

**BRUCE LEHRMANN**

Applicant

**NETWORK TEN PTY LTD & Anor**

Respondents

### **Submissions on behalf of Brittany Higgins in relation to credit**

#### **Introduction**

1. These submissions constitute the response by Ms Higgins to the trial judge's invitation to her to make such submission as she would wish to make concerning (as she understands it) the findings which the Applicant has submitted ought to be made concerning her credit in the final version of his closing written submissions. She was directed to provide any such submissions by close of business on Tuesday 9 April 2024. That invitation was conveyed to her by the solicitors for the first respondent on the afternoon of Friday 5 April 2024.
2. Ms Higgins is grateful for the opportunity provided to her, but wishes to observe at the outset that she is not a party to this litigation. That obvious fact has several consequences of present relevance, but if nothing else it means that she has no direct knowledge of the course of the evidence (other than her own), the oral submissions, or all of the written submissions (she has now been provided with the final written submissions filed on behalf of the Applicant and the First Respondent). Her ability to make submissions is thus necessarily limited by reason of her non-participation in the hearing, save by appearing as a witness.
3. To observe that her ability to respond to the invitation extended to her is limited both by the confined nature of her participation in the proceedings and the short time available to her in order to respond is not merely to record a practical or logistical problem, capable of being overcome with more time and by setting her professional advisors to work. It is an observation of a fundamental difference in status that she holds compared to a party in the proceedings.
4. It is the parties to the litigation who identify and frame the issues (including issues concerning credit) that arise in the proceedings, utilise the Court's processes to obtain relevant documents from parties and non-parties in relation to those issues (including issues of credit), and who determine the evidence to be led in relation to them (including by way of oral testimony of the witness whose credit is in issue, documentary evidence in support of that witness' credit, and oral evidence from other witnesses that would support that witness' credit).

5. If Ms Higgins had been a party to this litigation, it may be assumed that she would have led further and different evidence in relation to the attacks made upon her (both in terms of the scope of her own evidence, the questioning of other witnesses, and in terms of the adducing of other testimonial and documentary evidence). It follows that had Ms Higgins been a party to the litigation, she would have been able to place the attacks made upon her in a very different light to the way in which they have arisen for determination by this Court.
6. The present submissions must, of course, necessarily be confined by the case as run and the evidence adduced by the parties to the litigation. But overall, it is submitted that in making findings concerning Ms Higgins' credit in accordance with s 140 of the Evidence Act in these proceedings, the Court would be mindful of the disadvantage just identified, and the resulting *absence* of relevant context and evidence.
7. To take one example, it would have been Ms Higgins' position that any assessment of the significance of asserted inconsistencies in her account at different points in time ought necessarily to have had careful regard to the full circumstances in which each relevant account was given, and in particular her health, and particularly her mental health, her treatment and hospitalisations, at the relevant time. Had Ms Higgins been a party, then she would have opened up those issues.
8. One other example will suffice for the present purpose of demonstrating that the potential for further and different forensic choices to have been made if Ms Higgins was a party, which may have had a significant bearing on questions of Ms Higgins' credit, is not merely theoretical. On 5 April 2024, the day that the trial judge extended the invitation pursuant to which these submissions are made, the trial judge noted the reception into evidence of a document entitled "master chronology" (**Chronology**), which is an annexure to Affidavit of Taylor Auerbach dated 2 April 2024. At Chronology entry 158, on page 39 Chronology, there is an entry that appears to be a record made by a senior AFP officer (Leanne Cross) of a meeting with Minister Reynolds and Fiona Brown on 4 April 2019. That record states "I also have concerns from info I heard that this may have happened before or could happen again. (I was referring to info that alleged victim may have been drugged). Paul [Sherring] – we need to speak to a range of people. Security staff cleaners may have info.". As far as she is aware, the potential that Ms Higgins was drugged is not an issue that has been raised or explored in these proceedings, and while there is evidence now that there was "info" that Ms Higgins was drugged, and that the concerns expressed in that note were held, the nature of that "info" and the basis upon which the concerns were held was not explored. In the context of a serious challenge to the honesty and accuracy of Ms Higgins' account of the events of the night in question, the potential that her perceptive and recollective abilities may have been affected other than by alcohol and trauma is an issue that she would have wished to explore.
9. Other examples (not exhaustive) of areas of evidence or inquiries that Ms Higgins may have wished to introduce or make if she were a party are given below. The basic point is that, in the circumstances, the Court would be slow to draw adverse inferences against an incomplete evidentiary background.

