LEHRMANN v NETWORK TEN

CLOSING SUBMISSIONS OF THE SECOND RESPONDENT

The second respondent's further submissions in reply are double underlined in paragraphs 580F-580I, 610F, 614A, 655H-655K and 659G. As noted below, the second respondent relies upon any submissions in reply by the first respondent as to the general credit of the witnesses other than herself and the two other witnesses on the cross-claim.

The parts of these written submissions that are double underlined take into account the additional evidence adduced on the cross-claim pursuant to the orders of the Court made on 15 February 2024.

Otherwise, as previously, on issues about the general credit of the witnesses other than herself and the two other witnesses on the cross-claim, subject to the submissions below, as set-out in paragraphs 25, 40-41, and 51 Ms Wilkinson relies upon the submissions of Network Ten, including any additional submissions made about out of court statements.

Paragraphs in these written submissions that are double underlined in Section M Damages also address the Court's request for the assistance of the parties in an email dated 20 February 2024 in relation to the following matters:

a. His Honour wishes to understand whether the parties consider the observations made by McCallum J (as her Honour then was) in *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 (at [75]) are correct, and even if correct as a matter of State law, represent the position in federal jurisdiction, given that s 22(3) of the *Defamation Act* 2005 (NSW) is directed to the division of powers between a jury and a judge, being a division which is provided for in this Court by the *Federal Court of Australia Act* 1976 (Cth).

b. In the event the defences fail but no damages, or nominal damages, or contemptuous damages are determined to be the appropriate award, but the Court also reaches the conclusion that there had been conduct on the part of one or both of the respondents which was sufficiently improper to amount to an aggravating circumstance, given the compensatory nature of aggravated damages, what would be the principled position required to be adopted by the Court? And is this a case where it is necessary to distinguish between an award of ordinary compensatory damages (actual or nominal) and any

aggravated damages?

The new paragraphs that address these matters appear after paragraphs 24I, 381, 382, 551, 580D, 610, 641, 643, 655, and 659.

The paragraphs in these written submissions that are underlined are responsive to the applicant's written submissions served at 4pm on 25 December 2023 (**ACS**). To the extent that the applicant's submissions are not addressed in the underlined paragraphs it is because they have been dealt with orally or in the existing part of these submissions, already addressed by Network 10 in their oral or written submissions (including their responsive submissions), or the applicant's submission did not merit a response.

1A. It should be noted at the outset that the applicant's submissions in Section K, *Section 30 Defence* (particularly at ACS[399]-[453]), Section F *The Project Programme* and Section A Ms Wilkinson's credit generally, proceed on the basis of a number of fundamentally erroneous premises of fact and/or law, in particular as follows:

a. The repeated suggestion by the applicant that Ms Wilkinson had an "*unreasonable belief*" or unreasonable state of mind and was therefore unreasonable for the purposes of s30, which is not the issue in determining the s30 defence. Section 30 requires an assessment of the reasonableness *of her conduct* in publishing the defamatory matter about a person (Mr Lehrmann).

b. That Ms Wilkinson was, on behalf of the first respondent, a decision maker or relevant to its state of mind in publishing the Broadcast, when the unchallenged evidence from every witness from the respondents and the contemporaneous business records contradict that as a matter of fact.

c. That *The Project* production team, was required to pass on all information to Ms Wilkinson or that she was otherwise obliged to ensure that she was given and aware of all information that they had gathered.

d. That Ms Wilkinson had any role at all in the twenty-four hours leading up to publication in the content of the Broadcast.

e. That journalists, on the question of reasonableness, contrary to law, practice and common sense, are obliged to approach every bit of information that they had as having equal weight and credibility.

f. Generalised assertions about inconsistencies, inherent unlikeliness and other matters relating to Ms Higgins' account, mostly made without reference to the evidence, that the applicant contends required further investigation or steps erroneously suggesting that the Court should apply a "counsel of perfection" to the respondents in assessing the reasonableness of their conduct.

g. That legal advice on the question of whether to publish was anything other than binary – and relevantly for Ms Wilkinson was anything other than binary to her knowledge.

h. Bare assertions disguised as submissions, contrary to the evidence of Ms Wilkinson and other witnesses (including those such as Mr Campbell, Ms Binnie and Ms Thornton whose evidence was entirely unchallenged), about what a "*reasonable journalist*" knows or would have done in the context of a commercial television news and current affairs production about the subject matter of the Broadcast.

i. That the reasonableness of conduct in s30, contrary to the text of the statute, is to be evaluated to the standard of what a so-called hypothetical "*reasonable journalist*" would have done or believed – and in the absence of any factual or evidentiary basis for assertions about that hypothetical standard.

j. That regard need not be had to the purpose and context of s30 which is to provide a defence to publishers who published defamatory matter about a person that has not been justified having regard to the commercial realities relevant to the publishers and the nature of the publication.

k. That s30 requires publishers to prove they have taken all reasonable steps to make out the defence, when they need only establish that their conduct in publishing the matter was reasonable in all the circumstances.

The above listed errors made on behalf of the applicant colour a number of the submissions in the ACS, rendering them irrelevant to the Court's assessment of the issues to be determined in the proceedings.

A GENERAL CREDIT OF WITNESSES

Ms Wilkinson

1. Ms Wilkinson affirmed two affidavits in these proceedings: 28 July 2023 (**Wilkinson 1**); and 5 December 2023 (**Wilkinson 2**). She was cross-examined over one and a half days. Despite that length of time her account of factual events in her affidavits was almost entirely unchallenged. This is unsurprising as most of her account is supported by or based on contemporaneous documents and independently provable events.

2. The cross-examiner only challenged Ms Wilkinson as to the inferences and conclusions the Court should draw about her unchallenged account in relation to the s30 defence rather than any part of the factual account of which she has given evidence. Accordingly, the Court should accept and rely upon the evidence in both her affidavits.

3. Ms Wilkinson has spent decades in a professional environment which involved conversational style interviews and debates. It is unsurprising that she had difficulty within the structure of giving evidence for the first time in a Court. Although at time her answers were unresponsive, it was clear that she was earnestly attempting to answer what she understood she was being asked and was doing so honestly. Ms Wilkinson's oral evidence should be generally accepted and, where relevant, relied upon.

4. One of the difficulties for Ms Wilkinson was the somewhat convoluted and complex style or nature of the questions. This was particularly apparent where Ms Wilkinson was repeatedly questioned about her state of mind almost three ago as to what Ms Higgins said after reading portions of transcript of a lengthy conversation and interview from that time.

5. Throughout her evidence Ms Wilkinson made many concessions when she plainly could not recall specific events. This is unsurprising given that the events occurred almost three years ago, the investigation involved numerous telephone calls, conversations, interviews and meetings over a four-week period and Ms Wilkinson continued her busy schedule with Network Ten and *The Project*, described unchallenged in her affidavit (Wilkinson 1 [10]-[11]), throughout most of the four weeks and until November 2022.

6. Ms Wilkinson was challenged on two occasions about the truth of her evidence. First (T1812):

Q: *I want to suggest to you that your evidence earlier today, that other aspects of the broadcast show that Ms Brown was being caring, was untrue and that you knew it to be untrue. Do you agree or disagree?*

A. I disagree.

Q. *I want to suggest to you that your suggestion earlier in evidence today that, "We", being The Project presented the conversations and that Ms Higgins was actually complimentary about Brown and Reynolds, and we put that to air. Was also untrue and you knew it to be untrue?*

A. She told her to take the afternoon off.

7. The challenges were made with respect to a serious of questions that resulted from a line of questioning about a very friendly message from Ms Brown to Ms Higgins inviting her to a meeting with Senator Reynolds and the producers' decision not to show a further message with an offer for her father to attend as a support person (T1175.1-8):

Q. *Yes, wasn't that relevant?*

A. *No, because I think there are other aspects of the broadcast that show that Fiona Brown was being caring.*

Q. *Is that a serious answer?*

A. *That's a serious answer, Mr Richardson.*

Q. *What aspect of the broadcast do you say showed Fiona Brown being caring?*

A. *I believe that we presented the conversations – Ms – Ms Higgins was actually complementary about Fiona Brown and Linda Reynolds, and we put that to air.*

8. It is important to note, as discussed further below in section F, that Ms Wilkinson did not produce or edit the Broadcast – she did not have control over its tone and content and could only make recommendations (that as a matter of fact were mostly rejected) and she was not aware that the message was blurred out before broadcast (T1774.7-14).

9. The cross-examination then proceeded at T1792.30-36:

Q. *You also said I believe that we presented the conversations. Ms Higgins was actually complimentary of Brown and Reynolds and we put that to air. Do you remember saying*

that?

A. *Yes. I mean, I'm looking at it right now. She was apologetic. She was nice. She did say nice words.*

10. This answer referred to Ms Higgins' description of her meeting with Ms Brown and Senator Reynolds on 1 April 2021 recorded at paragraph 99 to the aide memoire to Ex1.

11. Then at T1798.15ff, Ms Wilkinson was taken to paragraphs 53-63 of the aide memoire and was rhetorically asked to accept that the Broadcast carried that Ms Brown was "*some kind of vile apparatchik*" or cold and unfeeling, which Ms Wilkinson reasonably rejected. It was then put to Ms Wilkinson that it showed her as caring, which Ms Wilkinson did not accept - describing it as neutral. The cross-examiner chose to put lengthy passages not individual parts to ask questions. The cross-examiner also did not ask any question about the overall message that was carried about Ms Brown.

12. Then at T1799.39ff, Ms Wilkinson was taken to paragraphs 65-77 to the aide memoire and was asked to accept that the material was not just critical but "*extremely critical*" and that the passage portrayed Ms Brown as "*a monster*". Both these propositions were reasonably rejected. Ms Wilkinson in her answers identified paragraph 72 - this line showed Ms Brown being supportive - she did the best she could. That is what the ordinary or reasonable viewer would understand the passage to mean – as an attempt from Ms Brown to provide support. The suggestion from the cross-examiner that these lines portrayed her as monstrous was not a reasonable characterisation of that passage and Ms Wilkinson appropriately rejected that proposition at line 47.

13. Then at T1802.17-22, the cross-examiner only asked whether the material was "*extremely critical*" or "*highly critical*" and it was reasonable for Ms Wilkinson to reject those again extreme characterisations put to her. At T1802.41, Ms Wilkinson's answer to line 91A that the message was very friendly was clearly a reasonable and correct description in light of the casual rather than formal language addressing a subordinate, the use of multiple exclamation marks, and the "Best, Fiona" signoff. Ms Wilkinson's answer that she considered that was caring was a reasonable and appropriate answer.

14. Then at T1803.12, Ms Wilkinson fairly gives an answer that accepts that the passage was critical of Ms Brown, though not accepting the more extreme *very critical* description again put, but identifies it was more critical of Minister Reynolds.

15. At T1803.29ff, the cross-examiner puts no proposition about the specific part of Ms Higgins interview that *"She was nice. She did say nice words. She was apologetic. She asked how I was and then pretty quickly the conversation turned to, sort of the police, and if I chose to go to the police, 'We would support you.'"* that Ms Wilkinson had already identified at T1792.30-36 as complimentary of Ms Brown and Senator Reynolds. The cross-examiner chose to ask questions about a broader passage and then asked questions using the phrases *very critical* and *terrible human being*. Again, Ms Wilkinson fairly accepted that it was critical in the sense that people like herself would have acted differently.

16. The cross-examiner proceeded (at T1809) - not asking Ms Wilkinson to identify other complimentary materials. She was not asked any specific questions about paragraph 107 that included the Government spokesperson stating that Ms Brown and Senator Reynolds encouraged Ms Higgins to speak to the police and guaranteed no impact on her career. Or the support from the then popular Prime Minister endorsing the way Ms Brown handled the case and provided Ms Higgins with her agency, support and to make decisions in her interests at paragraph 108. Ms Wilkinson reasonably and fairly rejected the propositions put to her about the remainder of the matters.

