IN THE FEDERAL COURT OF AUSTRALIA No. NSD 103 of 2023
DISTRICT REGISTRY: NEW SOUTH WALES
DIVISION: GENERAL

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD and another
Respondents

FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS

APPLICATION TO RE-OPEN THE PROCEEDINGS TO ADDUCE FRESH EVIDENCE

A. INTRODUCTION

1. These submissions are made in support of the First Respondent's interlocutory application filed on 31 March 2024 for leave to re-open the proceeding for the purpose of adducing fresh evidence. The application is supported by the affidavits of Marlia Ruth Saunders affirmed 31 March 2024 (**First Saunders Affidavit**) and 1 April 2024 (**Second Saunders Affidavit**). The First Respondent also relies on the affidavit of Ms Saunders affirmed 8 June 2023 (**Earlier Saunders Affidavit**). The First Respondent is grateful to the Court for accommodating the hearing of the present application on an urgent basis.

2. In summary, the First Respondent submits that it is in the interests of justice for the proceedings to be re-opened for the purposes of:

   (a) adducing the evidence of Taylor Auerbach, which is set out in Confidential Exhibits MRS-70 and MRS-71 to the First Saunders Affidavit (**Auerbach Evidence**); and

   (b) tendering various documents to put that evidence in context, being the matters annexed to the Second Saunders Affidavit.

3. The substance of the Auerbach Evidence (if accepted) is that, contrary to repeated assurances given by the solicitors for the Applicant (on instructions) to the First Respondent in correspondence, submissions made in open court by Senior Counsel for the Applicant (on instructions), and evidence given by the Applicant when being cross-examined at the trial, the Applicant committed an egregious contempt of court by providing materials to the Seven Network that were subject to an implied (or *Harman*)

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undertaking that they were not to be used for any purpose other than the criminal proceedings brought against the Applicant in the ACT Supreme Court. The Auerbach Evidence (if accepted) also discloses that the Applicant received a raft of hitherto undisclosed benefits in connection with his participation in two interviews on the Seven Network's *7News Spotlight* program in 2023: matters which ought to have been disclosed to the Respondents prior to trial and which could have formed the basis of cross-examination of the Applicant and submissions.

4. The First Respondent submits, in summary, that if the Auerbach Evidence is accepted:

   (a) It is capable of materially affecting the assessment of the credit of the Applicant because it discloses wilful dishonesty and a preparedness to commit a very serious contempt of court in order to attempt to advance his interests in this proceeding.

   (b) It is supportive of the First Respondent's submission that the Applicant has, in the conduct of this proceeding, engaged in an extreme abuse of process. In the First Respondent's submission, the abuse of process is so grave that had the evidence been known to it before now, it could have formed the basis of an application to strike out the proceeding.

B. <u>RELEVANT PRINCIPLES</u>

B.1 POWER TO RE-OPEN

5. The Court has an inherent power to re-open a matter for hearing up until the time of entry of judgment. The power is discretionary, but exceptional, and it is to be exercised having regard to the public interest in maintaining the finality of litigation: *Smith v New South Wales Bar Association* (1992) 176 CLR 256 at 265 (Brennan, Dawson, Toohey and Gaudron JJ); see also *Briggs on behalf of the Boonwurrung People v State of Victoria* [2024] FCA 288 (**Briggs**), [20].

6. The overriding principle to be applied by the Court in determining whether or not to grant leave to re-open a case for the admittance of further evidence is that it must be in the interests of justice in the proceeding: *Inspector-General in Bankruptcy v Bradshaw* [2006] FCA 22, [24] (Kenny J): *Briggs*, [22].

7. There are four recognised categories of cases which, subject to the interests of the administration of justice, may justify the granting of leave to re-open, although the categories are not necessarily closed: *Briggs*, [23].