10. In what follows, Ms Higgins will address particular submissions advanced by the Applicant. To the extent that she does not address a particular submission it should not, of course, be taken as implying acceptance or admission.

**The overall nature of the attack on Ms Higgins' credit (and why it should fail)**

11. The fundamental attack made by Mr Lehrmann on Ms Higgins is, of course, that she is dishonest. That attack should be decisively rejected. There are three broad reasons why that is so.
12. First, much of the conduct that Mr Lehrmann contends is dishonest is in fact entirely consistent with Ms Higgins having been raped. It supports, rather than undermines, her credit. The very first such example relied upon (which is itself an example of many similar instances upon which Mr Lehrmann fastens), in the Applicant's final written submissions at [28(a)], is Ms Higgins' conduct "in asking Ms Brown for a day off to go to a doctor's appointment on 28 March 2019, but never actually going to the doctor". Ms Higgins gave powerful evidence explaining her conflicted and traumatised response in the period following her rape. It is entirely consistent with contemporary understanding of the reaction of victims of sexual assault. Far from being evidence of dishonesty, this (and similar examples relied upon by Mr Lehrmann) is evidence entirely consistent with Ms Higgins having been raped.
13. Secondly, there is an obvious and basic distinction between a statement that is wrong, and a statement that is dishonest. To say that she was "falling all over the place" (Applicant's final written submissions at [28(d)]), to the extent that it is even wrong, hardly reflects adversely on her honesty when it is uncontroversial that she was highly intoxicated, had fallen at least once, and was very much affected in her coordination that night (as evidenced, for example, by her inability to put her own shoes on at Parliament House security). Or to take another example, namely, her incorrect statement that "she did not receive any emails from Mr Lehrmann before work on the Monday after the weekend of the incident" (Applicant's written submissions, [28(e)]). To suggest that a rape victim is dishonest because they did not recall such a trifling matter in the immediate aftermath of their rape, is to ignore both the trauma caused by the rape, and ordinary human experience of memory in relation to minor details.
14. One thing that emerged very clearly from Ms Higgins' evidence was her preparedness to accept that something she genuinely thought had happened, did not happen in light of objective evidence (for example, she did just that in relation to the submission concerning the dress made at [28(g)] of the Applicant's written submissions – a mistake which is rendered even more benign by the notorious difficulty of recalling the precise quantum of the passage of time). In circumstances where (as reflected in the evidence she gave during the trial) she was more intoxicated than she ever had been before and during the rape, and where she was highly traumatised after the rape, it is plain that she has done her best to reconstruct what happened to her. To the extent that peripheral details of her reconstructed memory were wrong, it does not in any way reflect adversely upon her honesty (and her willingness to accept such matters indeed stands very much to her credit).

