

NOTICE OF FILING

Details of Filing

Document Lodged: Affidavit - Form 59 - Rule 29.02(1)
Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment: 1/03/2023 3:15:10 PM AEDT
Date Accepted for Filing: 1/03/2023 3:15:15 PM AEDT
File Number: NSD104/2023
File Title: BRUCE LEHRMANN v NEWS LIFE MEDIA PTY LTD & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Registrar

Important Information

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 of the filing of the document is determined pursuant to the Court's Rules.

Affidavit

No. NSD. 104/2023

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

Bruce Lehrmann

Applicant

News Life Media Pty Ltd and Anor
Respondents

Affidavit of: **Paul Victor Svilans**
Address: Level 19, 68 Pitt Street, New South Wales, 2000
Occupation: Solicitor
Date: 1 March 2023

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I Paul Victor Svilans, solicitor of Level 19, 68 Pitt Street, Sydney in the State of New South Wales, make oath and say as follows:

1. I am a Principal with the firm Mark O'Brien Legal (**MOBL**), the solicitors for the Applicant in these proceedings and I have conduct of the matter.



Filed on behalf of (name & role of party) Bruce Lehrmann, Applicant
Prepared by (name of person/lawyer) Paul Svilans
Law firm (if applicable) Mark O'Brien Legal
Tel +61 2 9216 9830 Fax -
Email paul.svilans@markobrienlegal.com.au
Address for service Level 19, 68 Pitt Street, Sydney, New South Wales, 2000
(include state and postcode)

2. On 1 March 2023, I was informed by the Applicant and believe as follows.

Background

3. Mr Lehrmann was born on 14 June 1995 and raised in Moree, New South Wales.
4. In or about 2013 and while still at school, Mr Lehrmann began working in politics. He was initially employed part time as a Research Officer for Trevor Watts, Member of the Queensland State Parliament.
5. In or about December 2013, Mr Lehrmann moved to Canberra to study a Bachelor of Arts/Bachelor of Policy Studies at the Australian National University.
6. From early 2013 to the end of March 2019, Mr Lehrmann held the following political positions:
 - (a) Parliamentary Adviser to Barry O'Sullivan, former Senator for Queensland (part time);
 - (b) Ministerial Office Manager to the Hon. George Brandis KC, the then Commonwealth Attorney-General;
 - (c) Health Policy Adviser to the Hon. Dr David Gillespie MP, the then Assistant Minister for Health;
 - (d) Health Policy Adviser to Senator the Hon. Bridget McKenzie, the then Minister for Rural Health; and
 - (e) Home Affairs Adviser to Senator the Hon. Linda Reynolds CSC, the then Assistant Minister for Home Affairs.
7. In or about April 2019, Mr Lehrmann moved to Sydney and commenced employment with Ogilvy Public Relations as the Senior Manager, Government Relations. In March 2020, he was made redundant due to the Covid-19 pandemic.
8. From about April 2020 to 15 February 2021, Mr Lehrmann was employed in Sydney as Head of Regulatory Affairs at British American Tobacco Australia (**BATA**).

Events of 15 February 2021

9. On the morning of 15 February 2021, Mr Lehrmann read the article entitled '*Young Staffer Brittany Higgins says she was raped at Parliament House*' by Samantha Maiden published on the website news.com.au (**First Article**).
10. Mr Lehrmann started receiving messages from friends asking whether he was the individual the subject of the allegations made by Ms Higgins in the First Article (as they knew he had



worked for Ms Reynolds at the relevant time). Mr Lehrmann also sent messages to several friends to the effect: *"I used to work with her. I hope people don't think it was me"*.

11. At approximately 2pm on 15 February 2021, Mr Lehrmann was informed by Mr Joshua Fett, his supervisor at BATA, in substance, that he had received an email from Rosie Lewis, a journalist at The Australian, stating that Government sources were identifying Mr Lehrmann as the man accused of sexually assaulting Ms Higgins. Mr Lehrmann does not have a copy of the email from Ms Lewis to Mr Fett. Mr Fett forwarded the email to Mr Lehrmann on his work computer at BATA to which he no longer has access. Mr Lehrmann was then suspended pending an internal review. The internal review process was delayed and extended as a result of Mr Lehrmann requiring medical treatment and a period of medical leave following the publication of Ms Higgins' allegations (addressed in paragraphs [16] and [17] below).
12. Mr Lehrmann started regularly checking online commentary about the allegations and noticed that The Project was going to broadcast a segment involving Ms Higgins that evening.

13.

14.

Advice on potential defamation proceedings

15.

16.

Not read

ehhst

[Handwritten signature]

17.

Not read

18. Mr Lehrmann felt under siege from the intense media scrutiny and the extensive and relentless media coverage. Although he was not named in the First or Second Article or The Project, in addition to being identified by friends and colleagues, Mr Lehrmann saw that he s136 had been publicly identified on social media as the person Ms Higgins was referring to as having sexually assaulted her.

19. In early March 2021, Mr Lehrmann's mother made arrangements to re-locate him from Sydney to live with her in Queensland.

20.

21.

22.

23.

Contact with the Australian Federal Police

24. In or about mid-April 2021, Mr Lehrmann received a telephone call from his mother informing him, in substance, that the Australian Federal Police (AFP) had attended her home in Queensland and indicated that they would like to speak with him about the allegations made by Ms Higgins.

25. A day or two later Mr Lehrmann received a telephone call on his mobile from Detective Inspector Marcus Boorman, who informed him, in substance, that he was the lead AFP Officer in relation to the investigation of allegations made by Ms Higgins and that the AFP wished to speak to him about the matter. Mr Lehrmann said to Detective Inspector Boorman

eHst

Boorman

words to the effect: *"I have been advised not to speak with you at this stage. I will have my lawyer, John Korn, give you a call as soon as possible."*

26. Mr Lehrmann then spoke with Rick Korn and John Korn of counsel (Rick Korn's father) concerning the phone call from the AFP. Mr Lehrmann does not waive privilege in relation to the content of the discussions with Rick and John Korn.
27. On 19 April 2021, Mr Lehrmann voluntarily attended an interview with the AFP.
28. In late June 2021, at the conclusion of his medical leave, BATA terminated Mr Lehrmann's employment. Mr Fett informed Mr Lehrmann, in substance, that given the nature of the allegations being made against him, BATA did not consider he would be able to continue to fulfill his role in Regulatory Affairs and as a lobbyist to government.
29. On 7 August 2021, the AFP laid a charge against Mr Lehrmann in the ACT Magistrates Court of one count of engaging in sexual intercourse with Ms Higgins without her consent and being reckless as to whether she had consented.
30. Also on 7 August 2021, Mr Lehrmann was publicly identified by mainstream media outlets as the individual accused by Ms Higgins of sexually assaulting her.
31. In late 2021, Mr Lehrmann applied for unemployment benefits and he has continued to be unable to work since that time.
32. If found guilty of the charge laid against him, Mr Lehrmann faced imprisonment for up to 12 years. [His entire future depended on successfully defending the charge and being found not guilty. It was for that reason, that from about 7 August 2021 until 2 December 2022, the overwhelming and primary focus of Mr Lehrmann's life was to defend the charge laid against him.]

ACT Supreme Court proceedings

33. On 16 September 2021, the criminal proceedings instituted against Mr Lehrmann were listed for mention in the ACT Magistrate's Court. Rick Korn appeared on behalf of Mr Lehrmann, and informed the Court that Mr Lehrmann was pleading not guilty.
34. The trial was listed to commence in June 2022 and John Korn had been retained as counsel at the trial. In about May 2022, John Korn suffered a severe medical episode that meant he would be unable to appear at the upcoming trial.
35. Subsequent to this, Mr Lehrmann retained Kamy Saeedi Law to instruct and represent him at the trial (then scheduled to commence in the ACT Supreme Court on 27 June 2022, with an estimate of four weeks).