8. One of those categories is where leave to re-open is sought to adduce fresh evidence. The evidence must be "new", in the sense that the applicant was unaware of it at the time of the original hearing, and is evidence the applicant could not have obtained with reasonable diligence: *Kedem v Johnson Lawyers Legal Practice Pty Ltd* [2014] FCAFC 3, [74] (North, Barker and Katzmann JJ).

9. Other considerations relevant to the discretion to re-open include any prejudice likely to be suffered by the party resisting the application: *Briggs*, [25] and the probability that the additional evidence will affect the result: *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1436; (2008) 171 FCR 174, [209] (Lindgren). If success in re-opening is not likely to make any difference to the outcome of the trial, that would weigh against putting the parties and the Court to the delay, trouble and expenditure of resources involved in reopening: *Briggs*, [27].

10. In respect of the relevant degree of probability, it has been said that evidence should be admitted "when it is so material that the interests of justice require it" (*Re Australasian Meat Industry Employees' Union (WA Branch); Ex parte Ferguson* (1986) 67 ALR 491, 493-94 per Toohey J) or where the new evidence would "most certainly affect the result" (*Daniel v Western Australia* (2004) 138 FCR 254, 269 per RD Nicholson J: *Briggs*, [27].

B.2 THE HARMAN PRINCIPLE & CRIMINAL PROCEEDINGS

11. It is well established in civil litigation that an implied undertaking precludes parties from using documents produced under compulsion in court proceedings for a collateral or ulterior purpose unless the documents have been received into evidence: *Hearne v Street* (2008) 235 CLR 125; *Harman v Home Department State Secretary* [1983] 1 AC 280. Contravention of the implied undertaking is a contempt of court.

12. The implied undertaking applies equally to criminal and civil proceedings: *Taylor v Serious Fraud Office* [1999] 2 AC 177. In *Edwards v Avant Insurance Limited* [2020] TASSC 8; 31 Tas R 325, Blow CJ said at [13]-[14]:

> In *Taylor v Serious Fraud Office* [1999] 2 AC 177, the House of Lords held that that rule also applies to material disclosed by the prosecution in criminal proceedings. The policy reasons for extending the operation of the rule to criminal proceedings were explained by Lord Hoffmann as follows, at 211:
>
> > "Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of information or at any rate its disclosure to the accused for the purposes of

> enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected."

That aspect of the case has subsequently been referred to and accepted as correct in a number of Australian cases: *Ollis v New South Wales Crime Commission* [2007] NSWCA 311, 177 A Crim R 306 at [48]; *Re Clarecastle Pty Ltd (in liq)* [2011] NSWSC 553, 251 FLR 225 at [22]; *Alcoa of Australia Ltd v Apache Energy Ltd (No 6)* [2014] WASC 287 at [21].

13. In *EFG v Legal Profession Board of Tasmania* [2020] TASSC 26, Blow CJ said at [51] (our emphasis):

> In certain situations when documents are made available to litigants for the purpose of court proceedings, the recipients are obliged not to use those documents for other purposes. That rule applies to documents that are made available in civil proceedings by way of discovery: *Hearne v Street* [2008] HCA 36, 235 CLR 125. **It also applies to documents that are provided to an accused person in criminal proceedings because of a prosecutor's duty of disclosure: *Taylor v Serious Fraud Office* [1999] 2 AC 177**. It is said that the recipient of the documents in such situations is bound by an implied undertaking not to use the documents for a purpose unrelated to the proceedings. A breach of the implied undertaking amounts to a contempt of court. The implied undertaking binds not only the litigant but also the litigant's legal representatives: *Hearne v Street* (above) at [109].