17. It is in this context that Ms Wilkinson correctly and reasonably rejected the propositions the cross-examiner put at T1812.11-13 and did not accept the proposition at T1812.15-24 which challenged the truthfulness of her evidence. Ms Wilkinson's answers to all these questions were genuine and honest.

18. The second time Ms Wilkinson's truthfulness was challenged was at the end of cross-examination at T1897.26-29:

> Q. *And I want to suggest that your evidence that you knew anything about the state of Reynolds' knowledge prior to the first April meeting and some allegation that Senator Reynolds knew there was a sexual element is not frank evidence?*
>
> A. *Absolutely untrue.*
>
> Q. *Your Honour, that's the cross-examination.*
>
> HH: *Could I just ask one question arising out of that. You mentioned that that was a very important fact and a pretty central element, I think. Assuming there's no reference to it in the long – is there any reason why that would not have been canvassed in any of the recorded interactions between you and Ms Higgins prior to this time you can think of?*

A. No particular reason.

19. It is clear the Court asked the additional question on the assumption that senior counsel had a proper basis for this suggestion.

20. Paragraphs 96 and 97 of the aide memoire to Ex 1 read:

> LW: *Did Minister Reynolds know that that was the couch that you alleged the rape happened on?*
>
> BH: *There's no way she wouldn't. She knew it was in her office. I, I felt like I was reliving it every second of being in that room …*

21. The attack on Ms Wilkinsons' credit is unsustainable given what Ms Higgins told her on 2 February 2021 about Senator Reynold's knowledge about the rape, as repeated in the Broadcast. The cross-examiner should never have made the suggestion as he was aware and had examined on Ms Higgins' answer at paragraph 96 immediately earlier at T1788.40-1789.4. This was not the only source of information that Senator Reynolds knew about the sexual aspect or rape allegation before the 1 April 2021 meeting (bearing in mind the true state of affairs was that Ms Brown had informed Senator Reynolds the previous week, and Senator Reynolds (and Mr Hawke MP) wanted to report the rape allegations to the AFP):

a. Ms Wilkinson had the timeline document (Ex R125, see also Wilkinson 1 [36]) that recorded on the first page that Senator Reynolds found out from Ms Brown. *Facts/What was I told at the time* records that Ms Higgins told Ms Brown she was raped. The record of meeting 3 with Senator Reynolds and Ms Brown is recounted on the basis that Senator Reynolds already knew.

b. Ms Higgins told Ms Wilkinson in a telephone call on 23 February 2021 said she was traumatised by the insensitivity of being called into Minister Reynolds' office and asked to sit on the couch where the alleged rape occurred: Wilkinson 1 [57(b)].

c. On 27 February 2021, Ms Higgins told Ms Wilkinson during the 5 hour pre-interview meeting:

> 0:34:10.5

> Brittany: *We had a meeting, yeah. So a week following the actual event itself, after I went to the AFP Unit in Parliament House, she, I've got a WhatsApp from Fiona saying that Linda wanted to speak with you and they set up this informal meeting of Fiona, Linda and myself. And this was the first time I'd been back in that room. So they set this meeting up and it was in the room the assault happened.*
>
> 0:34:47.3
>
> Brittany: *Yeah, yeah. So we've got like this wider office where everyone goes to and then there's the Minster's office inside of that. So the actual assault happened inside the office. And they were all aware of that, they all knew the particulars of what had happened.* [underline added]

22. There can be no doubt from her evidence (and indeed it was put to her directly by the cross-examiner) that she believed in the truth of the allegations made by Ms Higgins about the applicant and that she held serious concerns about the procedures and assistance available to Ms Higgins immediately upon having been assaulted and the pressures Ms Higgins felt from the political machinations and lack of ordinary corporate support structures within the Australian Parliament.

23. Having been told by Ms Higgins her version and raising questions about her account of subsequent events, it is plain that Ms Wilkinson still believed Ms Higgin's allegations over the somewhat general and unsatisfactory responses from the Government. That was reasonable, particularly given the Government elected not to address the specific questions that were posed to each of the relevant persons by Mr Llewellyn.

24. There can also be no doubt that as of 15 February 2021 Ms Wilkinson had complete confidence in the experience, skill and professionalism of each the producers and executive producers who produced, edited, fact-checked and ultimately approved the Broadcast. There was no challenge to Ms Wilkinson's belief, trust and confidence at the time of broadcast in the experience, qualifications and performance of the production team and lawyers responsible for putting together the Broadcast.

24A. As to ACS[40]-[46], these submissions do not make good any proper challenge to the general credit of Ms Wilkinson as a witness in these proceedings. As a whole, those paragraphs misstate or exaggerate the evidence, ignore the content of contemporaneous documents or otherwise mischaracterise the submissions made on behalf of

Ms Wilkinson and then seek to respond to that mischaracterisation. The latter is a recurrent theme of the ACS – boxing at shadows rather than addressing the points actually made on behalf of the respondents.

24B. ACS[40] is a non-sensical submission given it appears to accept the honesty and genuineness of Ms Wilkinson's evidence and her beliefs but criticises that (honest) "*state of mind*" as "*unreasonable*" and thus somehow impacting her credibility as a witness.

(a) The relevance of Ms Wilkinson's evidence in these proceedings is to her conduct up to the time of publication and her belief in the truth of the allegations made by Ms Higgins against Mr Lehrmann. As to those matters, no challenge has been made to Ms Wilkinson's evidence detailing her conduct in January and February 2021 – it is not said that any aspect of her evidence as to what she did was untrue or incorrect. As to her belief in the truth of the allegation that Mr Lehrman sexually assaulted Ms Higgins, that was also not challenged. It is unclear how the submission in ACS[40] could have any impact at all on those issues, nor is it open to the applicant to make any such submission.

(b) If the court comes to assess damages, then Ms Wilkinson's conduct in giving the Logies acceptance speech 16 months after the Broadcast is also said to be relevant by the applicant. If it is accepted that an act so far removed from publication after the limitation period has long expired (and not being conduct in the course of these proceedings) could possibly be relevant to damages, again this credit submission goes nowhere. An "unreasonable state of mind concerning the Programme" could not have any impact on the reliability of Ms Wilkinson's evidence about the events leading up to the Logies acceptance speech, matters which were also not the subject of any challenge.

Having regard to those matters, the real question remains – what aspects of Ms Wilkinson's evidence were, in fact, challenged? The answer is, as detailed in [2]-[23] above, less than a handful of peripheral topics.

24C. As to first sentence of ACS[41], the applicant's submissions on Ms Wilkinson's answers are addressed in paragraphs [6]-[17] above. As to the second part of ACS[41], the Broadcast only made reference to pressure at lines [132]-[135]. What is described

in that part of the Broadcast, is pressure Ms Higgins felt from "*a strange culture of silence in the parties and you just, you don't, the idea of sort of, speaking out on these sort of issues, especially around a campaign is just. .. it's like letting the team down. You're not a team player" in direct response to the question "Did you feel pressured in any way whatsoever not to proceed with the case with the police"*. The submissions in ACS[41] are entirely misconceived and, notably, does not give any affidavit or transcript reference to Ms Wilkinson's evidence about this issue, which is misstated in ACS[41].

24D. The submission in ACS[42] is not a proper challenge to Ms Wilkinson's general credit for the same reasons addressed in [24B], above. In any event, the suggestion that Ms Wilkinson had "*no evidence before her*" to justify that belief is wrong: see for example Wilkinson 1 [21], [27], [36], [43], [47]-[51], [54], [57], [72], [74], [80]-[85], [96]; see also paragraphs [211B], [213]-[219], [261B]-[261D], [261K], [261N]-[261V], [580(b)] below. The mere fact that no workplace investigation took place into Ms Higgins' allegations is a disgrace (and is evidence of seeking to keep the whole affair quiet). Further, as far as Ms Wilkinson understood, Mr Lehrmann was terminated the same day that Ms Higgins made the allegation to Ms Brown (thus sweeping the entire thing under the rug) which is also evidence of "*a cover-up*". As to the last sentence of ACS[42], Ms Wilkinson did not insist that "*the mere fact that*" senior staffers from the PMO met with Senator Reynolds pointed to "*sinister dealings*". Again, that is an unfair exaggeration of the evidence: see T1768-16-1771.8 (which concerned Ms Wilkinson's state of mind when she sent an email on 11 February 2021 referring to a telephone call by Mr Finkelstein to Ms Higgins on the day of the Four Corners Canberra Bubble story).

24E. The submissions in ACS[43] is another mischaracterisation of the evidence. At [110] Wilkinson 1, Ms Wilkinson gives the following evidence:

> *"I recall that every new piece of information I received up to broadcast on 15 January 2021, corroborated the version of events Ms Higgins told me on 27 January 2021 and 2 February 2021, and settled in my mind that her allegation that she was raped in Parliament House was true and a public broadcast of her allegations was in the public interest."*

The paragraph is plainly directed to the issue that these proceedings are in fact concerned with – namely the allegation against Mr Lehrmann of rape. In any event, the applicant identifies only two facts in Mr Carswell's response, about support and assurance, in aid of a submission that Ms Wilkinson had information that contradicted Ms Higgins. Ms Higgins told Ms Wilkinson about the offers of support she received, and that part of her interview was broadcast. Ms Higgins described (as broadcast see, for example, lines 72 and 99) to Ms Wilkinson how she perceived the offers of support she admitted she received with respect to counselling and the police. There is nothing in Mr Carswell's statement that contradicts what Ms Higgins has said.

Further, Mr Carswell's initial statement admitted that: "*During this process, the Minister and a senior staff member met with Ms Higgins in the Minister's office. Given the seriousness of the incident, the meeting should have been conducted elsewhere*.": R759. Notably, that admission was watered-down in the final Government statement. In light of that admission, it is difficult to see how the additional information Mr Carswell provided was other than generally corroborative of Ms Higgins: see, for example, Wilkinson's 1 at [129], as to the significance in her mind of the responses confirming that the allegations were not of recent invention. Contrary to the bold submission in ACS[43] about Ms Wilkinson's reliability there is nothing in Mr Carswell's statement or other information available to Ms Wilkinson that affects her general credit.

24F. As to ACS[44], contrary to the suggestions made in this paragraph and in cross-examining Ms Wilkinson, Ms Higgins had always claimed that she lost her data when she changed to a new mobile telephone after her phone died. That Ms Higgins also claimed the situation was unusual or unique because data had not been lost previously when swapping phones is not inconsistent with a "*stuff-up*" or issue in transferring data being the cause. The explanation Ms Wilkinson gave in her first affidavit at [94] that she was told the most likely explanation was a stuff-up (see Ex R295) and later that there was an issue in transferring data. Both explanations are consistent with factual circumstances Ms Higgins described to Mr Llewellyn and Ms Wilkinson on 27 January 2021. Ms Higgins said that she had multiple devices (see aide-memoire to Ex 36 at 0:06:58 PG 6181). She also said that in an attempt to download the data, she had used Mr Sharaz' mobile phone: see 0:07:53ff PG 6182. The loss of some data such as

messages and contacts, but not necessarily all due to different types of backups and storage, when transferring between mobile devices, particularly when one dies, is a phenomenon most people have experienced. What Ms Wilkinson recalled and understood Mr Llewellyn had informed her, contrary to ACS[44], was documented in his message to her on 31 January 2021.

24G. Finally, the so-called "*general credit*" submissions at ACS[45]-[46] are not credit submissions at all and are otherwise entirely misconceived. The applicant's submissions are divorced from the factual reality set out in detail in Section F below and Section K.3 paragraphs [529] to [551] below. Suggesting, as an attack on her credit as a witness before the court, that she had "*a propensity to explain her own conduct*" by relying on others is not only incorrect, it is offensive and improper having regard to the reams of contemporaneous records and unchallenged evidence from other employees of Network 10 and the production company that show, unequivocally, her limited role.