36. On 19 June 2022, Ms Lisa Wilkinson gave a speech at the Logies concerning her interview of Ms Higgins on The Project.
37. On 21 June 2022, as a result of Ms Wilkinson's Logies speech and the media coverage of that speech, ACT Chief Justice McCallum vacated the hearing date for the trial.
38. On 4 October 2022, the trial commenced in the ACT Supreme Court before Chief Justice McCallum and (including jury deliberations) ran for 18 days.
39. On 27 October 2022, Chief Justice McCallum discharged the jury following juror misconduct. Her Honour allocated a provisional date of 20 February 2023 for a second trial.
40. On 31 October 2022, the ACT Director of Public Prosecutions confirmed that he intended to prosecute Mr Lehrmann in a second trial on 20 February 2023.
41. On 2 December 2022, the ACT Director of Public Prosecutions held a press conference and announced that he would no longer be proceeding with the prosecution of Mr Lehrmann and subsequently filed a Notice Declining to Proceed, bringing the prosecution of Mr Lehrmann to an end.
42. Mr Lehrmann did not give evidence at the trial. [REDACTED]

Not read

Defamation proceedings

43. On 12 December 2022, Mr Lehrmann met with legal representatives from MOBL. Mr Lehrmann does not waive privilege over the content of those discussions.
44. On 16 December 2022, MOBL sent a letter of demand to the producer of The Project and the First Respondent in proceeding NSD. 103/2023 (**the Network Ten proceeding**) and to each of the Respondents in proceeding NSD. 104/2023 (**the News proceeding**). Copies of the letters of demand are annexed hereto and marked "PVS-1". The enclosures to the letter of demand in the News proceeding, being the matters complained of, have been omitted.
45. Annexed hereto and marked "PVS-2" are copies of further correspondence passing between the solicitors for the Applicant and the solicitors for the respective Respondents:
 - (a) On 20 December 2022, the solicitors for the First Respondent in the News proceeding sought an extension of time to respond to the Applicant's letter of demand (see page 29).
 - (b) On 22 December 2022, the solicitors for the Respondents in the Network Ten proceeding sought an extension of time to respond to the Applicant's letter of demand (see page 31).



- (c) The Applicant agreed to extend the time for a response to 20 January 2023, conditional upon each of the respective Respondents not relying upon that extension in any opposition to an extension of the limitation period (see pages 28 and 32-34).
- (d) On 20 January 2023, the solicitors for the First Respondent in the Network Ten proceeding and the solicitors for the Respondents in the News proceeding informed the Applicant's solicitors that they did not accept the Applicant's offers in the letters of demand, and no Offers of Amends were made (see pages 35 to 42). A redaction has been made to a sentence in the letter from the solicitors for Network Ten (see page 38) for legal reasons.

46. On 7 February 2023, Mr Lehrmann instituted these proceedings against the Respondents.

47. Mr Lehrmann wishes to be vindicated by reason of the publication by the Respondents of First Article, the Second Article and The Project and to be compensated for the damage to his reputation occasioned by reason of the publications.

Sworn by the deponent
 at Sydney
 in New South Wales
 on 1 March 2023
 Before me:

)
)
)
)
)

 Signature of deponent

 Signature of witness
 Monica Helen Allen
 Mark O'Brien Legal
 Level 19, 68 Pitt Street
 Sydney New South Wales 2000
 An Australian Legal Practitioner within the
 meaning of the Legal Profession Uniform Law

Certificate Identifying Annexure
"PVS-1"

No. NSD. 104/2023

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

Bruce Lehrmann

Applicant

News Life Media Pty Ltd and Anor

Respondents

This is the annexure marked "PVS-1" now produced and shown to PAUL VICTOR SVILANS at the time of swearing his affidavit on 1 March 2023

Before me:



.....
Signature of person taking affidavit

Filed on behalf of (name & role of party)	<u>Bruce Lehrmann, Applicant</u>		
Prepared by (name of person/lawyer)	<u>Paul Svilans</u>		
Law firm (if applicable)	<u>Mark O'Brien Legal</u>		
Tel	<u>+61 2 9216 9830</u>	Fax	<u>-</u>
Email	<u>paul.svilans@markobrienlegal.com.au</u>		
Address for service (include state and postcode)	<u>Level 19, 68 Pitt Street, Sydney, New South Wales, 2000</u>		

[Form approved 01/08/2011]

Our Ref: MOBL657

16 December 2022

Lisa Muxworthy
Editor-in-Chief
news.com.au
News Life Media Pty Ltd
2 Holt Street
Surry Hills NSW 2010

Samantha Maiden
National Political Editor
news.com.au
News Life Media Pty Ltd
2 Holt Street
Surry Hills NSW 2010

Confidential and Not for Publication

By Email: lisa.muxworthy@news.com.au; samantha.maiden@news.com.au

Dear Ms Muxworthy and Ms Maiden

DEFAMATION OF BRUCE LEHRMANN

We act for Mr Bruce Lehrmann.

As you would be aware, criminal proceedings were brought against Mr Lehrmann in the Supreme Court of the Australian Capital Territory over the alleged sexual assault of Ms Brittany Higgins.

Mr Lehrmann has at all times vehemently denied sexually assaulting Ms Higgins.

The criminal proceedings brought against Mr Lehrmann were withdrawn on 2 December 2022.

Articles

On or about 15 February 2021, two articles written by Samantha Maiden titled 'Young staffer Brittany Higgins says she was raped at Parliament House' (the **First Article**) and 'Parliament House alleged rape: How Brittany Higgins' horror night unfolded' (the **Second Article**) were uploaded to the website news.com.au (together, the **Articles**). The Articles are still available for publication on the news.com.au website at the following URLs:

1. <https://www.news.com.au/national/politics/parliament-house-rocked-by-brittany-higgins-alleged-rape/news-story/fb02a5e95767ac306c51894fe2d63635>
2. <https://www.news.com.au/national/politics/parliament-house-alleged-rape-how-brittany-higgins-horror-night-unfolded/news-story/c51454dbf5cb7da229957b0268e93d85>

A copy of each of the Articles is **enclosed**.

The First Article contains a number of statements regarding Mr Lehmann, including as follows:

- a. 'Young staffer Brittany Higgins says she was raped at Parliament House'
- b. '... Brittany Higgins has told news.com.au that she spent the last two years "internalising the trauma".'
- c. 'She said the horror night quickly emerged as a crisis...'
- d. 'Brittany Higgins claims she was raped by a colleague in Parliament House.'
- e. 'The alleged sexual assault occurred in the early hours of March 23, 2019, just weeks before Prime Minister Scott Morrison called the election on April 10, 2019.

After a night of drinking with colleagues, Ms Higgins alleges she was assaulted in her own office by another Liberal staffer who she says was regarded as a "rising star" in the party.

She remembers the man buying "lots of rounds of drinks" at the event before it was suggested he lived in the same direction and his taxi could drop her home on the way.

Instead, he took her to Parliament House.'

- f. 'She began to feel unwell and lay down on the couch. It was then she woke up to the Liberal staffer having sex with her.

"All of sudden he was on top of me and I physically couldn't get him off of me," she said.

"I woke up mid-rape. I told him to stop. I was crying. He wasn't even looking at me. It felt like I was sort of a body that was there. It didn't feel like it was anything about me."

Ms Higgins said it felt like there was pressure on her leg during the alleged assault, and has photographs of a bruise on her leg that she says was from that pressure.

"The first thing I remember was being in pain. My leg was being crushed."

Ms Higgins said the man who was having sex with her did not speak to her during the incident.

"And I was crying. And then it was just happening. I couldn't get him off and I couldn't stop it. I remember just being stuck inside my body. As it was happening," she said.

She says the man got up, leaving her on the couch in a state of undress with her cocktail dress "up around my waist" and left the building.

g. [Photograph of Ms Higgin's leg] Brittany Higgins took this photograph of her bruised leg while in the Parliament House bathroom.'

h. 'When she returned to work on the Monday she ran into the Liberal staffer she said assaulted her but he did not make eye contact. He never contacted her or spoke to her again.

"I didn't process, 'You had sex, You didn't consent. You were crying'," she told news.com.au.

i. 'The office was also informed that an ambulance had been offered to Ms Higgins. But at that stage Senator Reynolds' office said they still did not regard it as a potential sexual assault.'

j. 'Ms Higgins learned from the chief of staff that the Liberal staffer who had signed her into parliament that night, had agreed to resign that day, on the spot.'

k. 'It was in a second meeting that the chief of staff says Ms Higgins disclosed an alleged assault.

"I said that he was on top of me. I think for the longest time I was really weird about actually saying it was rape. I don't know why. I was very delicate about it. I think from our exchange she understood the inference," Ms Higgins told news.com.au.'

l. 'Senator Reynolds' chief of staff contacted Ms Higgins to set up an opportunity to discuss the matter in her office. This meeting was conducted in the room where Ms Higgins says she was raped.