C. SUBMISSIONS

C.1 FRESH EVIDENCE THAT COULD NOT HAVE BEEN OBTAINED USING REASONABLE DILIGENCE

14. It cannot seriously be contended that the Auerbach Evidence is anything other than fresh evidence. It only came to the attention of the First Respondent in the last few days, and it could not have been obtained using reasonable diligence before that time: First Saunders Affidavit, [5]; see also the Earlier Saunders Affidavit regarding the enquiries made on behalf of the First Respondent in 2023. As set out below, representations and submissions contrary to the import of the Auerbach Evidence were repeatedly made (on instructions) by the Applicant's legal advisers. The documents establishing the substance of the evidence were not produced in response to subpoenas served by the First Respondent, in circumstances where they were squarely within their terms. It was not possible for the First Respondent responsibly to advance the submissions it now wishes to rely upon until the receipt of the Auerbach Evidence on 30 and 31 March 2024.

15. The legal representatives for the First Respondent were first notified of the potential existence of the Auerbach Evidence on <u>Thursday, 28 March 2024</u>: First Saunders Affidavit, [7].

16. The preparation of an affidavit deposing to the fresh evidence was foreshadowed on Good Friday, 29 March 2024: First Saunders Affidavit, [8].

17. The affidavit of Mr Auerbach sworn 30 March 2024 at Confidential Exhibit MRS-70 to the First Saunders Affidavit was provided to the First Respondent on Saturday, 30 March 2024: First Saunders Affidavit, [9].

18. The affidavit of Mr Auerbach sworn 31 March 2024 at Confidential Exhibit MRS-71 to the First Saunders Affidavit was provided to the First Respondent on Easter Sunday, 31 March 2024: First Saunders Affidavit, [10].

19. The present application was filed and served by the First Respondent as soon as practicable on Easter Sunday. A copy of the First Saunders Affidavit with the Confidential Exhibits was served on the solicitors for the Applicant at the time of serving the present application: Second Saunders Affidavit, [53].

20. The Second Saunders Affidavit was filed and served on Monday, 1 April 2024.

21. The First Respondent had made considerable attempts to identify the source of the materials that were provided to the Seven Network in apparent breach of the implied undertaking preventing their disclosure for purposes other than the ACT criminal proceedings against the Applicant, but those attempts were unsuccessful. It now appears that they were unsuccessful primarily because of the position taken by the Applicant (via his solicitors and senior counsel, on instructions) and the Seven Network in response to the First Respondent's enquiries (and in relation to the Seven Network, its response to two subpoenas to produce issued by the First Respondent).

22. The First Respondent first became aware that materials that were produced, but not tendered, in the ACT Criminal Proceedings had been provided to Channel 7 following the broadcast of a 7News Spotlight program on 4 June 2023 (**First Spotlight Program**): Second Saunders Affidavit, [16]-[17]. The First Spotlight Program included interviews with the Applicant and is Exhibit #R43 in this proceeding.

23. Following the broadcast of the First Spotlight Program, the First and Second Respondents made a number of enquiries and issued a subpoena to Seven Network (Operations) Limited (**Seven**) for the purpose of seeking to ascertain the possible source of the disclosure of the material the subject of the implied undertaking in the program: Second Saunders Affidavit, [18].

24. Those to whom the First Respondent made enquires included: (a) the solicitors for the Applicant, (b) counsel assisting the ACT Board of Inquiry, (c) the Applicant's previous

solicitors in the Criminal Proceedings (Kamy Saeedi Lawyers), (d) the Australian Federal Police, (e) the Acting Director of Public Prosecutions, (f) the Associate to the Honourable Chief Justice McCallum and (g) Seven Network (Operations) Limited. The solicitors for the Second Respondent and Ms Higgins also made separate enquiries. Details of the enquiries made by the First Respondent and the outcome of those enquiries are set out in the Earlier Saunders Affidavit, which was made in support of the Respondents' application at that time for leave to administer interrogatories to the Applicant (referred to in [26] below).

25. In correspondence, the Applicant's solicitors repeatedly denied, on instructions, that the Applicant had breached the implied undertaking by providing materials to Seven. For example, on 5 June 2023, the solicitors for the Applicant stated that (see Second Saunders Affidavit, [20]):

> Our client is well aware of his obligations pursuant to the decision in Harman, and he has at all times complied with those obligations.