24H. Ms Wilkinson was part of a commercial television news and current affairs production which involved a large and experienced team subject to the control and direction of the executives within Network Ten and the production company. That Ms Wilkinson was an experienced journalist across a range of different mediums over many years does not change or affect her responsibility and role in the preparation, production and publication of the Broadcast. The executive producer until 12 February 2021, Mr Campbell's unchallenged evidence was that Ms Wilkinson was a senior and experienced *presenter*: see paragraph [183] below. Network Ten executive producer Ms Thornton did not identify in her unchallenged evidence Ms Wilkinson as one of the "*senior journalists*" working behind the scenes to make sure the facts were right (c.f. Llewellyn, Meakin and Bendall): Thornton [53].

24I. The reasoning and circumstances of *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [395] about the writer's failure to give Mr Russell an opportunity to respond (where a print journalist, Mr Robertson, put his name to a draft surreptitiously prepared by a colleague, but failed to seek comment from Mr Russell about the allegations in that article) are far removed from Ms Wilkinson's circumstances and role in the commercial television news production (and c.f. the ability of the journalist to reasonably rely on the work of others recognised in that same

judgment at [387]). Ms Wilkinson's evidence as to her reliance and belief in the reasonableness of the work of others, based on their experience and expertise, as known to her at the time of publication, was almost entirely unchallenged: see paragraph 24 above. Otherwise, it is a nonsense to suggest that a witness giving truthful evidence consistent with the contemporaneous documentation reflects anything other than positively on the general credit of that witness.

24J. Ms Wilkinson affirmed two affidavits on the cross-claim: 16 January 2024 (**Wilkinson 3**); and 2 February 2024 (**Wilkinson 4**). Ms Wilkinson re-entered the witness box and was cross-examined. No effective challenge to her credit was made. With the experience of giving evidence for a second time, unlike witnesses who are dishonest or generally unreliable who become further exposed, Ms Wilkinson was an even more impressive witness: c.f., the difficulties she had giving evidence for the first time described in paragraphs 3-4 above.

24K. The evidence adduced on the cross-claim, both orally and in testimony from Ms Smithies, has graphically illustrated to the Court the legal advice and approval from Network Ten that Ms Wilkinson received to give her speech at the Logies: see Wilkinson 3 [4]-[14]; Smithies [18]-[38], T2544.13-2547,1, 2548.33-2550.6, 2611.21-35, 2615.18-20; Ex X1 p64-67. The Court (at T1833.7-14) expressed concern about inferring that such advice could have been given, and (at T2582.20-24) the Court identified in a question to Ms Smithies that concern may have affected the assessment of Ms Wilkinson. The Court now knows that Ms Wilkinson gave entirely truthful evidence about the advice she had received at T1721.21-22.

24L. Overwhelmingly, the evidence adduced on the cross-claim corroborates Ms Wilkinson's earlier evidence and bolsters her credibility. Ms Wilkinson answered questions in cross-examination about her Logies speech at T1729.26-1731.22. Those questions were posed towards what Ms Wilkinson knew and intended before or when giving the speech (in June 2022), not whether she now accepted the findings of the Chief Justice. It was entirely reasonable not to accept propositions in this context in relation to her state of mind during or before giving the speech as to how persons may perceive her words. It is apparent from the flow of the questioning that the time period that Ms Wilkinson was addressing was on and before 19 June 2022, which was the only relevant time period having regard to the allegation of aggravation, namely that her

conduct in making the speech was "*reckless and ill-advised*".

24M. The questions by the cross-examiner were not precise compared to those put by the Court at T1731.1ff. They included superlatives and rhetoric that were entirely reasonable for the witness not to accept: see for example, "*the overwhelming message is that you absolutely 100 per cent believe*"; "*it is the obvious interpretation of anyone listening*"; "*it's the irresistible interpretation and meaning*"; and "*you put pride and your ego ahead of my client's right to a fair trial*". On the other hand, when it was suggested to her that she did not take responsibility for the speech, Ms Wilkinson squarely admitted "*I take responsibility for those words; I spoke them.*"

24N. The answers Ms Wilkinson gave under cross-examination about her state of mind in giving the speech, to the effect that she believed before giving the speech its content was appropriate, are completely consistent with her actions in diligently seeking legal advice about the speech and other public statements at this time and following the advice she had received:

a. On 3 June 2022, when approached to make a public statement in the lead-up to the Logies she forwarded the request to Mr Farley (in-house lawyer) for advice as to what was permissible given the case was subject to "*serious legal restrictions*" and on 7 June 2022 Ms Wilkinson forwarded her responses copied to Ms Smithies and Mr Farley with the disclaimer "*but all are totally subject to Myles' and Tasha's approval. Let me know if you think the answers pass legal muster*" (Ex X1 pp64-67);

b. On 15 June 2022, Ms Wilkinson provided a copy of the draft speech to Mr Farley for legalling: Ex X1 pp83-85. He approved the content of the speech subject to changing the order of one phrase;

c. That same day Ms Wilkinson read out the part of the draft speech that referred to Ms Higgins to the DPP Mr Drumgold at video-conference attended by Ms Smithies. Neither Ms Wilkinson nor Ms Smithies understood Mr Drumgold to give any warning not to give the speech or to express any concern about the part of the speech he had read out to him: see Smithies file note Ex X1 p221, Wilkinson 2 [18]-[25], Smithies [25]-[37]. Ms Wilkinson's unchallenged evidence is that she would not have given the speech had she received such a

warning. Ms Smithies and Ms Wilkinson talked about the speech after that meeting (the entire speech was shown to Ms Smithies on an ipad and read out to her) and subject to minor amendments Ms Smithies gave Ms Wilkinson approval to make the speech;

d. On 19 June 2022, Ms Wilkinson provided the final draft to Ms Thornton: ex X1 pp93-95. Ms Wilkinson understood that the draft was given to and approved by Ms McGarvey, Ms Thornton, Ms Donovan and Ms Smithies: Wilkinson 3 [11]-[14]. Ms Wilkinson received a message from Ms Thornton before giving the speech that read "*Tasha [Smithies] says speech all good*": Ex X1 p96.

24O. None of the questions under cross-examination were directed towards, and her answers do not contradict, the genuineness of her approval of the apology to the Court (see Exhibit X1 p225) or her willingness to attend Court to make such an apology in person, see Wilkinson 3 [35], T2509.33-44. Ms Wilkinson's evidence is entirely unchallenged in this regard. The evidence on the cross-claim strongly supports the credibility of Ms Wilkinson.

Applicant

25. For the many reasons set out in the Network Ten submissions, the applicant was plainly an unsatisfactory witness, and his evidence should not be accepted on any matter of controversy, unless it constituted an admission.

26. A noticeable feature of his testimony was his responses to questions by his own senior counsel contradicted or not recalled by him in the following days when cross-examined. These have been canvassed at length in the second respondent's submissions.

27. Another example is when he gave starkly contradictory answers about his reaction to seeing the Samantha Maiden article published on news.com.au at about 8am on 15 February 2021 (**News Article**).

28. During the extension of time application on 16 March 2023 (when his proceedings in relation to the News Article were active) he was asked by his senior counsel (T64.3-64.11):

Q: *Okay. Having read that article, did you consider it had anything to do with you?*

A: *I did.*

Q: *Why was that?*

A: *Because it identified the office that the person worked in, you know, elements like the dock, things like that. However the element of an alleged sexual assault was not me.*

That same day in cross-examination (T72.22-29):

Q: *You had seen an article on news.com.au and you realised it was about you?*

A: *Yes.*

Q: *And your first thought was this is damaging to my reputation*?

A: *Well, yes.*

Q: *And you thought – you were outraged, you told his Honour?*

A: *Sure*.

Q: *Yes. And your first thought was the possibility of defamation proceedings against those who had written the article?*

A: *Absolutely*.

29. Then on 27 November during the trial the applicant gave the following evidence (T421.16-33):

Q: *Now, Mr Lehrmann, the first publication setting out Ms Higgins' allegations that she had been sexually assaulted in Minister Reynolds office occurred in the news.com.au article?*

A: *Yes*.

Q: *And that was at about 8 am on 15 February 2021?*

A: *Yes*.

Q: *And you read that article when it came out?*

A: *Yes, some time around that time.*

Q: *Well, you saw it quite early in the day on 15 February?*

A: *Yes*.

Q: *And you read it. You read it carefully?*

A: *Well, I read it.*

Q: *And immediately upon reading it, you knew that you were the person she was accusing?*

A: *No.*

Q: *When do you say you first realised that you were the person being accused?*

A: *At approximately 2 pm on that day when Ms Lewis from The Australian contacted my work.*

30. Then this (T424.5-20):

Q: *And so, is your evidence, Mr Lehrmann, that you read this article on the morning of 15 February 2021 but didn't realise that it was referring to you?*

A: *No.*

Q: *No. You didn't realise that it was referring to the episode on the morning of 23 March 2019 that had caused you – that had materially contributed to your being 10 terminated for serious misconduct?*

A: *What do you mean by episode?*

Q: *The incident?*

A: *Can you just repeat the question. Because you had episode in there. I just don't know what you referred to by episode.*

Q: *That's all right. If you need clarification, you are perfectly entitled to ask for clarification?*

A: *Yes.*

Q: *I'm suggesting, Mr Lehrmann, that when you read this article, you must have realised that it was referring to the incident which had materially contributed to you 20 being terminated for serious misconduct by Minister Reynolds?*

A: *No, I didn't.*

31. After being taken through the News Article and the contradictory evidence from the extension of time application, the applicant said that his evidence in March was "*not necessarily*" truthful (T426.7-10).

32. He could not explain the different answers he gave, despite being given a number of opportunities: T426.32-427.18.

33. He maintained his lie that he did not immediately comprehend that the News Article related to him:

Q: *So let me try and understand what your evidence is, Mr Lehrmann. You read the article by Samantha Maiden on the morning of 15 February 2021; correct?*

A: *Yes*.

Q: *Yes. You saw that the article contained an allegation of rape by Ms Higgins?*

A: *Yes*.

Q: *You recollect that you had worked with Ms Higgins in Minister Reynolds' office in – at the relevant time?*

A: *Yes*.

Q: *You saw the date of the alleged rape?*

A: *Yes*.

Q: *And what is your answer to my question: did you realise when you read the article by Samantha Maiden that it was about you?*

A: *No, not at that moment. I did not.*

Q: *All right. And can you offer any explanation to his Honour about why you answered that question in exactly the – with exactly the opposite answer on 16 March 2023?*

A: *Well, I – I can't, I'm sorry.* (see also T428.38-45)

34. If that evidence was true, then the News Proceeding was an abuse of process, as was the application to extend time in both proceedings. This example of stark dishonesty, which is one of many, demonstrates that the applicant is an active and deliberate liar:

(a) he lied repeatedly in 2019: about an ASIO position, to the security guards, to Ms Brown, and to Minister Reynolds (in writing);

(b) in 2021 he lied to his employer, his friends, his girlfriend (see *Lehrmann* [2023] FCA 385 at [107]), to the police and to his lawyers;

(c) in 2023 he lied repeatedly to this Court.

35. He lies, it would appear, without hesitation, to advance his own interests. In the above example, he gave one version to the Court to obtain his extension of time in relation to the News Article and now that he has settled those proceedings, another version (to the same Court!) to increase any damages award to him against the publishers of the Broadcast.

36. Such abominable conduct should not be encouraged or rewarded, thus to the extent he is found to have lied about facts in issue, those findings are relied on in relation to the reduction of any damages, discussed below and on any related cost issues.