A spokesman for the Morrison Government conceded this was a mistake.

"The Government takes all matters of workplace safety very seriously. No one should feel unsafe in a workplace," a spokesman said.

“On Tuesday, March 26, senior staff in Minister Reynolds’ office became aware of an incident that occurred in the Minister’s office outside of work hours. This incident involved two staff. It was initially treated as a breach of the Statement of Standards for Ministerial Staff.

“After further consultation with one of the staff members over the following days, it became clear to senior staff that there were elements of the incident that may be of a more serious nature.

“The staff member was notified that should they choose to, they were able to pursue a complaint, including a complaint made to the police, and that to do so was within their rights. They were informed that they would be assisted and supported through that process.

[...]

During the meeting, Ms Higgins says that Senator Reynolds expressed her horror at what had happened but also wanted to be clear whether she intended to go to the police or not.

“Standard lines. She said ‘I felt physically ill,’ All that sort of thing. And then it kind of turned to, ‘As women, this is something we go through,’” Ms Higgins said.’

- m. ‘Despite several meetings over this and how to handle it, Senator Cash says she never knew it was a sexual assault until recently.’*
- n. ‘Ms Higgins said she hoped telling her story would drive change in the parliamentary work culture.*

“I was ashamed before. I kind of internalised it,” she said. “I felt like I wanted to leave parliament. It’s not a place I want to stay.

“I don’t think what happened to be (sic) is remarkable. It happens all the time. It is devastating and soul destroying and I think about it everyday but the only thing that I know made people care about it was where it happened and who it was connected to. They didn’t care about me. They cared about the party.”

The Second Article also contains a number of statements regarding Mr Lehrmann, including as follows:

- a. ‘Parliament House alleged rape: How Brittany Higgins’ horror night unfolded*

Brittany Higgins alleges she was raped at Parliament House by a Liberal colleague. This is how her horror night unfolded.’

- b. ‘A security guard patrolling Parliament House in the early hours of Saturday morning found her.*

Half dressed, Brittany Higgins had been left on the couch of the Defence Minister Linda Reynolds' ministerial suite by a man she barely knew and only as a colleague.

It had been his suggestion to come past Parliament House to pick up something after a long night of drinking with colleagues.'

- c. *"I remember getting into the cab and I remember him shushing me at the security guards because I was super drunk. He had to get me through security so he was just like 'Shh, you need to be quiet'."*

She had no parliamentary security pass. Why would she? She had never planned to end up back at work on a Friday night.

She could barely sign her own name. He signed her in. Shortly afterwards, they were walking through the deserted ministerial wing where every move is tracked by CCTV and monitored 24 hours a day by security guards and the Australian Federal Police.'

- d. *'She decided to lie down on the couch. When she woke up, he was on top of her.*

"All of sudden he was on top of me and I physically couldn't get him off of me," she told news.com.au.

"And I was crying. And then it was just happening. I couldn't get him off and I couldn't stop it. I remember just being stuck inside my body. As it was happening.'

- e. *'The Department of Finance would later inform Senator Reynolds' chief of staff that Ms Higgins was found undressed and was offered medical assistance or an ambulance which she declined. Ms Higgins does not recall this.*

"I had half my dress on. It was a lady who called in. They just sort of yelled into the front office. I was in the ministerial suite, on the couch.

"I think I just yelled out, 'I'm fine!'. It was just that instant panic thing. It was protectionist mode."

- f. *'The next day was Monday. On autopilot, she returned to Parliament House. It wasn't long before she ran into her alleged attacker.*

"Yes. We didn't talk. We didn't look at each other," she said.

"It was obviously very tense. But I still was in that shocked space. The first thing I was immediately stressed about was if I was pregnant.

"I didn't process 'You had sex, You didn't consent. You were crying'. So I was just really concerned: 'Am I pregnant? Am I going to lose my job?'

"It's kind of like the impact of a car crash and the whole world goes fuzzy. I felt like that whole day I just wasn't connected to what I was doing."

Identification

The Articles were clearly of and concerning Mr Lehrmann, with Mr Lehrmann being identifiable to many viewers by reason of the Articles stating that the assailant of Ms Higgins:

- a. was 'a Liberal colleague' and 'another Liberal staffer who [...] was regarded as a "rising star" in the party';
- b. attended a pub on the Kingston foreshore called The Dock and a bar called 88mph with Ms Higgins on the night of 22 March 2019;
- c. returned to work on the following Monday and agreed to resign.

It was therefore readily apparent to any person working for the Liberal Party in Parliament House and indeed many other people in that workplace (where several thousand people work) that the assailant could only be Mr Lehrmann.

The Publications invited readers to speculate about the identity of Mr Lehrmann and within the following hours and days his name was widely trafficked as the culprit on social media and the internet generally. See for instance:

- <https://kangarocourtofaustralia.com/2021/02/27/were-young-women-sexually-assaulted-when-bruce-lehrmann-the-alleged-parliament-house-rapist-was-an-official-at-the-anu-un-conference/>
- <https://twitter.com/blakandblack/status/1363106005404549121?lang=en>
- <https://blotreport.com/2021/02/17/did-morrison-almost-tell-the-truth/>
- <https://twitter.com/PeterWMurphy1/status/1362759012719026177>
- <https://www.clownworldau.com/story/brittany-higgins/>
- <https://twitter.com/peakhourimages/status/1363960533964128256?lang=en>
- <https://www.clownworldau.com/story/bruce-lehrmann-david-sharaz/>
- <https://www.youtube.com/watch?v=xqUIBWw1q9c>

- <https://www.townsvillemagpie.com.au/unfriendly-fire-the-real-reason-behind-the-facebook-ban-morrison-s-lp-service-to-stiffen-ruperts-business-and/>

Further, by the time of publication of the Articles on 15 February 2021, it was notorious within Parliament House and elsewhere that Mr Lehmann was the person alleged to have sexually assaulted Ms Higgins. This is evidenced by numerous persons having contacted Mr Lehmann on 15 February 2021 and thereafter in relation to the Articles, having plainly identified him.

Noting the continuing publication of the Articles, Mr Lehmann was also publicly named in the mass media on about 7 August 2021 as the person charged with sexually assaulting Ms Higgins.

Imputations

The First Article conveys, amongst others, the following imputations of and concerning Mr Lehmann:

- He raped Brittany Higgins in Defence Minister Linda Reynolds' office in 2019.*
- He signed Brittany Higgins, who was drunk and did not have her security pass, into Parliament House so he could rape her.*
- He continued to rape Brittany Higgins after she woke up mid-rape and was crying.*
- He, whilst raping Brittany Higgins, crushed himself against her leg so forcefully that he bruised her.*
- After he finished raping Brittany Higgins, he left her on a couch in a state of undress with her dress up around her waist.*

The Second Article conveys, amongst others, the following imputations of and concerning Mr Lehmann:

- He raped Brittany Higgins in Defence Minister Linda Reynolds' office in 2019.*
- He signed Brittany Higgins, who was drunk and did not have her security pass, into Parliament House so he could rape her.*
- He continued to rape Brittany Higgins after she woke up and was crying.*
- After he finished raping Brittany Higgins, he left her on a couch half dressed.*

Mr Lehmann vehemently denies that he sexually assaulted Ms Higgins, and the imputations are therefore grossly and indefensibly defamatory of him, noting that in a civil case Ms Higgins' allegations would be required to be proven to the standard in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Limitation period

As at 15 February 2021 Section 56A of the *Limitation Act 1969* (NSW) was in the following terms:

(1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action.

(2) A court may extend the limitation period to a period of up to 3 years running from the date of the alleged publication of the matter if the plaintiff satisfies the court that it is just and reasonable to allow an action to proceed.

(3) In determining whether to extend the limitation period, the court is to have regard to all of the circumstances of the case and in particular to—

(a) the length of, and the reasons for, the plaintiff's delay, and

(b) if a reason for the delay was that some or all of the facts relevant to the cause of action became known to the plaintiff after the limitation period expired—

(i) the day on which the facts became known to the plaintiff, and

(ii) the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew whether or not the facts might be capable of giving rise to an action, and

(c) the extent, having regard to the delay, to which relevant evidence is likely to be unavailable or less cogent than if the action had been brought within the limitation period.