26. On 7 June 2023, the solicitors for the First Respondent wrote to the solicitors for Seven seeking confirmation that certain material provided to the court in the ACT Criminal Proceedings under compulsory process was not in Seven's possession as the result of a breach of the implied undertaking: Second Saunders Affidavit, [22]. On 8 June 2023, the solicitors for Seven sent a letter of response in which they stated that they were instructed that "as far as our client is aware, the material referred to in your letter did not come into its possession in breach of the implied undertaking": Second Saunders Affidavit, [23].

27. On 8 June 2023, at around 7:02pm, the solicitors for the First Respondent sent an email to the solicitors for the Applicant concerning the First Respondent's intention to seek leave to administer interrogatories to the Applicant. The purpose of the proposed interrogatories was to establish whether the Applicant was involved in the apparent breach of the implied undertaking: Second Saunders Affidavit, [26]. The solicitor for the Applicant responded to that message at around 8:17pm, in which he stated (Second Saunders Affidavit, [26], our emphasis):

> We refer to your email to us below in which you allege as follows: *The obvious inference is that the documents the subject of Harman undertakings were provided by, or with the knowledge or complicity of, Mr Lehrmann*. **Your allegation is a serious allegation, and we are unaware as to any basis for you to make that allegation**. In the circumstances, we place you on notice that our client will rely upon your making of the allegation in support of his claim for aggravated damages in the proceedings as against your client.

28. On 8 June 2023 at around 10:34pm, the Respondents jointly served an outline of submissions in support of an application for leave to administer interrogatories to the Applicant: Second Saunders Affidavit, [27]. The solicitor for the Applicant responded to that message on 9 June 2023 at around 9:01am, in which he stated (Second Saunders Affidavit, [28], our emphasis):

> We refer to the following submission contained in the Respondents' submissions as provided to the Associate to Lee J yesterday evening: *In the respondents' submission, the obvious inference from the matters referred to above is that the documents the subject of the implied undertaking were provided by or with the knowledge or complicity of Lehrmann.* **The making of the allegation by the Respondents was improper and unjustifiable**, and our client will therefore rely upon the making of the allegation in support of his claim for aggravated damages in the proceedings.

29. That response quoted selectively from the Respondents' joint submission, which actually concluded as follows (at [15]):

> The respondents seek leave to administer interrogatories to Lehrmann for the purpose of establishing whether he was involved in the apparent breach of the implied undertaking. If he has not, he should have no difficulty in saying so on his oath in answer to the interrogatories. If he has, that would be an extremely serious matter going to a potential abuse of the process of this Court.

30. On or about 9 June 2023, the parties attended a case management hearing before Lee J. During the course of that hearing, senior counsel for the Applicant said (on instructions):

> In the correspondence last night, and in the written submissions provided to your Honour, the allegation was made, it was the obvious inference that my client had provided materials to Channel 7 even in breach of his Harman obligations. He absolutely denies that. It is a grave and serious allegation. It's aggravating the damages in this case.

31. We respectfully agree with that characterisation of the seriousness of the matter. A breach by the Applicant of his *Harman* obligations, in the lead-up to the trial of this proceeding, in connection with interviews given by the Applicant in which he repeatedly lied (as set out in our closing submissions) is a grave and serious matter. Indeed, its seriousness would, in our submission, be difficult to overstate.

32. In response to the subpoena to produce served on Seven following the broadcast of the First Spotlight Program referred to at [23] above which required, among other categories of documents, production of "one copy of all communications or documents and materials evidencing communications between Mr Bruce Lehrmann and officers, employees or contractors of Seven in relation to the Lehrmann Spotlight Programme", the solicitors for Seven stated in a letter dated 13 June 2023 that "we are instructed that there are no written communications or records of communications to produce pursuant to the Subpoena": Second Saunders Affidavit, [32].