36A. The applicant's submissions on his credit generally do not reflect the actual evidence of the applicant and, as outlined above, his complete dishonesty in giving that evidence. The submission at ACS[12] that the applicant was "*consistent and unshaken*" in his evidence when it came to matters directly relevant to the facts in issue, to the extent it is suggested that such evidence should be accepted, is untenable. The second sentence of that paragraph makes a contention about the applicant's movements in the ministerial office and his interactions with Ms Higgins in that office in the early morning of 23 March 2019 that is directly contradicted by what he told Ms Fiona Brown on Tuesday, 26 March 2019 that he chatted with Ms Higgins in the office (see Fiona Brown affidavit [44]) – being evidence that he adduced. Ms Brown explained under cross-examination that the applicant told her on 26 March 2019 that he chatted with Ms Higgins in the office and she was fine when he left: Brown T2054.8-33. The applicant falsely denied in his evidence to the Court that he had admitted to Ms Brown that he had chatted with Ms Higgins within the office: see applicant T354.1-36. He has failed to address this key inconsistency.

36B. ACS[14] misrepresents the oral submission by senior counsel for the second respondent at T2318.28ff. It would be expected that any competent criminal lawyer would provide advice to a client as to the factual and legal consequences of the evidence available about their case – such as the interview with Ms Anderson on Four Corners. It would be contrary to appropriate and ethical legal practice to withhold such advice from a client. It is not unusual, or unethical, for legal practitioners to take instructions from clients after such factual and legal consequences have been explained or to test instructions and provide further advice in light of new evidence. Ethical issues only arise depending on the client's response – such as where a client indicates they intend to lie.

36C. As to ACS[13]-[14] generally, a consequence of Ms Higgins' extreme intoxication as reported on Four Corners on 22 March 2021 (Ex R51), which the applicant admitted he watched (T510.22-43), was that rational viewers, including lawyers, would be concerned that Ms Higgins was incapable of consenting to sexual intercourse.

Ms Anderson was an independent witness to Ms Higgins' intoxication. The lay observer of that program, such as the applicant, would also likely believe that Ms Higgins' memory and evidence would have difficulties establishing the *actus reus* beyond reasonable doubt in such circumstances. It would be a natural defensive reaction in those circumstances, albeit incredibly dishonest, to deny sexual intercourse, rather than admit the *actus reus* of the offence. Ms Higgins had given a tell-all interview about the rape allegations, including the bruise photograph, followed by the Four Corner expose over a month later. Despite a police investigation, the applicant had not been arrested and there was no indication he would be charged. There was no real gamble to be made that there existed additional forensic evidence available two years later to contradict his false denial.

36D. The submission at ACS[15] is accordingly misconceived. Lying is the more probable choice for the applicant, particularly in the circumstances of this case.

36E. As to ACS[16], the applicant's lie to the security at Parliament House is more probative than just as consciousness of guilt because it is direct contemporaneous evidence of the applicant covering-up the true reason for his attendance at Parliament House on the night in question. The submission at ACS[16] is also misconceived.

36F. The submissions at ACS[17]-[20] are made without regard to the applicant's lies to the police that he did not have alcohol in his office and had not told Ms Brown he drank whisky: see aide memoire to Ex 31 QAs762-765. The submissions also do not have regard to the evidence about his amorous intentions/actions towards Ms Higgins, his lies about the same or the discovery of Ms Higgins naked in the office the next morning. It is more probable than not, that the applicant lied to Ms Brown to cover-up his real reason for attending Parliament House with Ms Higgins, that is to have sexual intercourse (whether consensual or non-consensual).

Brittany Higgins

37. The second respondent accepts that Ms Higgins was a combative witness and at times, did not have a good recollection of some events. However, she was quick to accept when her memory failed her and also conceded where she made errors about some details and the sequence of events. Since making her claims public, Ms Higgins has been under unrelenting pressure and scrutiny. It is apparent that, more than any other

witness, she had every reason to be defensive, particularly given Mr Whybrow was the counsel who cross-examined her at the criminal trial.

38. The only fact in issue on the justification defence is what occurred in the Minister's office on the evening of 22/23 March 2019. Ms Higgins has never wavered in her account of what occurred when she woke up on Minister Reynold's couch. She should be believed in relation to that event.

39. We all saw Ms Higgins' evidence in chief about that event – it was compelling and believable. Ms Higgins' was supported by objective and incontrovertible evidence, as discussed below.

40. Ms Wilkinson relies on the first respondent's detailed submissions setting out the contemporaneous documents and corroborative evidence from other witnesses.

Fiona Brown

41. Briefly, given Network Ten has canvassed this witness in its submissions, the second respondent notes the following matters about the evidence of Ms Brown.

42. First, her evidence is only relevant to the credit of the applicant and Ms Higgins and also her receipt of (and lack of response to) the questions from Mr Llewellyn in February 2021.

43. The applicant adduced evidence in the form of Ms Brown's affidavit affirmed on 15 December 2023. That affidavit sets out unchallenged evidence about Ms Brown's interactions with the applicant from 26 March to 5 April 2019 which proves that he lied about various significant matters at the time and to this court. To the extent those interactions with the applicant are recorded in Ex R87, CB64, they should be accepted. That note also records a series of admissions by the applicant that are very harmful to his credit and his response to the justification defence.

44. It is notable that Ms Brown did not appear (from an emotional perspective) to have any difficulty answering questions. Many of her answers were unsatisfactory and were directly contradicted by her own notes, her record of interview to police in March 2021 and her affidavit in these proceedings. The court would not be satisfied that these difficulties were due to any mental health condition.

45. Ms Brown's contentions about her various interactions with Ms Higgins should not be accepted to the extent she maintains that she did not comprehend that Ms Higgins was alleging that she had been sexually assaulted. All of the contemporaneous documents contradict this – as does the evidence about the conduct and reactions of Lauren Baron, Senator Reynolds and Alex Hawke and the direct evidence of not only Ms Higgins, but also Christopher Payne and Nikita Irvine.

46. Having heard Ms Brown's evidence (over some 5 hours) and observed her demeanour and attitude towards this issue, it is open to the Court to form the view that Ms Brown is not being dishonest about this issue, rather she completely lacks ordinary human insight into such matters. There was certainly evidence that could lead to this conclusion. She plainly lacked training and experience to deal with the circumstances that arose in late March 2019, and also general human experience in relation to victims of sexual assault.

47. If that is the case, the Court would conclude that Ms Higgins did, in fact, make the disclosures of sexual assault that she has given evidence about. It makes no sense that she would tell Mr Dillaway (by text), about an hour after meeting Ms Brown on 26 March 2019 that she had done so unless she believed that she did.

48. Ms Brown's attitude and demeanour and significant age difference also readily explains why Ms Higgins felt that Ms Brown appeared uncomfortable and unwilling to discuss the issue, leaving Ms Higgins feeling abandoned and unsupported. The fact that Ms Higgins did not disclose to Ms Brown or Minister Reynolds that she had arranged to meet with the AFP SACAT team is further evidence of Ms Higgins' state of mind and feelings about Ms Brown and Senator Reynolds in that period and the pressures that she felt from them as a result of her various meetings and conversations with them.

48A. Notably absent from ACS is any submission about the credit of Ms Brown, a witness he subpoenaed to give evidence in the proceedings and who gave unchallenged evidence about her interactions with Mr Lehrmann which contradict the applicant's evidence and, if believed, must lead to a finding that the applicant lied about those interactions to this court. Further, the admissions he made during those conversations with Ms Brown days after the night in issue, prove that he is lying about what happened with Ms Higgins that night and has, at least, dishonestly claimed he had no interaction

with her after they entered the Ministerial suite, when he told Ms Brown otherwise.

Unchallenged Qualified Privilege witnesses

49. The applicant did not cross-examine Mr Craig Campbell, Ms Laurie Binnie and Ms Sarah Thornton, witnesses the second respondent relies upon for her s30 defence.

50. Their evidence is entirely unchallenged and should be accepted in its entirety.

Other witnesses

51. The second respondent adopts the written submissions of the first respondent as to the general credit of the other witnesses.

51A. The applicant has made no general credit submissions about these other witnesses. This is a surprising omission given the fact that some of them contradicted him on key matters. For example, having accused Lauren Gain from the witness box of concocting evidence, the applicant's submissions make no such assertion now in relation to her evidence that Mr Lehrmann was passionately kissing Ms Higgins that evening. The Court should accept the evidence of Ms Gain, and the others who contradict the applicant, again leading to the conclusion that he lied to the Court about key matters.

B FACT-FINDING PRINCIPLES

Facts in issue

Applicant

52. The onus is on the applicant to prove that he was reasonably identified by viewers of the Broadcast and that, if he was, what if any damage was caused to him as a result.

53. To the extent any damages are available, he bears an onus to establish that any conduct relied on to aggravate damages in fact occurred and was improper, unjustified and/or lacking in bona fides.

Justification

54. The only relevant facts for the justification defence in so far as the second respondent is concerned are those (few) facts alleged in paragraph 12 of her Defence: CA.4, p79-

80.

55. The only facts genuinely in dispute appear to be 12.3, 12.4 (only as to detail), 12.9 and 12.10 and 12.11 to the extent they presume 12.9 is true. As to 12.12 it cannot be in dispute that such conduct, if proved, would constitute rape.

56. All of the surrounding circumstances before and after 22-23 March 2019 only go to the credit of witnesses and are not otherwise facts in issue unless they are relevant to reducing any damages award.

Section 30

57. As to s30, the truth of the allegations in the Broadcast is irrelevant: *Duma v Fairfax Media Publications (No. 3)* [2023] FCA 47 at [235]-[268] and the authorities there cited per Katzmann J.

58. Therefore, the s30 enquiry for the second respondent is limited to Ms Wilkinson's information, conduct and state of mind by the time of Broadcast in relation to the defamatory matter about the applicant and other relevant circumstances such as those set out in s30(3).

Common law qualified privilege

59. Common law qualified privilege is only concerned with the objective circumstances of publication, the subject-matter of the publication and the identities of the recipients of the Broadcast (to be proved by the applicant given the identification issue) and the identity of the publisher, Ms Wilkinson.

Reduction of damages

60. The facts in issue for damages includes other proceedings, concerns notices and settlements.

61. The applicant's conduct proved in relation to the justification defence, including his dishonesty.

62. The second respondent also alleges that the applicant has engaged in other relevant disreputable conduct as particularised in paragraph 10.6 of her defence: CA.4, p77-78.

Particulars 10.6(b) and (c) are not in dispute.

Principles

63. In a civil proceeding, such as this, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities: s140(1) *Evidence Act 1995* (Cth).

64. The focus in fact-finding is on the Court being satisfied of the proof of individual facts on the balance of probabilities. This turns on consideration of the inherent likelihood of events having taken place.

65. The second respondent adopts the Fact Finding Principles outlined by the first respondent in their submissions subject to the following additional submissions.

66. The second respondent adopts the statement of principles by His Honour in *Transport Workers' Union of Australia v Qantas Airways Limited* [2021] FCA 873; (2021) 308 IR 244, [284]-[288] subject to two clarifications:

    a. the state of actual persuasion or reasonable satisfaction should be in accordance with the text of s140(1), that is satisfaction or persuasion that the case has been proved on the balance of probabilities. The balance of probabilities necessarily involves a weighing of the probability or availability of conclusions on the evidence; and

    b. the factors in s140(2) should not be used to apply a standard of proof other than civil standard described in s140(1).

67. The second respondent also relies upon the reasoning in *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 at [57]-[58]. The evidence of an applicant who faces a justification defence whose evidence is disbelieved in material aspects will still be important because it will not be rational to draw an inference where the only person who could have given evidence on a subject has necessarily excluded that inference or conclusion as a possibility.

67A. The applicant's submissions at ACS[47]-[60], suggest that the Court should apply a standard higher than the civil standard of proof mandated in s140 and, taken to their

logical conclusion, would lead the Court into error in interpreting and applying that statute and the civil standard. It is unhelpful to the Court to re-interpret passages from *Briginshaw*, as opposed to strictly applying the text of s140. The submissions the applicant has made about this issue do not assist.

67B. The passage at ACS[51] from *Seymour v Australian Broadcasting Corporation* (1977) 19 NSWLR 219 was the summary of the appellant's submissions in a minority judgment seeking to explain *Briginshaw*: c.f. the majority judgment per Glass JA at p220 (Reynolds JA agreeing). Curiously, in that case the appellant plaintiff sought to deploy the *Briginshaw* submission recorded in that passage to overturn a jury verdict that a defamatory publication of grave allegations about a solicitor were justified – the appeal was dismissed.