It is well established that a putative applicant is entitled to wait until criminal or coronial proceedings traversing the same issues are disposed of before commencing defamation proceedings. In such circumstances the Court has a discretion to extend the limitation period for a period of time. See for instance:

- a. *Houda v New South Wales* [2012] NSWSC 1036 where the Court was prepared to extend time from mid-December (when the DPP decided not to appeal the Magistrate's dismissal of the charges) until 19 March of the following year.
- b. *Barrett v TCN Channel Nine Pty Ltd* [2017] NSWCA 304. In this case the coronial decision was in February and the plaintiff had sought legal advice and given instructions to commence proceedings at a conference in May of the same year. The trial judge was prepared to extend time until the end of June (but a period of unexplained delay meaning proceedings were not filed until later that year meant the extension application failed).

In summary, given the ACT Director of Public Prosecutions only announced on 2 December 2022 he was withdrawing the criminal proceedings brought against Mr Lehrmann in relation to the allegation

that he sexually assaulted Ms Higgins, Mr Lehrmann will be entitled to an extension for the commencement of proceedings over the Publications.

Next Steps

We have retained Steven Whybrow SC and Matthew Richardson SC to act in defamation proceedings against the publisher of news.com.au in relation to the Articles.

However, Mr Lehrmann is prepared to consider a non-litigious resolution of his concerns before proceedings are commenced. In that regard we refer you to the provisions of the *Civil Dispute Resolution Act 2011* (C'th) in addition to the *Defamation Act 2005* (NSW).

Mr Lehrmann offers to resolve the dispute on the following terms:

- (a) Payment of the sum of \$235,000 for damages to Mr Lehrmann.
- (b) Immediate and permanent removal of the Articles from the news.com.au website and any other location where they have been published;
- (c) News.com.au provides to Mr Lehrmann a letter of apology on news.com.au letterhead and signed by the editor-in-chief in the following terms:

"Apology to Bruce Lehrmann

On about 15 February 2021, news.com.au published two articles titled 'Young staffer Brittany Higgins says she was raped at Parliament House' and 'Parliament House alleged rape: How Brittany Higgins' horror night unfolded'.

The articles alleged that Ms Higgins was raped by a colleague and Liberal staffer who shortly thereafter resigned. That staffer was immediately identified by many persons as Mr Bruce Lehrmann.

News.com.au only ever intended to suggest that Ms Higgins had made allegations against Mr Lehrmann and not that he was guilty of those allegations.

On 2 December 2022, the Director of Public Prosecutions in the Australian Capital Territory announced the dropping of the charges against Mr Lehrmann.

We accept in those circumstances that Mr Lehrmann is entitled to the presumption of innocence, and we apologise to him for the publication of the articles."

- (d) Payment of Mr Lehrmann's reasonable costs and expenses incurred in relation to this matter.

This offer is open for 14 days from the date of this letter.

Mr Lehmann, in the event the offer is not accepted, will rely upon the sending of this letter, and any response to it (or lack of response) on any issue arising in the proceedings, including aggravated damages and indemnity costs.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Mark O'Brien', written in a cursive style.

Mark O'Brien

Principal

T +61 2 9216 9828

M +61 412 637 304

E mark.obrien@markobrienlegal.com.au

Copy to:

Michael Cameron

michael.cameron@news.com.au

Our Ref: MOBL657

16 December 2022

Beverley McGarvey
Executive Vice President & Chief Content Officer
Network Ten Pty Limited and Network Ten (Sydney) Pty Limited
1 Saunders Street
Pyrmont, NSW 2009

Christopher Bendall
Executive Producer
The Project
Como Centre
Level 4, 620 Chapel Street
South Yarra, VIC 3141

Confidential and Not for Publication

By Email: bmcgarvey@networkten.com.au; Cbendall@theprojecttv.com.au

Dear Sir and Madam

DEFAMATION OF BRUCE LEHRMANN

We act for Mr Bruce Lehrmann.

As you would be aware, criminal proceedings were brought against Mr Lehrmann in the Supreme Court of the Australian Capital Territory over the alleged sexual assault of Ms Brittany Higgins.

Mr Lehrmann has at all times vehemently denied sexually assaulting Ms Higgins.

The criminal proceedings brought against Mr Lehrmann were withdrawn on 2 December 2022.

Publication

On or about 15 February 2021 Network Ten broadcast a segment during the program *The Project* in which Ms Lisa Wilkinson interviewed Ms Brittany Higgins. That segment was also published online via www.markobrienlegal.com.au

The Project's YouTube channel on the YouTube website with close to 300,000 views (<https://www.youtube.com/channel/UCornjoVYwGGyND4SZVtrVDQ>) (the **Publications**).

The Publications contained a number of statements regarding Mr Lehmann, including the following:

- a. *Lisa Wilkinson: "Can you describe how you were treated professionally by one of the senior male advisors to Minister Reynolds?"*

Brittany Higgins: "Yeah. So immediately it became clear that this person had a special bond with the Minister. It was very clear that he was sort of her go-to person and he was really quite territorial of that position."

- b. *Lisa Wilkinson: "So he was a bit of a favourite of Minister Reynolds?"*

Brittany Higgins: "Yeah very much so. He had been advising her in the Home Affairs portfolio prior to that. He had a lot of friends everywhere. He was considered one of the sort of rising stars."

- c. *Lisa Wilkinson: "On the 22nd of March 2019, less than three weeks after she'd started in Linda Reynold's office, Brittany organised Friday night drinks with contacts and colleagues in Defence. So how did this senior male colleague act towards you?"*

Brittany Higgins: "He was nice to me. I think he was grateful that I invited him. I was kind of happy that I had an opportunity to kind of demonstrate some value to the team I guess. I noticed that he was buying me a lot of drinks and I was kind of... I just thought of 'job well done', I thought I was kind of broadly being rewarded in a weird way."

- d. *Brittany Higgins: "My senior male colleague who was actually quite helpful in terms of getting me into a cab on the basis that I really couldn't walk. I mean I don't specifically remember the exact conversation but the general tone was 'we live in the same direction but I've got to stop somewhere first.'"*

Lisa Wilkinson: "Where was that somewhere?"

Brittany Higgins: "Parliament."

- e. *Brittany Higgins: "The first thing that sort of awoke me was... I was in a pain. My leg was kind of being crushed. The senior staffer was on top of me. He was clearly almost finished [...] I woke up mid-rape essentially. I don't know why I knew he was almost finished but I'd felt like it had been going on for a while or that he was almost done. He was sweaty. I couldn't get him off of me. At this point I started crying."*

Lisa Wilkinson: "What did you say to him?"

Brittany Higgins: "I told him to stop."

Lisa Wilkinson: "Did he?"

Brittany Higgins: "No."

Lisa Wilkinson: "How many times would you estimate you said to him to stop?"

Brittany Higgins: "I felt like it was on a loop endlessly. At least half a dozen. I was crying the whole way through it."

- f. *Lisa Wilkinson: "You have a photo that you took of a bruise that developed from that night. What does that photograph show?"*

Brittany Higgins: "It's quite a large bruise. It's just the weight obviously of his leg pinning me down."

- g. *Brittany Higgins: "My dress was up around my waist, the straps were kind of down, I was pretty dishevelled."*

- h. *Lisa Wilkinson: "Monday morning, Brittany went to work as usual. So did her senior colleague, the alleged rapist. But no one raised the security breach. That came on Tuesday morning."*

- i. *Brittany Higgins: "[Fiona Brown] came in on the Tuesday morning and asked if the senior colleague and I would go into the office and speak with her. So she originally brought in the senior colleague and they were probably in there for about 45 minutes."*

Lisa Wilkinson: "So this colleague came out?"

Brittany Higgins: "Yes so he immediately walked out of the office and started packing up his things."

- j. *Lisa Wilkinson: "What was her tone towards you until you told her that you had been raped?"*

[...]

Brittany Higgins: "She asked me to recount the events of the night [...] that was sort of the first time I'd vocalised that I'd been raped. And I think as I was telling it, it was the first time I had sort of pieced it together myself what had happened was an assault..."

- k. *Lisa Wilkinson: "We now return to our interview with Brittany Higgins, the young Liberal staffer who tells us she was raped inside Parliament House."*

- l. *Lisa Wilkinson: "So you had just told a senior advisor to Prime Minister Scott Morrison that you had been raped on Minister Reynold's couch in her private office?"*

Brittany Higgins: "Yes."

