141) The imputation pleaded in sub-paragraphs 5(c) and 7(c) of the Statement of Claim and in paragraph 18(b)(i)(B) above - *"The Applicant disgraced his country Australia and the Australian army by his conduct as a member of the SASR in Afghanistan"* (**Imputation 3**) is substantially true by reason of the facts and matters set out in particulars 1-129 above.
- (142) The imputation pleaded in sub-paragraphs 9(a) and 11(a) of the Statement of Claim - *"The Applicant while a member of the SASR committed murder by pressuring a newly deployed and inexperienced SASR soldier to execute an elderly, unarmed afghan in order to 'blood the rookie'"* (**Imputation 4**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, and 40 to 48 and 122A to 122H above.
- (143) The imputation pleaded in sub-paragraphs 9(b) and 11(b) of the Statement of Claim - *"The Applicant while a member of the SASR, committed murder by machine gunning a man with a prosthetic leg"* (**Imputation 5**) is substantially true by reason of the facts and matters set out in particulars 1-16, 40-41 and 49-52 above.
- (144) The imputation pleaded in sub-paragraphs 9(d) and 11(d) of the Statement of Claim - *"The Applicant having committed murder by machine gunning a man in Afghanistan with a prosthetic leg, is so callous and inhumane that he took the prosthetic leg back to Australia and encouraged his soldiers to use it as a novelty beer drinking vessel"* (**Imputation 6**) is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-41 and 49-55 above.



- (145) The imputation pleaded in sub-paragraphs 13(a) and 15(a) of the Statement of Claim - *"The Applicant committed an act of domestic violence against a woman in the Hotel Realm in Canberra" (Imputation 7)* is substantially true by reason of the facts and matters set out in particulars 132-138 above.
- (146) The imputation pleaded in sub-paragraphs 13(b) and 15(b) of the Statement of Claim - *"The Applicant is a hypocrite who publicly supported Rosie Batty, a domestic violence campaigner, when in private he abused a woman" (Imputation 8)* is substantially true by reason of the facts and matters set out in particulars 130 to 138 above.
- (147) The imputation pleaded in sub-paragraphs 13(c) and 15(c) of the Statement of Claim - *"The Applicant as deputy commander of a 2009 SASR patrol, authorised the execution of an unarmed Afghan by a junior trooper in his patrol" (Imputation 9)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 122H above.
- (148) The imputation pleaded in sub-paragraphs 13(d) and 15(d) of the Statement of Claim - *"The Applicant during the course of his 2010 deployment to Afghanistan, bashed an unarmed Afghan in the face with his fists and in the stomach with his knee and in so doing alarmed two patrol commanders to the extent that they ordered him to back off" (Imputation 10)* is substantially true by reason of the facts and matters set out in particulars 1-16 and 56-63 above.
- (149) The imputation pleaded in sub-paragraphs 13(e) and 15(e) of the Statement of Claim - *"The Applicant as patrol commander in 2012 authorised the assault of an unarmed Afghan, who was being held in custody and posed no threat" (Imputation 11)* is substantially true by reason of the facts and matters set out in particulars 1-16, 37, 40-48, 64-66, and 102 to 118-122H above.
- (150) The imputation pleaded in sub-paragraphs 13(f) and 15(f) of the Statement of Claim - *"The Applicant engaged in a campaign of bullying against a small and quiet soldier called Trooper M which included threats of violence" (Imputation 12)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 17-36 above.
- (151) The imputation pleaded in sub-paragraphs 13(g) and 15(g) of the Statement of Claim - *"The Applicant threatened to report Trooper J to the International Criminal Court for firing at civilians, unless he provided an account of a friendly fire incident that was consistent with the Applicant's" (Imputation 13)* is substantially true by reason of the facts and matters set out in particulars 1-3 and 70-85 above.
- (152) The imputation pleaded in sub-paragraphs 13(h) and 15(h) of the Statement of Claim - *"The Applicant assaulted an unarmed Afghan in 2012" (Imputation 14)* is



substantially true by reason of the facts and matters set out in particulars 1-16, 40★
41, 49-52, 56-64, 86-117 and 123-129 above.

Date: 8 September 2020

A handwritten signature in black ink, appearing to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents

This pleading was settled by ATS Dawson SC, Lyndelle Barnett and Chris Mitchell of counsel.

**Certificate of lawyer**

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

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

Date: 8 September 2020

A handwritten signature in black ink, which appears to read "Peter Bartlett", is written over a horizontal line.

Signed by Peter Bartlett
Lawyer for the Respondents