67C. As to ACS[57]-[58], there is a danger, irrespective of apparent approaches in different cases in assessing or applying reputational effects in the fact finding process. Section 140 applies not just to the justification defence but to all fact finding and requires the Court to take into account not just the gravity of the matters alleged but the nature of the cause of action or defence, and the nature of the subject-matter of the proceeding. Where an individual is sued, a finding that a professional has indefensibly defamed someone or otherwise acted in a way justifying aggravated damages may have as devastating an impact as findings made against an applicant. To the extent that reputation is relevant to fact finding it applies equally to the facts sought to be made against both the applicant and the respondents, but the second respondent submits, irrespective, findings ought be made in accordance with the terms of s140 not by re-interpreting language from different cases under the common law or s140.

Legal Professional Privilege

68. The second respondent remains an employee of the first respondent. Ms Wilkinson has ongoing legal and equitable duties to maintain the confidence of communications over which her employer maintains legal professional privilege. The first respondent has not authorised Ms Wilkinson to disclose the contents of communications over which her employer maintains legal professional privilege: see Wilkinson 1 [4], Wilkinson 2 [6]. Documents over which privilege was claimed by Ms Wilkinson in discovery was done so at the direction of the first respondent.

69. The rule at common law is that no inference can be drawn from a claim of legal professional privilege: *Wentworth v Lloyd* [1864] 10 HLC 589; 11 ER 1154. That rule applies to fact finding under the *Evidence Act* 1995 (Cth): *Ashby v Slipper* (2014) 219 FCR 322; [2014] FCAFC 15 at [144] per Mansfield and Gilmour JJ.

70. Irrespective, and in any event, as Ms Wilkinson is bound by her duty to her employer – there is a reasonable explanation in her not giving evidence about the content of communications over which Network Ten purports to maintain legal privilege. Ms Wilkinson was bound to keep her employer's confidence unless compelled to answer questions or to answer a call from the applicant.

71. No adverse inference in the fact-finding assessment can be made against Ms Wilkinson in these circumstances in not giving evidence about the contents of communications over which Network Ten purports to maintain legal professional privilege. The applicant was invited to call for the legal advice and challenge the claims of privilege but did not do so. The applicant made this forensic choice perhaps because he feared the documents and advice contained within would support the respondents and not assist him.

72. As is discussed below, the second respondent does not, in any event, rely on the actual legal advice given prior to the Broadcast. Ms Wilkinson relies on the systems that were, to her knowledge, in place at the time of Broadcast at Network Ten which existed to ensure lawful, accurate, reasonable and fair reporting. One of those resources was an experienced team of lawyers.

73. In relation to the Logies speech, Ms Wilkinson sought advice from the DPP, and read out the relevant parts of her speech in the presence of Ms Smithies, a very senior media lawyer who Ms Wilkinson understood had 20 years' experience and expertise: Wilkinson 1 [89]. Ms Wilkinson bears no onus on this issue – the applicant must establish the requisite impropriety.

74. Ms Wilkinson also gave unchallenged evidence that she gave the speech on advice and with the approval of Network Ten, in circumstances where CEO Ms McGarvey, Ms Donovan, Ms Thornton and Ms Smithies had reviewed the speech: T1731.18-22; Wilkinson 2 [26]-[27].

75. Waiver has plainly occurred in relation to the Logies speech by this evidence, about which no one complained, and no call was made for the advice from Ms Smithies by the applicant's lawyers. Ms Wilkinson's reliance on that advice as a non-lawyer (with no contempt training) was also not challenged.

Fiona Brown, Linda Reynolds and Michaelia Cash

76. The truth or falsity of any allegations against Ms Brown, Senator Reynolds or Senator Cash in the Broadcast is not a relevant fact in issue.

77. It is also irrelevant whether the beliefs held by Ms Wilkinson that were not published were true or false.

78. For example, it would have been objectionable (other than if relevant to credit) to put to Ms Brown that she "*was a knowing participant in a systemic cover up of the rape allegation*".

79. Similarly, it is irrelevant whether Linda Reynolds was "*lying through her teeth*" during Question Time on 15 February 2021.

80. The only matters on which these witnesses could give evidence was as to the credit of Ms Higgins (and in some respects the applicant) and also whether they received and answered Mr Llewellyn's questions in February 2021 – although this is proved by contemporaneous documents. Senator Cash appears to be in the applicant's camp given his direct contact with her in order to obtain consent to play the recorded conversations.

David Sharaz

81. Mr Sharaz is not a relevant witness to any fact in issue that Ms Wilkinson has the onus of proving.

82. He did not witness any of the facts pleaded in paragraph 12 of Ms Wilkinson's defence, going to justification. His evidence could not even contribute to the *res gestae* of the of the alleged assault in 2019.

83. His interactions with Ms Wilkinson relevant to s30 are primarily in writing and unchallenged in any event.

84. His intentions or the intended meaning of his communications with Ms Wilkinson (or indeed Mr Llewellyn) are irrelevant. In so far as the second respondent is concerned, the only relevant issue concerning Mr Sharaz is Ms Wilkinson's state of mind in relation to the credibility of the information he provided. Even that issue is of marginal relevance given that Ms Wilkinson was then in direct contact with Ms Higgins, who was the direct source of the allegations against the applicant.

85. To the extent Mr Sharaz is said to be relevant to the credibility of Ms Higgins, then section 102 of the *Evidence Act* precludes the admission of his evidence and no relevant section applies. The Court would fall into error by speculating about what cross-examination may have arisen when it is clear that no relevant evidence from Mr Sharaz was admissible.

85A. For those reasons, the submissions at ACS[154]-[156] about Mr Sharaz and the conception of the Broadcast are entirely misconceived. Sections 29A and 30 are enacted to provide a defence without any need to call sources.

C PRE-22 MARCH 2019 EVENTS

86. Events in this period are relevant to the credit of Ms Higgins and the applicant, and thus relevant to reducing any damages award.

Alcohol in office

87. Prior to moving offices, the applicant had a number of bottles of whisky that he kept above his desk, which he placed in his box and moved to the new Reynolds suite in March 2019. He lied to the police in 2021 about the availability of alcohol in the office.

ASIO

88. The applicant told a number of bizarre lies in this period about his intention to work for ASIO and then lied about those matters in his evidence.

Kingston Hotel – 2 March 2019

89. At a social gathering at the Kingston Hotel on 2 March 2019 with Nicola Hamer and Jesse Wotton, Mr Lehrmann told Ms Hamer that he thought that Ms Higgins was attractive. He dishonestly denied that when giving evidence.

90. He also lied to the Court about asking Ms Hamer to arrange for Ms Higgins to attend the drinks that day.

91. The applicant insisted that Ms Higgins stay for longer to have another drink and also (according to Ms Hamer and Ms Higgins) grabbed her phone to stop her from leaving. He denied doing so.

92. The interactions at the Kingston Hotel resulted in the applicant being reprimanded by Minister Reynolds. The applicant denied that occurred, but the evidence of Mr Wotton and Ms Hamer should be preferred in relation to that incident.

93. The first respondent has canvassed these issues in detail with the relevant references and Ms Wilkinson otherwise refers to those submissions.

93A. As to ACS[73], the applicant did not just give evidence of genuine and honest differences in recollection. He flat out denied matters and doubled down, that the witnesses with differences in recollection were giving deliberately false evidence. It was only when faced with irrefutable proof, such as CCTV footage, that the applicant changed his evidence. His entire approach and demeanour was not of someone giving genuine and honest evidence who may have at times merely had a different recollection to others.

D THE EVENTS OF 22-23 MARCH 2019

Kingston Hotel

94. The applicant's account that he deliberately left his keys at Parliament House (because he did not intend a big night out) makes little sense, given he had left for the day to have dinner at the Kingston Hotel with Mr Wenke at about 6pm and his home was halfway between the Kingston Hotel and Parliament House.

95. Whilst at the Kingston Hotel with Mr Wenke the applicant claims he received a message about going to the Dock from Ms Higgins. No such message appears on his phone records or on hers. Ms Higgins agrees that she invited Mr Lehrmann, along with others at the office, but it is more likely she did so in person before she left work.

96. The applicant has concocted the lie about the late invitation (which the Court was told

might have come through on a second phone) namely receiving the message from Ms Higgins while at dinner, in order to explain his other lie about deliberately leaving his keys at work given he had not intended to stay out later.

Dock and 88MPH

97. The applicant's bizarre evidence about submarine conversations with unnamed persons warrants a mention. On balance, it is unlikely such conversations occurred and were concocted by the applicant to bolster his later lie about Question Time folders.

98. There can be no doubt that Mr Lehrmann purchased more drinks that evening than his bank statements account for, and that he purchased alcohol for Ms Higgins and otherwise encouraged Ms Higgins to drink alcohol purchased by others, despite his evidence to the contrary. He was unable to explain how he paid for these additional drinks which he can be seen acquiring on the CCTV footage. The court should find that the tender of the bank statements by the applicant were intended to mislead the court and the respondents (and were apparently also tendered for the same purpose at the criminal trial).

99. The applicant and Ms Higgins were very close as the course of the evening progressed (she abandoned Nick by about 9pm in favour of Mr Lehrmann's company) and they were "*handsy*" with each other (hands on the other person's thighs) and shared a passionate kiss at 88mph. The applicant dishonestly denied these interactions.

100. Ms Higgins fell over on the stairs and later fell out of a booth at the nightclub.

Parliament House

101. The applicant and Ms Higgins travelled together to Parliament House (**APH**). On balance, it should be found that the applicant's intention in travelling to APH with Ms Higgins was in order to have sexual intercourse with her there.

102. It should also be found that Ms Higgins was too intoxicated to make rational decisions at this point in time. It may be (having regard to her interactions with him at the nightclub) that it was her intention to have sexual intercourse with the applicant at that time and that she no longer recalls that given her level of intoxication. This would be one explanation why she exited with the applicant at APH rather than staying in the

Uber and going home by herself.

103. The applicant was lying when he said he went to APH to collect his keys. He could have telephoned his girlfriend to let him in. He did not even attempt to see if she was awake for that purpose according to his phone records. The claim in his evidence that it was complicated to enter his apartment complex is ridiculous. It cannot have been more complicated than the security procedures at APH.

104. When they arrived at APH the applicant lied about his purpose for being there to security – he was not there for any work purpose.

105. Ms Higgins was too intoxicated to navigate entry to the building without assistance, and was observed by security guards to be intoxicated and stumbling. The CCTV shows the applicant watching her closely as she walked through the security station as he leaned on the conveyer belt. He collected only one phone (not two as he claimed) as he passed through security.

106. From time to time throughout the evening, including in the footage at APH, the applicant is "glued" to his phone, that he was clearly monitoring all evening. He made no phone calls to his girlfriend that evening while at the Dock, 88MPH or later.

107. From the time the two of them are left by security at the door of the Minister's suite, the unchallenged evidence is that:

(a) Mr Lehrmann left about 40 minutes later, alone and in a hurry;

(b) During that 40 minute time period his girlfriend called him a number of times and he did not answer those calls;

(c) He did not return his girlfriend's calls at all that night or send her any text messages;

(d) Ms Higgins was found naked on the Minister's couch by a security guard at about 4:30am, passed out;

(e) Security guards checked on Miss Higgins again at about 9am and she responded to them;

(f) Ms Higgins left APH at about 10am;

(g) Cleaners were brought in to clean the Minister's office later that afternoon.

108. The applicant now claims that he was working on Question Time briefs because of his submarine conversations at the Dock, having previously asserted that he was drinking whisky. He claims that both of his phones were on silent and facedown, and that is why he missed his girlfriend's calls. He also claims that he did not see Ms Higgins again after they entered the suite. That is contrary to the admissions he made to Ms Brown about these matters (on 26 March and 5 April) that "*they chatted*" and "*she was happy when I left*" – being evidence that he read and relied on in these proceedings.