Lisa Wilkinson: "That's a serious crime."

Brittany Higgins: "Yeah."

m. Brittany Higgins: "It felt like everyone had all this information on my own assault and I didn't have any..."

n. Brittany Higgins: "We actually went into the room where it happened [...] it was the first time I had ever had to go back there. And so between sort of me and their table was the couch and I just remember feeling so [...] I was just so cognisant of this is where it's happened, it's right there, that's exactly where... and it was just this loop playing in my mind of this trauma that I'd just sort of come to terms with. And I just thought it was unfathomable that they would put me in that space again [...] I felt like I was reliving it every second of being in that room."

o. Lisa Wilkinson: "So what's happened to the man that you say raped you on Minister Reynolds's couch?"

Brittany Higgins: "He's fine. He's working in Sydney. He's got a good job. People don't know why he left and I don't think he's suffered any consequences for it at all."

p. Lisa Wilkinson: "If everything that you say is true, it sounds to me like the easiest place in this country to rape a woman, and get away with it, is Parliament House in Canberra."

Brittany Higgins: "Yeah."

Identification

The Publications were clearly of and concerning Mr Lehrmann, with Mr Lehrmann being identifiable to many viewers by reason of the Publications stating that the assailant of Ms Higgins:

- a. was a "senior male advisor to Minister Reynolds";*
- b. was Minister Reynolds "go-to person";*
- c. was "a bit of a favourite of Minister Reynolds";*
- d. "had been advising her in the Home Affairs portfolio prior that";*
- e. attended Friday night drinks organised by Ms Higgins on 22 March 2019;*
- f. started packing up his belongings on the Tuesday morning after the alleged incident following a meeting with Fiona Brown; and*

g. was working in Sydney in February 2021.

It was therefore readily apparent to any person working for the Liberal Party in Parliament House and indeed many other people in that workplace (where several thousand people work) that the assailant could only be Mr Lehrmann.

The Publications invited readers to speculate about the identity of Mr Lehrmann and within the following hours and days his name was widely trafficked as the culprit on social media and the internet generally. See for instance:

- <https://kanarocourtsofaustralia.com/2021/02/27/were-young-women-sexually-assaulted-when-bruce-lehrmann-the-alleged-parliament-house-rapist-was-an-official-at-the-anu-un-conference/>
- <https://twitter.com/blakandblack/status/1363106005404549121?lang=en>
- <https://blotreport.com/2021/02/17/did-morrison-almost-tell-the-truth/>
- <https://twitter.com/PeterWMurphy1/status/1362759012719026177>
- <https://www.clownworldau.com/story/brittany-higgins/>
- <https://twitter.com/peakhourimages/status/1363960533964128256?lang=en>
- <https://www.clownworldau.com/story/bruce-lehrmann-david-sharaz/>
- <https://www.youtube.com/watch?v=xqUJBWw1q9c>
- <https://www.townsvillemagpie.com.au/unfriendly-fire-the-real-reason-behind-the-facebook-ban-morrison-s-lip-service-to-stiffen-ruperts-business-end/>

Further, by the time of broadcast of The Project segment on 15 February 2021, it was notorious within Parliament House and elsewhere that Mr Lehrmann was the person alleged to have sexually assaulted Ms Higgins. This is evidenced by numerous persons having contacted Mr Lehrmann on the evening of 15 February 2021 and thereafter in relation to the segment, having plainly identified him.

Imputations

The Publications convey, amongst others, the following imputations of and concerning Mr Lehrmann:

- a. He raped Brittany Higgins in Defence Minister Linda Reynolds' office in 2019.*
- b. He continued to rape Brittany Higgins after she woke up mid-rape and was crying and telling him to stop at least half a dozen times.*

- c. *He, whilst raping Brittany Higgins, crushed his leg against her leg so forcefully that to caused a large bruise.*
- d. *After he finished raping Brittany Higgins, he left her on a couch in a state of undress with her dress up around her waist.*

Mr Lehmann vehemently denies that he sexually assaulted Ms Higgins, and the imputations are therefore grossly and indefensibly defamatory of him, noting that in a civil case Ms Higgins' allegations would be required to be proven to the standard in *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Limitation period

As at 15 February 2021 Section 56A of the *Limitation Act 1969* (NSW) was in the following terms:

- (1) *A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action.*
- (2) *A court may extend the limitation period to a period of up to 3 years running from the date of the alleged publication of the matter if the plaintiff satisfies the court that it is just and reasonable to allow an action to proceed.*
- (3) *In determining whether to extend the limitation period, the court is to have regard to all of the circumstances of the case and in particular to—*
 - (a) *the length of, and the reasons for, the plaintiff's delay, and*
 - (b) *if a reason for the delay was that some or all of the facts relevant to the cause of action became known to the plaintiff after the limitation period expired—*
 - (i) *the day on which the facts became known to the plaintiff, and*
 - (ii) *the extent to which the plaintiff acted promptly and reasonably once the plaintiff knew whether or not the facts might be capable of giving rise to an action, and*
 - (c) *the extent, having regard to the delay, to which relevant evidence is likely to be unavailable or less cogent than if the action had been brought within the limitation period.*

It is well established that a putative applicant is entitled to wait until criminal or coronial proceedings traversing the same issues are disposed of before commencing defamation proceedings. In such circumstances the Court has a discretion to extend the limitation period for a period of time. See for instance:

- a. *Houda v New South Wales* [2012] NSWSC 1036 where the Court was prepared to extend time from mid-December (when the DPP decided not to appeal the Magistrate's dismissal of the charges) until 19 March of the following year.
- b. *Barrett v TCN Channel Nine Pty Ltd* [2017] NSWCA 304. In this case the coronial decision was in February and the plaintiff had sought legal advice and given instructions to commence proceedings at a conference in May of the same year. The trial judge was prepared to extend time until the end of June (but a period of unexplained delay meaning proceedings were not filed until later that year meant the extension application failed).

In summary, given the ACT Director of Public Prosecutions only announced on 2 December 2022 he was withdrawing the criminal proceedings brought against Mr Lehrmann in relation to the allegation that he sexually assaulted Ms Higgins, Mr Lehrmann will be entitled to an extension of time for the commencement of proceedings over the Publications.

Next Steps

We have retained Steven Whybrow SC and Matthew Richardson SC to act in defamation proceedings against Network Ten in relation to the Publications.

However, Mr Lehrmann is prepared to consider a non-litigious resolution of his concerns before proceedings are commenced. In that regard we refer you to the provisions of the *Civil Dispute Resolution Act 2011* (C'th) in addition to the *Defamation Act 2005* (NSW).

Mr Lehrmann offers to resolve the dispute on the following terms:

- (a) Payment of the sum of \$235,000 for damages to Mr Lehrmann.
- (b) Network Ten provides to Mr Lehrmann a letter of apology on Network Ten letterhead and signed by the Executive Vice President & Chief Content Officer in the following terms:

"Apology to Bruce Lehrmann

On about 15 February 2021, Network Ten broadcast a segment on the program The Project in which Ms Lisa Wilkinson interviewed Ms Brittany Higgins.

The broadcast alleged that Ms Higgins was raped by a senior colleague working in the same ministerial office as Ms Higgins. That colleague was immediately identified by many persons as Mr Bruce Lehrmann.

Network Ten only ever intended to suggest that Ms Higgins had made allegations against Mr Lehrmann and not that he was guilty of those allegations.

On 2 December 2022, the Director of Public Prosecutions in the Australian Capital Territory announced the withdrawal of the charges against Mr Lehmann.

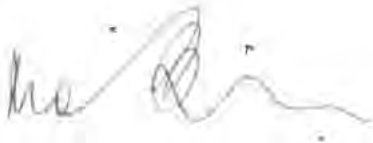
We accept in those circumstances that Mr Lehmann is entitled to the presumption of innocence, and we apologise to him for the publication of the broadcast."

(c) Payment of Mr Lehmann's costs, including Counsels' fees, incurred to date.

This offer is open for 14 days from the date of this letter.

In the event the offer is not accepted, Mr Lehmann will rely upon the sending of this letter, and any response to it (or lack of response) on any issue arising in the proceedings, including aggravated damages and indemnity costs.