15. Thirdly, the balance of Mr Lehrmann's submissions alleging dishonesty rarely rise any higher than the observance of an inconsistency in the account given by Ms Higgins at different points in time. There is, of course, a world of difference between an inconsistency (if such be found) and dishonesty. Even taken at their highest, none of the asserted inconsistencies (either individually or collectively) could be taken rationally to suggest any dishonesty on the part of Ms Higgins. At their highest, they might be argued to raise an issue concerning her reliability.
16. Once the issue is correctly identified as one of reliability, rather than honesty, then attention is invited to such considerations as:
  - a. well-known general features of human memory, and the entirely normal variation in recall (especially in relation to peripheral detail) that will demonstrated over time;
  - b. the relative significance of the subject matter of the inconsistency compared to the key features of the account;
  - c. the precise context in which the prior account was given having regard to, in particular:
    - i. surrounding or background events, communications, negotiations, discussions and conduct leading up to the making of a written or oral statement;
    - ii. the understanding of the person giving the account or the purpose of doing so (including whether the account is intended to consist solely of that person's own direct observations, or whether it is intended to incorporate a statement of elements based upon, or inferred from, other information available at that time, or deductions or honest suppositions);
    - iii. the information available to the person at the time;
    - iv. the advice (if any) given to them concerning the purpose, nature and content of the statement in question;
    - v. the mental state of the person giving the account;
    - vi. the non-lawyer's lack of close familiarity with the distinction between recollection and reconstruction; and
  - d. the well-known specific effect of trauma, and in particular sexual assault, on the memory of the victim.
17. In Ms Higgins' submission, none of the asserted inconsistencies in her evidence rise above the level of detail that human memory, and especially the memory of a victim of a traumatic assault, would be expected to exhibit some variance of recall in relation to. Once again, in particular where Ms Higgins has always been clear that she was highly affected by alcohol, and incapable of remembering (or even consciously observing) many events, care must be taken to distinguish between inconsistencies that are a product of a (failed) attempt to work out the detail of what happened to her, and (which is denied) dishonest invention.

18. Overall, however, it must be recognised that the fundamental elements of those events that she was conscious to observe and was able to recall have always been both pellucid and consistent. The asserted inconsistencies are, on any view, minor details in comparison to that central compelling narrative.
19. An unwavering, consistent and clear account of Mr Lehrmann's rape of Ms Higgins has been given by her on multiple occasions, over many years, including under close forensic questioning, including:
  - a. to the AFP officers based at Parliament House on 1 April 2019;
  - b. to Network Ten in the Project interviews the subject of these proceedings in January and February 2021;
  - c. to the AFP in her first EIC interview on 24 February 2021;
  - d. in her draft book manuscript prepared in 2021;
  - e. to the Commonwealth of Australia in bringing her civil claim against it in 2022;
  - f. to the ACT Supreme Court in the criminal trial of *R v Lehrmann* in October 2022; and
  - g. to the Federal Court of Australia in these proceedings in November and December 2023.
20. Each of those accounts describes the circumstances of her rape with powerful consistency; and when the focus is, as it should be, on those critical events, the insignificance of the miscellany of penumbral details upon which Mr Lehrmann's submissions fasten comes into sharp relief.

### **Specific submissions concerning the settlement deed with the Commonwealth**

21. Ms Higgins retained Blumers Lawyers, personal injury lawyers, to act for her in relation to her civil claims against the Commonwealth, which were settled by way of a Deed following a mediation on 13 December 2022 (Exhibit 59, Deed, First letter, Draft particulars).
22. In assessing Mr Lehrmann's submissions concerning the content of the Deed, the following matters (in addition to the general points made above concerning inconsistencies) need to be taken into account:
  - a. First, the circumstances in which the Deed came to be prepared, agreed and executed have not been explored in evidence in any meaningful way. The legal advice she received about the nature and purpose of the Deed and its constituent elements, let alone their content, is unknown to the Court. The without prejudice communications between her, her representatives, and the representatives of the Commonwealth leading up to and concerning the Deed are not in evidence. It is known that the mediation leading to the execution of the Deed occurred very shortly after the conclusion of Mr Lehrmann's aborted criminal trial. The detail of Ms Higgins' health, including mental health, during and after that trial has not been explored in evidence

in these proceedings, but it is known that she was hospitalised. It may be inferred that her knowledge of the evidence in the criminal trial other than her own was limited by the nature of her participation, and her health and treatment. There is thus an enormous lacuna in the evidence, which it may be inferred Ms Higgins may have sought to fill had she been a party. Overall, therefore, there is no proper basis in the evidence in these proceedings upon which to make any findings as to Ms Higgins' subjective state of mind upon which any finding of dishonesty could be made in relation to the contents of the Deed.