109. Ms Higgins says that she sat on the window seat for a while and then fell asleep. She woke up on the Minister's couch with Mr Lehrmann on top of her having sex with her and she started crying and told him to stop. He did not. He finished and then he left. Ms Higgins does not know how she got to the couch or how she came to be naked.

110. The Court should conclude that the applicant and Ms Higgins had sexual intercourse in the 40-minute period between about 1:48am and 2:33am in Minister Reynold's suite at APH on 24 March 2019 based on the unchallenged evidence alone.

111. As to the issue of consent, if Ms Higgins is believed, she was unconscious when Mr Lehrmann commenced and was therefore incapable of consent – which would have been obvious to Mr Lehrmann at the time. In any event, she made that plain by telling him to stop and crying.

112. If Ms Higgins' evidence is not accepted, then on balance, particularly having regard to the toxicology evidence, the Court would be satisfied that Ms Higgins was too intoxicated to give consent.

113. The only question remaining would be the applicant's state of mind on the issue of consent and the extent to which he knew or was reckless as to her consent. Given he was with her and was encouraging her to drink, he was in a position to comprehend her state of intoxication by the time they entered APH. She was unable to put on her shoes and was giggling and skipping down the hall after she passed the security check point.

114. In his favour is the fact that he was an immature 23-year-old man and she appeared

lucid at that point in time on the CCTV. Earlier in the evening she had, arguably, indicated a sexual interest in him by kissing him.

115. On balance, having regard to the unchallenged evidence and objective circumstances, and assuming the Court forms the view that neither the evidence of the applicant or Ms Higgins is reliable, the Court would be satisfied that Mr Lehrmann was at least reckless as to Ms Higgins' consent to have sexual intercourse.

116. The first respondent has canvassed the evidence in detail with the relevant references and Ms Wilkinson otherwise refers to those submissions.

Responsive submissions

116A. As to ACS[92], the respondents do not put their case in a vacuum or in isolation. Evidence that the applicant kissed Ms Higgins on 22-23 March 2019 is entirely contrary to the narrative that the applicant promulgated under oath in this Court, the media, to the police and through his instructions to the Jury. The submission in ACS[92] ignores all other evidence and in particular the incontrovertible circumstances that two young persons, who had been drinking, entered a secured closed office suite for over 40 minutes, without any satisfactory explanation, after which one left hurriedly and the other was discovered asleep and naked.

116B. As to ACS[98]-[99], the Naval officers at The Dock were not in the camp of the respondents, let alone Ms Wilkinson. There is no available inference that can be drawn from the failure of Ms Wilkinson to call these officers. Further, although the overall onus is on the respondents to establish the imputations were substantially true that onus does not require the respondents to independently disprove the applicant's account, let alone an implausible account. It was in the applicant's power and knowledge to adduce further detail or evidence that would substantiate his otherwise implausible account or satisfy the Court that his account was true. The suggestion that an unknown Naval officer or officers were in Ms Wilkinson's camp is untenable.

116C. As to ACS[105], *Smith (a pseudonym) v R* [2021] ACTA 16 has no relevance to the assessment of the implausibility of the applicant's work related explanation, that provided no electronic audit trail. It is quite bizarre that anyone would not turn on their computer if genuinely doing work in a professional office – having accessed the

Ministerial office after hours there was no need to hide his tracks or lie about what he actually did unless he was doing something entirely inappropriate. What persons are likely to do in the Court's experience in professional offices afterhours on a weekend has no comparison to the invariable responses of persons during sexual intercourse. The reliance on this case reflects, implicitly, the weakness in the applicant's position in defending the indefensible.

116D. As to ACS[152], it may be accepted that the standard of inferential reasoning required in criminal cases is not readily applicable where it is suggested (such as the applicant suggests in ACS[105]) that the civil court should apply a higher criminal standard. When it is, as the second respondent submits, that the higher standard of inferential reasoning in criminal cases would establish a fact in issue, this readily translates to civil proceedings. The applicant's submissions appear to raise s140 to a standard beyond even the criminal standard – this is plainly not right. The Court, and any tribunal of fact, can use their common sense and human experience to assess the evidence. The Court, if satisfied that a fact exists on the balance of probabilities must make that finding irrespective of whether other plausible or even reasonable possibilities exist – to do otherwise would be not to apply the civil standard in s140.

E POST 22-23 MARCH 2019 EVENTS OF RELEVANCE TO JUSTIFICATION

117. On 25 March 2019 cleaners cleaned the Minister's office, but not the rest of the suite.

118. At the time Ms Brown was unqualified to deal with such a serious workplace issue as arose that week, and plainly unsuited to question a potential sexual assault victim and suspect.

26 March 2019

119. At 11am Ms Brown had a congenial meeting with Mr Lehrmann to finalise the end of his contract, which he had elected not to renew. She did not intend to terminate his employment (despite the document security breach the week before).

120. At 11:45 am Ms Brown spoke to Lauren Barons from the Department of Finance who informed her that the applicant and Ms Higgins had entered the Ministerial suite on Friday night intoxicated and Ms Higgins was found naked after Mr Lehrmann left. She

was not told in that conversation that they told security that they were there for urgent work reasons. She found that out the following day when she read the DPS report.

121. At midday Ms Brown asked Mr Lehrmann about the weekend security breach. Her evidence as it appears in her affidavit about this meeting is not contested. Her oral evidence that went beyond her affidavit and notes about this meeting should not be accepted – including that that she told the applicant that Ms Higgins was naked and that she offered him a support person. She has never made either of those claims before.

122. Ms Brown then spoke to Chris Payne and told him about Ms Higgins being found naked over the weekend in the Minister's office. She said she would look into the CTTV to see if she could get to the bottom of it.

123. At 1:30pm Ms Brown spoke to Ms Higgins. Her notes of this conversation should be accepted over the additions she sought to add in her affidavit and during her cross-examination. She did not tell Ms Higgins that she was found naked, she did not tell Ms Higgins that she was offered an ambulance and medical assistance, and she did not ask Ms Higgins if something happened that she did not agree to – with Ms Higgins saying no. She did not make such claims to the police.

124. During this meeting, Ms Higgins told Mr Brown that she woke to find Mr Lehrmann on top of her. Ms Brown offered EAP counselling, the 1800RESPECT number, the afternoon off and further time working from home, or time off to travel to the Gold Coast to see family. The Ministerial standards were not discussed.

125. Ms Higgins sat in her car for about 45 minutes crying and then spoke to Ms Brown.

126. Ms Brown became concerned that the Minister's office had been cleaned on Monday and spoke to Stephen Frost and was told that the Minister's office was also cleaned on Saturday.

127. Ms Brown telephoned Minister Reynolds and told her what had been said during the meetings. This call is not in her notes.

128. Ms Higgins exchanged text messages with Mr Dillaway where she disclosed the assault and her confusion about consent. She also texted Mr Dillaway that she had told Fiona Brown the COI about the assault.

129. Text messages between Ms Brown at about 5pm are consistent with the disclosure by Ms Higgins having been made.

27 March 2019

130. Mr Payne told Ms Higgins that she was found naked by a security guard and he disclosed the assault to him.

131. Ms Brown briefed Daniel Wong from the Prime Minister's Office about the incident with Ms Higgins and Mr Lehrmann.

132. Minister Reynolds and Ms Brown met with the Secretary of the DPS and received and read the DPS incident report. Minister Reynolds was concerned that her office had been cleaned because it could have been a crime scene.

133. Ms Higgins met with Ms Brown and she asked whether Ms Higgins wanted to lodge a complaint to which Ms Higgins replied that she "*didn't want to be any trouble*".

28 March 2019

134. Ms Higgins disclosed the assault to Nikita Irvine.

135. Ms Higgins met with Ms Brown and signed the Ministerial Standards. Ms Brown recalls that it was at this meeting that Ms Higgins told her that she "*remembered him on top of me*". She asks if she can see the CCTV because a number of cameras would have captured her entering and exiting with Mr Lehrmann.

136. Ms Brown informed Minister Reynolds of the conversation and Ms Barons but does not record those calls.

137. Nikita Irvine informed Ms Brown that Ms Higgins had disclosed the assault to her.

29 March 2019

138. Minister Reynolds spoke to Alex Hawke, Special Minister of State and told him what Ms Higgins had alleged. Both of them were of the view it should be reported to police and Ms Brown is repeatedly directed to make the report. Many phone calls took place about this issue.

139. Ms Brown refused on the advice of Ms Barons who was of the view that it was up to Ms Higgins.

140. Ms Brown telephoned Ms Higgins and asked her whether she wanted to make a police report. Ms Higgins told her that she wanted to speak to her father first.

141. Ms Brown received an email from Mr Barons that summarised her advice, including that Ms Higgins be given the 1800RESPECT number.

1 April 2019

142. Ms Higgins attended a pre-arranged meeting with Minister Reynolds and Fiona Brown in the Minister's office where the assault is alleged to have occurred.

143. The Minister then asked Fiona Brown to look into the applicant's employment status and whether he can be terminated.

144. At midday, Ms Higgins spoke to AFP officers at APH and then told Ms Brown that she was not going to pursue to the matter. Relevantly, she told Federal Officers Cleaves and Thelning that at the nightclub the applicant got quite "*handsy*" and she didn't really mind. This is consistent with the evidence of Lauren Gain about what she observed about the interactions between Ms Higgins and the applicant at 88MPH referred to above.

3 April 2019

145. The AFP requested that the CCTV be quarantined and reviewed.

4 April 2019

146. Minister Reynolds was informed by Assistant AFP Commissioner Leanne Close that Ms Higgins had alleged a sexual assault to the AFP.

147. Most of the CCTV footage was quarantined (some cameras missed).

148. Ms Higgins asked Ms Brown if she could move to Brisbane to work at CHQ with the media team. Ms Brown offered Ms Higgins a position at the Gold Coast (from where she would carry out the remainder of her contract and not return) or working in Western Australian where the Minister would be.

149. Ms Brown emailed Dr John Kunkel, the Prime Minister's Chief of Staff about Ms Higgins working from the Gold Coast for "*personal and family reasons*".

150. Minister Reynolds then sent a letter to the applicant about terminating his employment. It raised a workplace safety issue (which was a reference to leaving Ms Higgins alone and drunk at APH) but it does not give any details of that matter.

5 April 2019

151. Mr Lehrmann responded to the Minister's letter in an account replete with falsehoods

152. Just after 1:25 pm the Minister informed Ms Brown that Leanne Close had informed her that Ms Higgins had made an allegation to the AFP of sexual assault against Mr Lehrmann. Ms Higgins had not told Ms Brown or Minister Reynolds about that.

153. At 1:43pm Ms Brown and Mr Chamberlain telephoned the applicant and he gave them a version of what occurred with Ms Higgins, including that she "was happy" when he left.

154. At 4:05pm agent Cleaves called Ms Brown to inform her that Ms Higgins had an appointment with SACAT on Monday 8 April at 5pm. It is unclear why such a personal matter was disclosed by the AFP to Ms Brown but is consistent with Ms Higgins claim that Minister Reynolds had asked to be "kept informed" of any police complaint.

155. Ms Brown informed agent Cleaves that Mr Lehrmann had been fired and that Ms Higgins did not want to go to Western Australia. She did not disclose to the AFP her conversations with the applicant and Ms Higgins about the events in question.

156. Shortly after 4pm Ms Brown met with Senator Reynolds who decided to terminate Mr Lehrmann's employment. A termination letter referring to the telephone call that day as one of the reasons was then emailed to the applicant's Hotmail address.

157. Ms Brown then amended/added to her notes and closed the notes document at 6:16pm. She plainly at least added the events from that day, but also added the last page of the notes – being phone calls on 29 March.