33. In response to a complaint made by the First Respondent to Seven under the Commercial Television Industry Code of Practice 2015, Seven stated in a letter dated 30 June 2023 in respect of the audio recording produced, but not tendered, in the ACT Criminal Proceedings, that: "As Seven has previously made clear to your solicitors in the Lehrmann defamation proceedings, together with those acting for Ms Wilkinson, Seven is not aware of having received the Audio Recording in breach of the implied undertaking; it was not obtained by Seven from subpoenaed materials or otherwise from the criminal trial of Mr Lehrmann. There is accordingly no basis for Network Ten's suggestion that Seven has used the material in breach of any law": Second Saunders Affidavit, [36].

34. In a letter dated 10 August 2023, the solicitors for the Applicant stated that "…**our client is aware of his obligations pursuant to the Harman implied undertaking**, and we assume that you will be advising your client's employees as to their obligations in complying with the implied undertaking in relation to documents a discovered by our client in these proceedings" (our emphasis in bold: Second Saunders Affidavit, [40]).

35. On 13 August 2023, a broadcast of the 7News Spotlight program occurred that featured further interviews with the Applicant and extracts of materials that were produced, but not tendered, in the ACT Criminal Proceedings (**Second Spotlight Program**): Second Saunders Affidavit, [41]. The Second Spotlight Program is Exhibit #R44 in this proceeding.

36. Following the broadcast of each of the First and Second Spotlight Programs, the First Respondent endeavoured to establish through correspondence and the issuance of subpoenas to Seven whether the Applicant or anyone on his behalf had provided material to Seven in breach of the implied undertaking. In particular:

37. Following the broadcast of the Second Spotlight Program, the First Respondent issued a subpoena to Seven the purpose of seeking to ascertain the possible source of the disclosure of the material the subject of the implied undertaking in the program: Second Saunders Affidavit, [42].

38. In response to the subpoena to produce served on Seven following the broadcast of the Second Spotlight Program which required, among other categories of documents, production of copies of communications between Seven and the Applicant in relation to the program, the solicitors for Seven stated in a letter dated 10 October 2023 that there were no documents to produce in response: Second Saunders Affidavit, [45].

39. The First Respondent accordingly made exhaustive enquiries in an attempt to identify the source of the material provided to Seven in apparent breach of the implied undertaking protecting materials produced, but not tendered, in the ACT criminal proceedings. Those enquiries were hamstrung by the responses it received from the Applicant's solicitors and the solicitors for Seven, and the representations and submissions made on instructions on behalf of the Applicant set out above.

40. If the Auerbach Evidence is accepted than, as explained below, it discloses that the Court and the First Respondent were gravely misled, and that (a) the Applicant committed a very serious contempt by providing material subject to an implied undertaking to Seven; (b) the Applicant gave inexcusably false instructions to his solicitors and Senior Counsel, causing them to make incorrect representations and submissions; and (c) documents exist that were caught by the subpoenas issued to Seven, but which were not produced in response to those subpoenas at the time of the trial.

41. A further consequence of the true position being wilfully concealed by the Applicant from the First Respondent (again, assuming the Auerbach Evidence is accepted) is that the Australian Federal Police have referred the disclosure of the protected material to the National Anti-Corruption Commission as part of an investigation regarding whether any AFP members may have been involved in this conduct: Second Saunders Affidavit, [46]. If the Auerbach Evidence is accepted, then there is nothing for the NACC to investigate, because the contempt was committed by the Applicant, not any members of the AFP. If the Auerbach Evidence is accepted, then that is a matter that must have been known to the Applicant at all times, and yet he acquiesced in an investigation being commenced concerning the integrity of officers of the AFP in circumstances where he was the guilty party.