Yours faithfully



Mark O'Brien
Principal
T +61 2 9216 9828
M +61 412 637 304
E mark.obrien@markobrienlegal.com.au

Copy to: **Stuart Thomas**
stthomas@networkten.com.au
Tasha Smithies
tsmithies@networkten.com.au

**Certificate Identifying Annexure
"PVS-2"**

No. NSD. 104/2023

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

Bruce Lehrmann

Applicant

News Life Media Pty Ltd and Anor

Respondents

This is the annexure marked "PVS-2" now produced and shown to PAUL VICTOR SVILANS at the time of swearing his affidavit on 1 March 2023

Before me:



.....
Signature of person taking affidavit

Filed on behalf of (name & role of party) Ben Roberts-Smith VC MG, Applicant

Prepared by (name of person/lawyer) Paul Svilans

Law firm (if applicable) Mark O'Brien Legal

Tel +61 2 9216 9815

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)

[Form approved 01/08/2011]

Paul Svilans

From: McAvaney, Grant <grant.mcavaney@news.com.au>
Sent: Wednesday, 21 December 2022 4:14 PM
To: Mark O'Brien
Cc: Cameron, Michael; Paul Svilans; Carla Wilson
Subject: Re: DEFAMATION OF BRUCE LEHRMANN

Without prejudice

Dear O'Brien

We refer to your email below.

We confirm that on the basis your client extends the offer until 20 January 2023, our clients will not rely upon the extended three week period in any opposition to an application for an extension of time.

Yours sincerely

GRANT MCAVANEY

Head of Litigation

T +61 2 7252 2352
2 Holt Street Surry Hills NSW 2010

E grant.mcavaney@news.com.au W NewsCorpAustralia.com

We acknowledge the Traditional Custodians of the land in all states and territories on which we work and report. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and honour their history, cultures, and traditions of storytelling. Proudly supporting [I.durrup](#), A News Corp Australia initiative.



On Wed, 21 Dec 2022 at 12:27, Mark O'Brien <Mark.O'Brien@markobrienlegal.com.au> wrote:

Dear Mr Cameron

Our client is not prepared to grant a four week extension to respond to his settlement offer ,noting that such extension would allow the offer to remain open for a period of six weeks.

However ,our client is prepared to extend the offer for a further period of three weeks until 20 January 2023 ,subject to you confirming by return email that your clients will not rely upon the extended period in any opposition to an extension of the limitation period which our client may seek in relation to the foreshadowed proceedings.

Yours Sincerely

Mark O'Brien
Principal | Mark O'Brien Legal



Level 19, 68 Pitt Street, Sydney NSW 2000 Australia
T +61 2 9216 9828 | M +61 412 637 304
E mark.obrien@markobrienlegal.com.au
W www.markobrienlegal.com.au

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On 20 Dec 2022, at 6:03 pm, Cameron, Michael <michael.cameron@news.com.au> wrote:

Dear Mr O'Brien,

I write to acknowledge receipt of your letter on behalf of your client, Mr Lehrmann, on 16 December 2022. My clients are prepared to give serious consideration to your proposal. However, they consider your 14-day deadline (which expires on 30 December 2022) to be unreasonable in the circumstances. The Christmas slow-down period is already upon us and a number of key decision-makers and informants are on annual leave. I cannot get instructions at this time.

Accordingly, we seek a four-week extension to your deadline. We believe a court would consider this to be a reasonable request. We propose to respond to your letter by 27 January 2023.

Yours sincerely,

Michael Cameron

On Fri, 16 Dec 2022 at 13:19, Mark O'Brien <Mark.O'Brien@markobrienlegal.com.au> wrote:

Dear Ms Muxworthy and Ms Maiden

Please find *attached* letter of today's date.

Regards

Mark O'Brien

Principal | Mark O'Brien Legal

<image001.png>

Level 19, 68 Pitt Street, Sydney NSW 2000 Australia

T +61 2 9216 9828 | M +61 412 637 304

E mark.obrien@markobrienlegal.com.au

W www.markobrienlegal.com.au

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MICHAEL CAMERON

National Editorial Counsel

2 Holt Street Surry Hills NSW 2010

T +61 417061258

E michael.cameron@9news.com.au

We acknowledge the Traditional Custodians of the land in all states and territories on which we work and report. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and honour their history, cultures, and traditions of storytelling.

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THOMSON GEER

LAWYERS

Level 14, 60 Martin Place
Sydney NSW 2000 Australia

GPO Box 3909 Sydney NSW 2001

T +61 2 8248 5800
F +61 2 8248 5899

Our ref MS:5263490
Your ref MOBL657

22 December 2022

**CONFIDENTIAL AND
NOT FOR PUBLICATION**

Mark O'Brien
Mark O'Brien Legal
Level 19, 68 Pitt Street
SYDNEY NSW 2000

Dear Mr O'Brien

Mr Bruce Lehmann

We act for Network Ten Pty Limited, Network Ten (Sydney) Pty Limited and Mr Christopher Bendall.

We acknowledge receipt of your letter dated 16 December 2022.

We have assumed your letter is intended to be a concerns notice issued under the *Defamation Act 2005* (NSW), although we note it is not marked as such. Please let us know if it is not intended to be a concerns notice.

The offer made in your letter is expressed to be open for 14 days, which expires on 30 December 2022. Our clients' offices commenced their shut down period last Friday. Accordingly, our clients will not be in a position to take instructions on the various matters raised in your letter or respond substantively to the letter or the offer by that deadline.

Our clients will be in a position to respond in the New Year.

Given the historical nature of the publications referred to in your letter, and the fact that the YouTube video has not been available on the relevant channel for around 17 months, we trust that the slight delay in our clients' response will not cause your client any prejudice, particularly given the time of year.

If you would like to discuss this matter in the meantime, please let us know.

Yours faithfully
THOMSON GEER

Marla Saunders
Partner
T +61 2 8248 5836
M +61 417 435 251
E msaunders@tglaw.com.au

**MARK
O'BRIEN
LEGAL**

ABN 86 002 421 123

Level 19, 68 Pitt Street
Sydney NSW 2000
Australia

Our Ref: MOBL

Attention: Ms Marla Saunders
Thomson Geer
Level 14, 60 Martin Place
SYDNEY NSW 2000

By email: mrsaunders@tjlaw.com.au.

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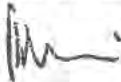
Dear Ms Saunders

MR BRUCE LEHRMANN

We refer to your letter to us of today's date.

Our client is prepared to extend his offer for a further period until 9 January 2023, subject to you confirming by return that your clients will not rely upon the extended period in any opposition to an extension of the limitation period which our client may seek in relation to the foreshadowed proceedings

Yours faithfully



Paul Svilans

Principal

T +61 2 9216 9830

M +61 410 687 900

E paul.svilans@markobrienlegal.com.au

30035

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THOMSON GEER

LAWYERS

Level 14, 60 Martin Place
Sydney NSW 2000 Australia

GPO Box 3809 Sydney NSW 2001

T +61 2 8248 5800
F +61 2 8248 5899

Our ref MS:5263490
Your ref MOBL657

22 December 2022

Mark O'Brien & Paul Svilans
Mark O'Brien Legal
Level 19, 68 Pitt Street
SYDNEY NSW 2000

**CONFIDENTIAL AND
NOT FOR PUBLICATION**

Dear Colleagues

Mr Bruce Lehmann

We refer to your letter sent this afternoon.

Our clients' office is shut until 9 January 2023. Accordingly, our clients will not be in a position to take instructions or respond substantively to the concerns notice by that deadline, and will require until 20 January 2023 to respond.

Our clients agree not to rely upon this extended period in opposition to any extension of the limitation period your client may seek in relation to the foreshadowed defamation proceedings.

Please confirm your client agrees to this extension.

Yours faithfully
THOMSON GEER



Maria Saunders
Partner
T +61 2 8248 5836
M +61 417 435 251
E msaunders@tgiaw.com.au

**MARK
O'BRIEN
LEGAL**

ABN 86 002 421 123

Level 19, 68 Pitt Street
Sydney NSW 2000
Australia

Our Ref: MOBL

23 December 2022

Attention: Ms Marlia Saunders
Thomson Geer
Level 14, 60 Martin Place
SYDNEY NSW 2000

By email: msaunders@tola.com.au.