6 April 2019 and following – AFP and CCTV

158. On 6 April the AFP complained to the DPS that they had not been provided with the DPS report – some 2 weeks after alleged assault. They were finally provided with the incident report on the evening of 7 April.

159. On 8 April 2019 Ms Higgins met with the SACAT team and a rape crisis counsellor (who she continued to speak to in the months following).

160. On 9 April the DPS recommended that the request to view the CCTV footage be approved. Minister Reynolds and her Chief of Staff were consulted and the request was approved only after the AFP confirmed that the content of the footage would not be disclosed to Ms Higgins.

161. On 11 April the Leader of the House and the President of the Senate finally approved the application for the AFP to review the CCTV footage. The AFP was not informed.

162. On 13 April Ms Higgins informed the AFP that she did not wish to proceed.

163. Also on 13 April Ms Higgins travelled to work in Western Australia.

164. On 15 April AFP chased up the CCTV approval and were finally able to view the material on 16 April 2019.

165. On 18 April 2019 the AFP made an application requesting that the CCTV footage be released to them.

166. On 26 April the DPS recommended that the request for the release of the CCTV footage be approved and that it be released to the AFP.

167. The Presiding Officers never attended to that recommendation – it appears to have been ignored.

168. The Federal election was held on 18 May 2019.

169. On 27 June the AFP were asked if the CCTV needed to be retained and they said it did need to be retained.

170. On 8 November the Agency Security Advisor asked AFP Paul Shearing if the

quarantined footage needed to be retained – he said it did.

171. On 17 October 2019 the DPS Communications Team received a response from ACT Police Media to an enquiry from the Canberra Times. The ACT police statement said *"On 1 April 2019 AFP received an initial complaint relating to an alleged assault at Parliament House. ACT Policing Investigators subsequently spoke to a complainant who chose not to proceed with making a formal complaint. ACT Policing's investigation has not progressed as a result."*

172. Senator Cash's chief of staff spoke to Ms Higgins about the media request. Ms Higgins received a voicemail from Senator Cash about it on 20 October 2019.

173. On 15 November 2019 the AFP sought release of the CCTV footage to preserve it as evidence in case Ms Higgins wished to proceed with the complaint.

174. Throughout 2020 further requests were made by the AFP to retain the CCTV footage and they tried to collect it.

175. After the Broadcast, on 25 February 2021 the AFP request that the CCTV footage be released – and it was released the same day to SACAT. The footage had been scheduled for destruction on 8 April 2021.

F THE PROJECT PROGRAMME

F.1 Conception

176. On 18 January 2021, Ms Wilkinson received an email from David Sharaz that he had sent at 10: 13am, in which he wrote, inter alia, "I've got a sensitive story surrounding a sexual assault at Parliament House; a woman who was pressured by the Liberal Party and female cabinet minister not to pursue it. She's asked me to be the one to get the story told this year.": Wilkinson 1 [13]; email Ex R105.

177. Ms Wilkinson met Mr Sharaz a number of years before when he was a student and did a few days' work experience at the *Today Show*. He was keen to become a journalist, and had approached her for advice about that. He had reached out to her on a handful of occasions over the following years to let her know how his career was going: Wilkinson 1 [14]. The limited nature of their relationship was reflected in the fact that

Ms Wilkinson knew Mr Sharaz and he had her email address but not her telephone number – Ms Wilkinson having to provide him her number so they could talk: email Ex R106.

178. Ms Wilkinson was chosen to conduct and present the television interview by Ms Higgins because of her work on family violence and because she was "nice" to Mr Sharaz in the past: Ex R105. Ms Wilkinson's unchallenged evidence is that in their second telephone conversation Ms Higgins told her that wanted media interest to bring scrutiny to allow an investigation to proceed and to prevent her experience being shared by other women: Wilkinson 1 [57(p),(r)]; see also pre-interview meeting on 27 January 2021 Ex 36 part 3 at 0:11:01.8-13:33 and at 0:56:17-23; pre-recorded interview on 2 February 2021 Ex 37 at 2:10:30-2:11:18 (aide memoire 2:13:17-2:14:03).

179. Mr Sharaz's email stood out to Ms Wilkinson because of the serious allegations being made - about an alleged crime in Parliament House and that the complainant was allegedly being forced not to pursue it: Wilkinson 1 [17]. Ms Wilkinson, was too busy, and it took until 19 January 2021 to talk to Mr Sharaz: Wilkinson 1 [17]-[21].

180. On 19 January 2021, Ms Wilkinson and Mr Sharaz that was about 20-30 minutes in which Mr Sharaz said (Wilkinson 1 [21]):

    a. a young woman he knew was alleging that she had been sexually assaulted on a government minister's couch;

    b. after being in contact with police on two occasions and reporting the alleged rape shortly after it happened, the young woman had felt significant enough pressure in the political environment she was in not to take her allegation further; and

    c. he believed that there was an active coverup as the alleged rape was in the leadup to the 2019 Federal Election.

181. That day Ms Wilkinson spoke with Mr Campbell and outlined the allegations Mr Sharaz had told her: Wilkinson 1 [24]. Ms Wilkinson's unchallenged evidence was that Mr Campbell had been the highly respected Executive Producer of The Project for 12 years by this stage, with a strong news and current affairs track record during that time. She held him in high regard, and valued his strong "news sense" and was interested to hear

his perspective on what she had been told.

182. Mr Campbell gave unchallenged evidence that Ms Wilkinson told him on that call (Campbell [15]):

a. she had been contacted by David Sharaz, who she had worked with previously at the Today Show;

b. Mr Sharaz had told her that a young woman had been sexually assaulted;

c. the sexual assault had happened while the woman was employed by the Federal Government;

d. the sexual assault was alleged to have occurred in Australian Parliament House; and

e. that the young woman wanted to do one television interview for broadcast with Ms Wilkinson and one print interview with News Corp journalist Samantha Maiden.

183. Mr Campbell knew Ms Wilkinson to be a senior and experienced television presenter. He held her in high regard: Campbell [16].

184. Mr Campbell told Ms Wilkinson on that call that the story was worth investigating: Campbell [17]; Wilkinson [24]. Ms Wilkinson asked for Mr Llewellyn to assist her in investigating and producing the story and Mr Campbell agreed: Campbell [18]; Wilkinson [33]. Mr Campbell consider Mr Llewellyn to be the most experienced producer at The Project at that time and he believed Mr Llewellyn was the best person to assist Ms Wilkinson with investigating and producing this story.

185. Ms Wilkinson considered Mr Llewellyn a distinguished, long-time news and current affairs producer at The Project and The Sunday Project with extensive experience in both radio and TV journalism, including as Producer of the Mike Carlton Breakfast Show (Radio 2UE), Executive Producer of Insight (SBS TV), and as a Producer on Sunday Night (Seven Network). She had previously worked with Mr Llewellyn in radio on 2UE's Mike & Fitz Breakfast Show (live news and current affairs broadcasting) before The Project and The Sunday Project. She also knew of his respected reputation

from other journalists who had worked with him at SBS and the Seven Network. She wanted to work with Mr Llewellyn on this investigation, because in her experience - particularly while working with him at The Project and The Sunday Project - he was a principled, sensitive, and tenacious investigative journalist. Mr Llewellyn was someone Ms Wilkinson could trust implicitly to carefully and thoroughly check these allegations and do justice to what she expected to be a complicated investigation.

186. The unchallenged evidence is that about this time Ms Wilkinson had conversations with Mr Sharaz where he said that (Wilkinson 1 [27]):

a. the young women had been in contact with the police on two occasions shortly after the alleged rape;

b. he had evidence of a sexual assault complaint being recorded at the named location by police in Canberra shortly after the alleged assault;

c. the young woman had decided not to proceed with police charges;

d. she felt a lack of support from her superiors in the Minister's office;

e. the Minister in question was Linda Reynolds;

f. the young woman believed that in the leadup to a federal election her complaint would cause a scandal if she pursued her complaint;

g. she felt pressured to not pursue the complaint in those circumstances;

h. she felt that going public with a media interview was now the only way she would be able to gain access to critical information she said that she needed to be able to proceed with the police investigation into the alleged assault;

i. she felt that Parliament House in Canberra was an unsafe work environment for women, and that a media interview outlining her experiences would help expose that culture.

Ms Wilkinson asked Mr Sharaz to send her a copy of the evidence he said he had, and any other information that would support the young woman's claims.

187. That day, Ms Wilkinson informed Ms Sarah Thornton about Ms Higgin's allegations:

Wilkinson [1] [28]-[29]; Thornton [27].

188. At this time, Ms Wilkinson also phoned the former Executive Director of News and Current Affairs at Network Ten, Peter Meakin who she understood to be the most senior, experienced and highly respected News Chief in the country, having run the newsrooms at all three free-to-air Networks over the previous 40 years: Wilkinson 1 [30]-[32]. She first met Mr Meakin when she was working for Kerry Packer during her time in magazines, in about the mid-1980s - he was the Director of News and then Head of News and Current Affairs for the Packer-owned Nine Network. She then worked directly with him for more than 4 years when she was working at Sunrise and Weekend Sunrise at Network Seven - he was the Director of News and Current Affairs during that period. She thought it was important that Mr Meakin be involved from the outset. Ms Wilkinson wanted his views and feedback because she considered his perspective invaluable given his knowledge and unequalled television news experience, as well as the serious and sensitive nature of the investigation. It was Ms Wilkinson's practice while working at The Project and The Sunday Project to consult Mr Meakin on any news or current affairs story of significant public interest that involved serious investigation and credible fact checking. She told Mr Meakin of the allegations, and sought his advice on the best way forward on such politically sensitive material. See also, Meakin [26]-[28].

189. About this time, Ms Wilkinson became aware from Mr Campbell that Ms Laura Binnie would be working on the matter: Wilkinson 1 [38]-[39]. Ms Wilkinson knew that Ms Binnie was the head of long-form feature stories for *The Project* and *The Sunday Project* and had been an on-air news reporter for some time and then moved into a senior producing role. Ms Wilkinson had worked with Ms Binnie previously on stories and knew her to be a competent and thorough producer.

190. On 19 January 2021, Ms Wilkinson received an email Mr Sharaz sent at 6:36pm, attaching a file named "Brittany Higgins - Timeline" and a screenshot from the ACT Policing statistics: Wilkinson 1 [34]: email and attachment Ex R115.

191. Ms Wilkinson carefully read the information that Mr Sharaz sent her that night and her contested evidence is that she recalls noticing it was alleged that (Wilkinson 1 [36]):

    a. Ms Higgins informed Minister Reynolds' acting chief of staff Fiona Brown of the

alleged assault just days after it happened;

b. a police report had been made of an allegation of sexual assault at Parliament House in 2019;

c. a number of Ministers, staff from the Prime Minister's office and various media advisers in Parliament House were said to have been aware of the rape allegation;

d. the alleged offender had been fired by Ms Brown just days after the incident;

e. shortly thereafter Ms Higgins met with members from the Parliament House police unit to recount the incident;

f. Ms Higgins then met with members from the AFP police unit in Belconnen;

g. the police were said to have had difficulty access to the CCTV footage of the night from Parliament House;

h. Ms Brown had apparently seen the CCTV footage of the night and described part of it to Ms Higgins;

i. Minister Reynolds questioned Ms Higgins about the incident while Ms Higgins was sitting on the couch where the incident was said to have occurred;

j. Minister Reynolds had said that reports of what had happened made her feel "physically ill";

k. Ms Higgins was made to re-sign a document called "The Ministerial Code of Conduct"

l. there was an unusual presence and involvement of senior staff from the Prime Minister's Office in the days following Ms Higgins' complaint to Ms Brown;

m. shortly thereafter, Ms Higgins decided not to proceed with the police case due to "workplace demands"; and

n. after the 2019 election the counsellor from the Canberra Rape Crisis Centre voluntarily followed up by email with Ms Higgins asking if any issues were now arising for her.