C.2 THE INTERESTS OF JUSTICE FAVOUR THE ADMISSION OF THE AUERBACH EVIDENCE

42. During the cross-examination of the Applicant in this proceeding by Senior Counsel for the Second Respondent, the Applicant gave the following evidence in respect of the agreement between him and Seven (Second Saunders Affidavit, [49] and MRS-107, T523.32-7):

> And it was part of the agreement, wasn't it, that you were paid for 12 months of accommodation by Channel 7?---That is – that's the only part of the – yes, that's what I get (T522.31-33).
>
> …

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> In addition to giving the interviews, you also agreed to give all information, documents, film, video, photographs, items and assistance? Yes
>
> Reasonably requested by Seven in relation to the above?---Yes.
>
> And did you do so?---No, I just gave an interview.

43. If the Auerbach Evidence is accepted, the Applicant's evidence cannot have been truthful.

44. The Auerbach Evidence consists of:

    (a) evidence that the Applicant, on or about 18 December 2022, provided to Mr Auerbach, an employee of Seven, a Cellebrite extract comprising 2,312 pages of text messages exchanged between Ms Higgins and Mr Dillaway: Second Saunders Affidavit, [6(a)] (**Dillaway Messages**);

    (b) evidence that the Applicant, on or about 4 March 2023, provided to Mr Mark Llewellyn, an Executive Producer at Seven, a Cellebrite extract comprising a series of text messages exchanged between Ms Higgins and Mr Peter FitzSimons: Second Saunders Affidavit, [6(b)](**FitzSimons Messages**); and

    (c) various records evidencing payments made by or on behalf of Seven for the benefit of the Applicant in connection with his appearance in the First and Second Spotlight Programs: Second Saunders Affidavit, [6(c)] (**Payment Records**).

C.2.1 DILLAWAY AND FITZSIMONS MESSAGES

45. The Dillaway and FitzSimons Messages were contained in the electronic brief of evidence (**eBrief**) provided to the Applicant by the prosecution in the ACT Criminal Proceedings: Second Saunders Affidavit, [11]-[15].

46. The Dillaway and FitzSimons Messages were not tendered in the ACT Criminal Proceedings: Second Saunders Affidavit, [7]-[8].

47. The file name and metadata for the eBrief indicates that it was prepared on 30 March 2022: Second Saunders Affidavit, [14].

48. The Dillaway Messages in the eBrief consist of a pdf document called "Identified Chat 3 – BH – Redacted – Ben Dillaway.pdf": Second Saunders Affidavit, [15(c)].

49. The FitzSimons Messages in the eBrief consist of a pdf document called "Identified Chat 14 – BH – Redacted – P Fitzsimmons.pdf": Second Saunders Affidavit, [15(d)].

50. The Dillaway and FitzSimons Messages in the eBrief came from an extraction of data from Ms Higgins' mobile phone by police: Second Saunders Affidavit, [15(b)].

51. The metadata from the Dillaway Messages provided to Mr Auerbach by the Applicant shows that they were created on 30 March 2022 and that they consist of a pdf document with the same name as the messages from the eBrief (i.e. "Identified Chat 3 – BH – Redacted – Ben Dillaway.pdf"): Confidential Exhibit MRS-71 to the First Saunders Affidavit at [4].

52. As deposed at [50] of the Second Saunders Affidavit, had the First Respondent been aware at the time of the trial of the existence of evidence to the effect that the Applicant provided the Dillaway and FitzSimons Messages to Seven in breach of his undertaking that those documents be used only for the purposes of the ACT Criminal Proceedings (assuming the Auerbach Evidence is accepted), questions would have been put to him in cross-examination, and submissions advanced in closing to the effect that:

    (a) the Applicant had committed a disgraceful contempt that warrants a referral for prosecution; and

    (b) the Applicant's evidence as recorded at [42] above was wilfully false.

C.2.2 PAYMENT RECORDS

53. Similarly, and as deposed at [51] of the Second Saunders Affidavit, had the First Respondent been aware at the time of the trial of the existence of the Payment Records, it would have put those records to the Applicant in cross-examination and advanced submissions in closing to the effect that if the Payment Records are accepted as accurately recording benefits received by him from Seven, then his evidence as recorded at [42] above was wilfully false.