- b. Secondly, Ms Higgins was not cross-examined on the Deed itself, and thus did not have an opportunity to either explain her understanding of its terms in light of the written document itself, to explain or justify some particular provision or statement by reference to the circumstances surrounding its execution, or to accept that her recollection or understanding (either as recorded in the Deed, or in her evidence to this Court) was not correct. Procedurally, it would be grossly unfair for any allegations concerning the Deed to be used against Ms Higgins.
- c. Thirdly, Ms Higgins is not a lawyer, and should not be presumed to comprehend or be familiar with a complex formal document in the same way that a lawyer is or would be. To suggest, for example, that her evidence that the Commonwealth "came to an agreement that a failure of a duty of care was made" is dishonest because the Deed, on page 5 at letter J of Exhibit 59 says no admission of liability was made (see Applicant's final written submissions at [28(1)]) goes absolutely nowhere in circumstances where, from the perspective of a non-lawyer, her claim to that effect had been resolved by the payment of a substantial amount of money. This attack is a highly subtle point, which was never put to Ms Higgins in cross-examination. There is simply no basis upon which it could be said to bespeak dishonesty.

- 23. All of these features represent a particular example of the disadvantage that a person who is purely a witness suffers relative to a person who is a party-witness. When the context in which the relevant statements were made is considered, coupled with the limited evidentiary framework, and the complete absence of cross-examination on the topic, the Court would not be justified in drawing any adverse inference concerning Ms Higgins' credit.
- 24. In any event, the asserted inconsistencies between the account recorded in the Deed, and her account in evidence are either non-existent, or utterly trivial.
- 25. To take but one example, to say as the Applicant does in the Table at paragraph 33C of his final written submissions, that there is a dishonest falsehood revealed by Clause 3.5 of the Deed, is utterly devoid of merit:
  - a. The relevant extract from the Deed is quoted by Mr Lehrmann as: "*Without invitation or agreement with the Claimant, Mr Lehrmann then directed the taxi to stop at Parliament House alleging that he wanted to retrieve something from his office.*"
  - b. The evidence in these proceedings said to be inconsistent with that in a way bespeaking dishonesty is quoted as: "*At some point in the ride, I think it was pretty*

*early, I remember Mr Lehrmann saying something to the effect of, 'I have to just pick something up from work'. And I didn't have all my wits about me to question it or to be curious about what he needed at work at whatever time in the morning it was. He just said he had to stop in, and so I was drunk, I wasn't really thinking about it, and I just went along with it. I – I didn't even have a second thought about it. It was just, 'Okay, yes, you go to work.'"*

- c. Those two statements are entirely consistent insofar as they state that Mr Lehrmann directed the taxi to stop at Parliament House and gave his reason for doing so as picking something up from work. To the extent that it is said the inconsistency is found in the extent to which he did that “without invitation or agreement with the Claimant”, it is submitted that it is clear that on both versions Mr Lehrmann did not seek the consent of Ms Higgins – he told her what he was doing. True it is that she said that, not having her wits about her by reason of her extreme intoxication, she “just went along with it”. That is a very long way from voluntary agreement. What she is describing is a lack of resistance. In any event, whether on a close parsing of the two statements there is an inconsistency, it could never be one capable of indicating dishonesty.

26. In most other cases, the premise of inconsistency depends upon the acceptance of disputed evidence. In all cases, the subject matter of the asserted inconsistency is peripheral to the one thing that matters in this case: namely, whether Mr Lehrmann raped Ms Higgins.

### **Conclusion**

27. In relation to the fundamental issue in the case just identified, Ms Higgins account has not changed or wavered. To the extent that her account of other, peripheral, details has varied, that is explicable solely on the basis of the various factors and considerations outlined above, and in no way bespeaks dishonesty.
28. Above all else, though, it is submitted that the Court must bear steadily in mind the well-known impact of trauma (and sexual assault in particular) on both the conduct and the memory of victims. For the Court to treat the credit attacks made against Ms Higgins as a reason to disbelieve her about her rape would be to use a consequence of that rape as a basis to deny its occurrence.

**Nicholas Owens**

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9 April 2024