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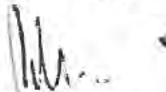
Dear Ms Saunders

MR BRUCE LEHRMANN

We refer to your letter to us of 22 December 2022.

We advise that, upon the basis as indicated in your letter, our client agrees to the extension as sought, namely until 20 January 2023.

Yours faithfully



Paul Svilans

Principal

T +61 2 9216 9830

M +61 410 687 900

E paul.svilans@markobrienlegal.com.au

30035

Liability limited by a scheme approved under Professional Standards Legislation

Level 14, 60 Martin Place
Sydney NSW 2000 Australia

GPO Box 3909 Sydney NSW 2001

T +61 2 8248 5800
F +61 2 8248 5888

Our ref MS:5263490
Your ref MOBL657

20 January 2023

Mark O'Brien & Paul Svilans
Mark O'Brien Legal
Level 19, 68 Pitt Street
SYDNEY NSW 2000

Dear Colleagues

Mr Bruce Lehrmann v Network Ten Pty Limited & Ors

We refer to your letter of 16 December 2022 and to our letters exchanged on 22 and 23 December 2022.

Your client claims that the following publications were defamatory of him:

1. a segment on the program *The Project* in which Ms Lisa Wilkinson interviewed Ms Brittany Higgins which was broadcast on Network Ten on 15 February 2021 (the **Broadcast**); and
2. a copy of the **Broadcast** which was uploaded to *The Project's* YouTube channel accessible online at the URL <https://www.youtube.com/channel/UCQm1nVYw3GvND4SZV1rVDDQ>,

(collectively, the **Publications**).

You assert the **Publications** conveyed a number of defamatory imputations about your client, namely that:

1. he raped Brittany Higgins in Defence Minister Linda Reynolds' office in 2019;
2. he continued to rape Brittany Higgins after she woke up mid-rape and was crying and telling him to stop at least half a dozen times;
3. he, whilst raping Brittany Higgins, crushed his leg against her leg so forcefully that it caused a large bruise; and
4. after he finished raping Brittany Higgins, he left her on a couch in a state of undress with her dress up around her waist,

(collectively, the **Imputations**).

In our view, there are a number of significant deficiencies with any prospective claim for defamation by your client in respect of the **Publications**.

Limitation period has expired

Your client did not commence proceedings for defamation within the one-year limitation period.

Given the **Publications** pre-date the commencement of the relevant amendments to the *Limitation Act 1969* (NSW) introduced by the *Defamation Amendment Act 2020* (NSW) on 1 July 2021, the terms of

section 56A of the *Limitation Act 1969* (NSW) (Limitation Act) in force prior to the relevant amendments are applicable.

On that basis, and contrary to what is set out in your letter, the applicable test on an application for an order under s 56A of the Limitation Act to extend the one-year limitation period is:

1. A person claiming to have a cause of action for defamation may apply to the Court for an order extending the limitation period for the cause of action.
2. A court must, if satisfied that it was *not reasonable in the circumstances* for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 14B to a period of up to 3 years running from the date of the publication.
3. A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).

The Court is required to determine whether the reasons why a plaintiff did not commence an action within time point to the conclusion that it was not reasonable to commence the action (*Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175 at [115]).

You assert in your letter that it is well established that a prospective applicant is entitled to wait until criminal proceedings concerning the same issues have been disposed of prior to commencing defamation proceedings. We disagree with this as a statement of general principle. It is clear that the Court is required to undertake an objective assessment on a case-by-case basis, taking into account the specific circumstances of the matter. The Court must weigh up the entirety of the circumstances before coming to a determination (see *Joukhador v Network Ten Pty Ltd* [2021] FCAFC 37; 283 FCR 1 at [59]).

Your client bears the onus of proof. It is an extremely difficult hurdle to overcome unless there are some unusual circumstances (for example, the plaintiff being unaware of the publication within the period of one year from the publication having occurred: see *Rayney v The State of Western Australia (No. 3)* [2010] WASC 83 at [41]). As you will know, the principal reason for success in Mr Joukhador's case on appeal was that he did not know about the publication in question at the relevant time.

In this matter, and without limitation:

1. your client was aware of the Broadcast before it went to air because our clients contacted your client for comment, and presumably he was aware of the Publications at the time they were published;
2. your client was not facing any charges at the time of the Broadcast. In fact, it is our understanding that he was not interviewed by the Australian Federal Police until 19 April 2021 and was not charged until August 2021 (around six months after publication of the Broadcast); and
3. your client could have commenced defamation proceedings and sought a stay until the determination of the criminal proceedings.

In the circumstances, our clients consider that there is a real prospect that your client would be unable to satisfy the Court that it was not reasonable for him to have commenced any action within the relevant limitation period (including in the months preceding the Publications), such that he would be unable to obtain an extension of the limitation period.

Your client is not identified

We disagree with the assertion in your letter that your client is identified in the Publications.

The Publications refer in the broadest of terms to a senior male colleague of Ms Higgins.

Your client bears the onus of establishing that a sensible viewer of the Publications would reasonably identify him as being the person to which the Publications refer. *Consolidated Trust Co Ltd v Browne* (1948) 49 SR (NSW) 86 and *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239.

Your client has no cause of action in defamation unless he can demonstrate the Publications were communicated to a person with knowledge of extrinsic facts, not otherwise generally known.

Our clients are of the view your client will face insurmountable challenges in proving that he was identified in the Publications.

Further, our clients vehemently deny that the Publications in any way "invited [viewers] to speculate about the identification of Mr Lehmann". In any case, we disagree with the assertion in your letter that within the hours and days following the Publications having been published, your client's name was "widely trafficked as the culprit on social media and the internet generally". That assertion is not supported by the obscure websites and Twitter accounts referred to in your letter, including the websites of 'Clown World Australia' and 'Kangaroo Court'. In our view, the obscurity of those websites and accounts, emphasises the difficulties your client will face in establishing that he was identified by the Publications to anyone.

Imputations are not conveyed

In our view, the Imputations were not conveyed by the Publications.

It is well established that, in determining whether imputations are conveyed, a matter complained of must be taken as a whole and any imputations are to be considered in the context of the entire matter.

The Publications consist of an interview with Ms Higgins in which she made an allegation of serious sexual assault. The Publications consistently made clear that Ms Higgins' statements were "claims" or "allegations" rather than proven facts, including through the way in which questions were phrased or the way in which information provided by Ms Higgins was characterised.

In the circumstances, no ordinary reasonable viewer would have understood the Publications as conveying allegations that your client had in fact raped Ms Higgins.

Substantive defences

Insofar as your client is able to prove that he was identified by the Publications and that any of the Imputations are found to be conveyed (all of which are denied), in our view our clients would have a number of substantive defences available to them, including defences of justification and qualified privilege.

Justification

While we are aware of the observations of Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 and the provisions of s 140(2) of the *Evidence Act 1996* (Cth), the substantive truth of any of the relevant imputations found to have been conveyed by the Publications would nevertheless be required to be proved on the balance of probabilities as opposed to the standard in criminal proceedings.

We note that if your client intends to seek damages for hurt to feelings in any proceedings for defamation, he would be required to give evidence. He would also be subjected to extensive cross-examination in

relation to the matters arising from any justification defence, which he was able to avoid in the criminal proceedings.

In particular, we note that your client has advanced numerous conflicting and implausible reasons as to why he attended Parliament on the night of the incident, including that:

- He did not have his security pass with him, and told security personnel he was attending after hours "to pick up some documents";
- He told police he did not keep alcohol in his office yet there was evidence at the trial that he kept alcohol under his desk and that he returned "to drink some whiskey and had [about] two glasses", which he told Fiona Brown the week after the incident;
- He had purposely left the keys to his apartment at Parliament before going out on that night, which he told police in April 2021 during an interview;
- He denied having any missed calls from his then girlfriend on the night in question, despite call logs to the contrary being produced during his police interview; and
- He had to "attend the office to do some work" on the night in question which involved sticking tabs on a Question Time brief for Minister Reynolds, despite there being no Question Time that next week, which he also told police in April 2021.

Additionally, our client and its employees have a strong ongoing relationship with Ms Higgins. Given these open lines of communication with her, it is anticipated she will give evidence in support of any justification defence.

The risks associated with progressing this matter should be obvious to your client.