54. Further, the Payment Records would have also been relevant to the Second Respondent's mitigation claim. In a letter dated 6 June 2023, the solicitors for the Second Respondent notified the solicitors for the Applicant that in mitigation of any damage award the Second Respondent intended to rely upon, *inter alia*, "the interview the applicant gave to Seven Network that was broadcast on 4 June 2023 including any compensation received for giving or supporting that interview": Second Saunders Affidavit, [21].

C.2.3 DILLAWAY AND FITZSIMONS MESSAGES / PAYMENT RECORDS

55. As deposed at [52] of the Second Saunders Affidavit, had the First Respondent been aware at the time of the trial of the matters referred to above in respect of the Dillaway and FitzSimons Messages and the Payment Records, it would have submitted in closing that those matters:

(a) bear adversely on the Applicant's credit in a material way; and

(b) support in a material way, the First Respondent's submission to the effect that the Applicant has engaged in discreditable conduct amounting to an extreme abuse of process, such that in the circumstances the proceedings ought to be dismissed, or the Applicant ought to be entitled to no damages even if the Court finds that he has established his claim and all defences have failed.

56. The Applicant gave evidence at trial that he participated in the *7News Spotlight* program to put his side of the story into the public domain and attempt to vindicate his reputation (T522.27-29). In fact, however, the Applicant:

(a) gave evidence that was inconsistent with what he had said on the *Spotlight* program about finding Ms Higgins attractive: First Respondent's Outline of Closing Submissions, [13];

(b) accepted that the explanation he had given on the *Spotlight* program for not telling Ms Brown that one of the reasons for being at Parliament House was to work on Question Times folders was a lie: First Respondent's Outline of Closing Submissions, [92];

(c) said during his interview on *Spotlight* that he had received sensitive information that needed to be documented while at The Dock, which was contradicted by the evidence of Major Irvine: First Respondent's Outline of Closing Submissions, [311];

(d) accepted that, during his interview, he sought to convey that he had gone and had a coffee with Ms Higgins, when in fact he had brought her a takeaway coffee: First Respondent's Outline of Closing Submissions, [507]; and

(e) used the interview to make a scandalous attack on the credibility of a witness of truth, Lauren Gain: First Respondent's Outline of Closing Submissions, [10], [10A], [11], [381] and [1157].

57. Lauren Gain gave unchallenged evidence at trial about her concerns about giving evidence in the proceeding after an extract from the audio recording of her police interview was used in the First Spotlight Program: Gain, [67]-[70]. She described feeling shocked and betrayed. She said the use of that material had eroded the confidence she had that the interview she willingly gave to the ACT police would be used for the purpose of aiding their investigation, and not for the purpose of supporting a narrative prosecuted

through the media. She said that she no longer felt confident about participating in the legal process.

58. All of these matters support the First Respondent's submission, made in support of its application to issue interrogatories to establish whether the Applicant was responsible for breaching *Harman* undertakings in connection with the provision of material to Seven, that:

> The apparent purpose of Lehrmann's current campaign is to cement a public narrative in the lead-up to the trial of this proceeding. The media coverage is calculated to denigrate Ms Higgins and to bolster Lehrmann and to suggest the existence of some kind of political conspiracy. That narrative has the inherent capacity to prejudice the fair trial of this proceeding including by discouraging witnesses from giving evidence, lest they find themselves targeted in this campaign (see e.g. *Thunder Studios Inc (California) v Kazal (No 12)* [2022] FCA 110 and *Bastiaan v Nine Entertainment Co Holdings Limited* [2022] FCA 60).

D. CONCLUSION

59. The First Respondent submits that in the exceptional circumstances referred to above, it is in the interests of justice in the proceeding for leave to be granted to re-open the case for the purposes of adducing the Auerbach Evidence.

2 April 2024

M J COLLINS

T SENIOR

Counsel for the First Respondent