Finally, [REDACTED] we put you on notice that if he commences proceedings our clients will seek a stay of any civil proceeding pending the determination of those criminal charges on that basis that those charges (if they are proven) are relevant to our clients' justification defence and any plea in mitigation.

Qualified Privilege

Aside from any defence of justification, our clients would also have available to them defences of qualified privilege, pursuant to s 30 of the Act and at common law. The Publications related to matters of obvious public interest, including allegations of serious sexual assault within Parliament House and the subsequent handling of those allegations by members of the Government and officials.

Our clients' conduct in publishing the Publications was entirely reasonable in the circumstances, including by engaging in extensive fact checking of the story, contacting your client prior to publication in order to obtain a comment or response from him in relation to the allegations, framing the statements as allegations and taking care not to identify your client.

Matters in mitigation of damages

While we are of the view that your client has low prospects of establishing any defamation claim and ultimately succeeding in that claim, assuming to the contrary there are also a number of matters that would substantially mitigate any damage caused to your client by the Publications, including:

1. From at least the date your client was charged in August 2021, any damage to his reputation arising from the fact of the allegations was occasioned by the fact of the charge, not by the Publications.

2. Our clients acted responsibly in taking down the online version of the Broadcast from YouTube around the time your client was charged.

Next Steps

In light of the matters set out above, we are instructed that our clients reject your client's offer and stand by the Publications.

If your client issues proceedings, our clients will vigorously defend the Publications.

Our clients reserve their rights, including the right to rely on this correspondence on the question of costs.

Yours faithfully
THOMSON GEER



Marlia Saunders
Partner
T +61 2 8248 5836
M +61 417 435 251
E msaunders@tglew.com.au

Your Ref: MOB1657

News Corp Australia
2 Holt Street
Surry Hills NSW 2010
+61 2 9288 3000

20 January 2023

Grant McAvaney
Head of Litigation
E: grant.mcavaney@news.com.au
P: +61 421 332 889

Mr Mark O'Brien
Mark O'Brien Legal
Level 19, 68 Pitt Street
SYDNEY NSW 2000

BY EMAIL: mark.obrien@markobrienlegal.com.au

Dear Mr O'Brien

Your client: Bruce Lehrmann

We refer to your letter dated 16 December 2022, regarding:

1. An article published on 15 February 2021 on the website *news.com.au*, entitled "Young staffer Brittany Higgins says she was raped at Parliament House"; and
2. An article published on 15 February 2021 on the website *news.com.au* entitled "Parliament House alleged rape: How Brittany Higgins' horror night unfolded",

(together, "the Articles").

We note that the letter is not intended to be a concerns notice. It is not described as such, and it does not contain all of the imputations that your client considers are or may be carried by the Articles. The letter sets out some imputations but states that there are others without identifying them.

Limitation period

We note that your letter states that "as at 15 February 2021 Section 56A of the *Limitation Act 1969* (NSW)" was in the terms set out in your letter. However, your letter sets out the current version of section 56A rather than the version in force as at 15 February 2021.

As at 15 February 2021, section 56A of the Limitation Act was as follows:

56A Extension of limitation period by court

- (1) A person claiming to have a cause of action for defamation may apply to the court for an order extending the limitation period for the cause of action.

(2) A court must, if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication, extend the limitation period mentioned in section 14B to a period of up to 3 years running from the date of the publication.

(3) A court may not order the extension of the limitation period for a cause of action for defamation other than in the circumstances specified in subsection (2).

Pursuant to the foregoing version of section 56A of the Limitation Act, it is incumbent upon your client to establish that it was not reasonable in the circumstances for him to have commenced an action in relation to the Articles within 1 year from the date of publication (the “not reasonable test”). It is well accepted that the burden imposed on a person seeking an extension of the limitation period is one which will only be satisfied in “relatively unusual”, “special” or “compelling” circumstances: *Houda v State of NSW* [2012] NSWSC 1036 at [10] citing *Noonan v MacLennan* [2010] QCA 050; 2 Qd R 537 at [15] per Keane JA; at [50] to [51] per Chesterman JA; *Barrett v TCN Channel Nine Pty Ltd* [2017] NSWCA 304 at [71].

Your letter does not sufficiently indicate on what basis your client could satisfy the not reasonable test. Additionally, the cases referred to in your letter are not analogous to the circumstances of your client’s case. In this regard, we note that the incident in Parliament House occurred sometime in March 2019, the Articles were published on 15 February 2021 and your client was not charged until in or around August 2021 – by which time almost six months of the ordinary limitation period for the Articles had already elapsed. We also note that your client did not contact us about the Articles within the limitation period.

In the matter of *Houda* referred to in your letter, the plaintiff was arrested and charged on 16 September 2010 and the matter complained of was published on 17 September 2010. The plaintiff’s evidence in the extension of time application focussed on the fact that at all relevant times prior to the expiration of the limitation period, the plaintiff was focussed on defending criminal proceedings (see *Houda* at [22]). This was central to the court’s decision to permit the extension of the limitation period, with the court noting the following (at [34]-[35] and [37]) (emphasis added):

I am satisfied that it was not reasonable for Mr Houda to commence proceedings for defamation before the conclusion of the criminal proceedings against him. The wisdom of that course was inextricably linked with the fate of the criminal charges, which demanded priority as the forum in which he had to vindicate his reputation.

...

In my view, it would not have been reasonable for him to launch the juggernaut of defamation proceedings before he was in a position to assess the prospects of success of those claims. Had he been convicted of the criminal charges, the prospect of then vindicating his reputation in a civil action would have been derisory. Indeed, a premature decision to commence such action may have compounded the very harm sought to be vindicated.

It does not necessarily follow that every person facing criminal charges should automatically have an extension of the limitation period. My decision in the present case is based on the complete overlap between the issues raised in the criminal proceedings and by the claim in defamation, the fact that the plaintiff is a solicitor who faced the prospect of professional ramifications if he misjudged the seriousness of the criminal allegations against him and the fact that Mr Houda seeks to pursue other causes of action at the same time as the claim in defamation.

Where your client was not charged until about 6 months after publication of the Articles, it cannot be said that there was an overlap between the issues in proceedings in defamation and criminal proceedings. Of course where the matter complained of predates the pressing of criminal charges, it is open for a plaintiff to commence proceedings in defamation which can be stayed if and when any such criminal charges are ultimately laid (for example in the cases of Craig McLachlan and Peter Gregg).

In the matter of *Barrett* referred to in your letter, it was determined that it was not reasonable for the plaintiff to have commenced proceedings within the one year limitation period in circumstances where the plaintiff, having been involved in a serious car accident central to the matter complained of, could not recall whether he was the driver of the car. A police report obtained by his solicitor after the publication of the matter complained of and prior to the coronial inquest indicated that the plaintiff was the driver of the car in question, which resulted in the death of his friend, Mr Innes. In these circumstances, the court considered that, by virtue of section 345(4) of the *Legal Profession Act 2004 (NSW)*, the conclusion must have been that a claim in defamation would not have reasonable prospects of success. It was not until the conclusion of the coronial inquest in 2015 (after the expiration of the limitation period) that there was a finding that Mr Innes was the driver of the car and not the plaintiff, a matter which was central to the plaintiff's prospects in the defamation proceedings.

There have been no findings whatsoever in respect of your client as a result of the criminal proceedings brought against him, and we do not understand your client to be indicating that he does not recall the events of the night in question. As such, we do not agree that the circumstances of your client's delay in commencing proceedings are in any way analogous to those in the matter of *Barrett*.

Request for further information

We request that your client provide a copy of the evidence that he would give on any application to extend the limitation period (in affidavit form) so that we can properly consider the assertion in your letter that your client "will be entitled to an extension".

As to the issue of identification, we do not agree that your client is identifiable in the Articles. To the extent that your client will seek to rely on material extraneous to the Articles to establish identification for the purposes of defamation, we request a list of persons to whom your client alleges he was identifiable in the Articles together with the information each person had which led to his identification.

In the event that your client pursues this matter, our clients will rely on this letter in support of an application that your client pay our clients' costs of any proceedings on an indemnity basis pursuant to section 40 of the *Defamation Act 2005 (NSW)* (and the corresponding legislation in the other States and Territories) and the principles in *Calderbank v Calderbank* [1976] Fam 93 and *Cutts v Head* (1984) CH 290.

Yours sincerely

Grant McAvaney
Head of Litigation
News Corp Australia