192. Ms Wilkinson was unchallenged in her evidence that she formed the view, based on the information provided, that Ms Higgins had felt under significant pressure in the leadup to the 2019 election and that there appeared to be some sort of coverup. Ms Wilkinson considered it highly relevant that the young woman had made contemporaneous reports of her allegations to the police, her superiors and the Canberra Rape Crisis Centre. Ms Wilkinson could see no reason for Ms Higgins to engage with the Canberra Rape Crisis Centre for any reason other than because she had been raped. It was very significant to Ms Wilkinson that a counsellor from the Canberra Rape Crisis Centre having dealt with Ms Higgins had attempted to re-engage with Ms Higgins after the election. Ms Wilkinson considered there was no reason for a trained counsellor to re-engage with Ms Higgins asking about her welfare unless she believed Ms Higgins was a survivor of rape. It was also significant to Ms Wilkinson that it appeared that many people who worked in Parliament House knew about the rape allegation but apparently no action or appropriate investigation had been undertaken.

193. On 20 January 2021, Mr Wilkinson forwarded Mr Sharaz's email and attachments to Mr Campbell, Ms Thornton, Ms Binnie, Mr Meakin and Mr Llewellyn: Wilkinson [41]; Exs R124 and R125.

194. On 20 January 2021, Ms Wilkinson sent a message to Mr Llewellyn about the potential story that stated (Ex R120):

> *It is an extraordinary coverup involving Linda Reynolds, Michaelia Cash and the PMO. Sarah thinks it is so explosive we should do it over three segments from 7pm. Its for March. Enjoy your holiday. The women at the centre of it all is ready to talk. She is based in Canberra. We can fly her up. Would you be good for a meeting with her on Monday?*

195. On 20 January 2021, Mr Campbell sent an email that only Ms Wilkinson and Mr Llewellyn should meet with Ms Higgins and Mr Sharaz to progress the investigation of Ms Higgins' allegations: Campbell [31]; Wilkinson 1 [45]; Ex R127.

196. On 20 January 2021, Ms Wilkinson forwarded an email from Mr Sharaz with photographs of the applicant and a hyperlink to his LinkedIn account: email Ex R129. As Ms Wilkinson was not on LinkedIn she did not click through the hyper-link: Wilkinson 1 [44].

197. On 21 January 2021, Ms Wilkinson received messages from Ms Higgins and shortly thereafter she had an initial telephone call with Ms Higgins. Ms Wilkinson explained in her answer to the Court that it was her preference to deal directly with Ms Higgins and for her to be the main contact: T1900.8. Ms Wilkinson's unchallenged recollection of this initial discussion with Ms Higgins is (Wilkinson 1 [54]):

a. Ms Higgins spoke to Ms Wilkinson about what she alleged had happened to her on the night of March 22 and early morning of March 23, 2019.

b. Ms Higgins told Ms Wilkinson of the difficulties she said she had in seeking support from her superiors when she informed them of the alleged rape.

c. Ms Higgins spoke of the intimidation she felt from some members of the Prime Minister's office, and her concerns over going public.

d. Ms Wilkinson told Ms Higgins she had to think long and hard before she made the decision to go public and she agreed.

e. They discussed having a meeting in person the following week.

198. Ms Wilkinson's unchallenged evidence is that on 23 January 2021, she had a further telephone call with Ms Higgins: Wilkinson 1 [57]. She recalled seeking further details from Ms Higgins about her claims, and checked on how she was feeling about going public. Ms Wilkinson told Ms Higgins that their conversations were confidential, and that she was under no obligation to follow through with an interview if she was feeling at all unsure. Ms Wilkinson told Ms Higgins that she believed this was a story that would attract significant public interest, and Ms Higgins needed to be prepared for the enormity of that. Ms Wilkinsons recalls that Ms Higgins told her about the following matters:

a. she reported the rape within days of the alleged assault to the Minister's office;

b. she was traumatised by the insensitivity of being called into Minister Reynolds' office and asked to sit on the couch where the alleged rape occurred;

c. about her police complaints - having reported her allegations to the police twice shortly after the alleged rape;

d. she had decided not to proceed with the police complaint as she was feeling pressured from a work perspective and police had told her there were roadblocks to getting information around what had happened that night;

e. she was distressed about not being able to view CCTV from Parliament House from the night of the incident - that she had asked for it on numerous occasions and was continually denied access to it;

f. she believed that CCTV footage of her from that night existed because Fiona Brown had told her that she had seen it and that Ms Higgins looked drunk;

g. she had been told that the external AFP had made a number of requests for access to that same CCTV footage and had also been denied;

h. she described how isolated she felt from Minister Reynolds from the moment she made the allegations;

i. she felt she had little option other than to go and work in WA in the lead up to the election;

j. she felt powerless;

k. she did not think that she could achieve justice through the courts alone because of the roadblocks;

l. she believed that there was a cover up;

m. she believed that the only way she could be heard was through the media;

n. she told me words to the effect, "They will come after me";

o. when I asked her who "they" were, she said words to the effect, "The government";

p. she thought that the media interest would result in close scrutiny so that it would be harder for those involved to block the investigation and cover up relevant evidence;

q. she believed she was working within a system that was designed to prevent these

allegations from being properly addressed;

r. she was speaking out because she did not want her terrible experiences to be suffered by any other women;

s. she, being aware of the possible consequences of speaking publicly, wanted to proceed to a face-to-face meeting.

199. In the lead-up to pre-interview meeting with Ms Higgins on 27 January 2021, Ms Wilkinson spoke to various persons in the production team about what Ms Higgins had told her and what steps they needed to take to investigate and test the allegations: Wilkinson 1 [55], [60].

200. On 25 January 2021, Mr Llewellyn returned from holiday and, from Ms Wilkinson's perspective and knowledge, on his return, he worked almost full-time on the investigation and production until broadcast: Wilkinson 1 [76]. Ms Wilkinson, on the other hand, in accordance with her duties to her employer Network Ten continued with her daily commitments as host of The Project and The Sunday Project as detailed in Wilkinson 1 paragraphs 10 and 11.

201. On about 25 January 2021, Ms Wilkinson accessed and read a shared Google document with suggested question themes for the pre-interview meeting with Ms Higgins that Mr Llewellyn had created, and then discussed additions and changes to the document with Mr Llewellyn on one or more occasions Wilkinson 1 [61]: message and Google doc Exs R194-195. During each of these conversations the document was updated.

202. On 27 January~~March~~ 2021, Ms Wilkinson and Mr Llewellyn met with Ms Higgins, Mr Sharaz and Mr Llewellyn at the Darling Hotel in Pyrmont, Sydney for a meeting that lasted more than 5 hours: Wilkinson 1 [65]; Ex 36.

203. Ms Wilkinson explained that the purpose of the meeting included (Wilkinson 1 [68]):

a. seeing Ms Higgins face-to-face so we could form a view of her credibility off-camera and report that back to the Executive Producers;

b. going through Ms Higgins' allegations in as much detail possible so we could understand who the main individuals were and how her account unfolded

chronologically;

c. identifying information and persons for fact-checking and corroboration; and

d. developing a mutual rapport and trust with Ms Higgins, so that she be comfortable and at ease opening up to me about her deeply personal experiences.

204. The meeting was a pre-interview meeting with a potential interview subject. Such meetings are a common practice in television journalism on investigations of potential significance. These meetings are ordinarily conducted by producers only, however, in this instance as Ms Wilkinson was the initial contact, had had numerous communications with Ms Higgins and there appeared to be many elements to the story, it was decided that both Mr Llewellyn and Ms Wilkinson attend the meeting: Wilkinson 1 [66]; see also Campbell [31].

205. It is not unusual for Ms Wilkinson when building rapport with an interview subject to disclose more personal details about herself, views she holds and people they discover they both know. This is a trust building exercise on both sides. As the pre-interview meeting progressed Ms Wilkinson took a more personal approach to guide when and how she should ask questions about the alleged sexual assault: see Wilkinson 1 [71].

206. The meeting was only scheduled for an hour or so, but it went much longer as the issues were much more complex than anticipated, more time was required to develop mutual rapport and trust with Ms Higgins, and a short break was taken for lunch. Establishing trust is part of a journalist's job when an interview involving such sensitive matters is proposed. It was not intended to be a formal interview.

207. The most sensitive matters were kept to the end of the meeting after Mr Llewellyn and Ms Wilkinson considered that Ms Higgins was comfortable to proceed.

208. Importantly, Mr Sharaz left the room during questions about the alleged sexual assault: Wilkinson 1 [70]; see also Llewellyn [121]-[124].

209. Ms Wilkinson concluded from the meeting that Ms Higgins' allegations were credible and it was in the public interest to continue to pursue the investigation because (Wilkinson 1 [74]):

a. Ms Wilkinson found the chronology of events that Ms Higgins described was logical and had a level of detail that could not in her mind have been fabricated;

b. the power imbalance, bullying and gendered office dynamics that Ms Higgins described to her were consistent with circumstances Ms Wilkinson had witnessed in other workplaces;

c. Ms Higgins became emotional a number of times before she detailed her experiences in Minister Reynolds' office and Ms Wilkinson observed a young woman who was clearly traumatised by the events she had experienced;

d. Ms Higgins maintained eye-contact throughout the meeting and impressed Ms Wilkinson with her humility and concentration for more than five hours;

e. Ms Higgins appeared to Ms Wilkinson to be distraught over the lack of support she received from within Parliament House and the Liberal Party, as well as the roadblocks that even the AFP were experiencing in trying to gather evidence in order to investigate her complaint. Ms Wilkinson found her explanation regarding why she did not proceed with a Police investigation of her complaint in 2019 as compelling and understandable;

f. Ms Wilkinson did not perceive in Ms Higgins' tone any malice or rancour - just raw and unfiltered trauma and a woman whose life appeared to be in limbo. Ms Higgins impressed her as a young woman who felt she had lost control of her life and future over the previous 2 years and wanted to take back ownership of her life and control of her future;

g. Ms Wilkinson had interviewed dozens of survivors of sexual assault in her television career, as well as in her charity and community work, and Ms Higgins' descriptions and demeanour were consistent with those survivors;

h. when Ms Wilkinson asked Ms Higgins directly about her alleged assault she started to cry shortly after she commenced recounting her experience. This sign of emotion was to Ms Wilkinson’s observation spontaneous and genuine, and consistent with the behaviour of survivors she had spoken to in the past;

i. Ms Wilkinson found the very specific description Ms Higgins gave of the extreme

pain she said woke her during non-consensual intercourse, whilst also being pinned down by the weight of the perpetrator's body, believable;

j. it is a common journalistic practice to test sensitive subject matter by seeking further detail about a version of events. Ms Wilkinson used this practice in questioning Ms Higgins, such as questions about the lighting and the pain she described, and considered that her answers were consistent and not embellished; and

k. Ms Wilkinson believed that a credible allegation had been made by a young woman of being raped on a government minister's couch in Parliament House. Reasonable and documented attempts had been made by her to take the matter to police and there were highly suspicious circumstances known to Parliamentary authorities on the morning Ms Higgins was seen in an unconscious state of undress. Ms Wilkinson believed there should have been further investigation at a workplace safety and policing level both before and after her complaint. Ms Wilkinson felt there was a very strong public interest in an investigation of and urgent public discussion about each of these matters.

210. On 29 January 2021, Ms Wilkinson attend an online audio-visual conference during which it was decided to proceed to a formal interview: Wilkinson 1 [90]. Mr Meakin, Mr Llewellyn, Ms Thornton, Mr Campbell, Ms Binnie, Mr Farley and Ms Smithies attended this meeting: Campbell [41]; Thornton [39]-[41]; Llewellyn [167]. Ms Thornton's uncontested evidence was that during this meeting:

a. She noted to Mr Campbell that his co-EP Chris Bendall was not present on the call and requested his inclusion in this story. At the time, Mr Bendall was co-Executive Producer of The Project and the most senior, full-time journalist at 7PM.

b. Ms Wilkinson and Mr Llewellyn provided a briefing about their meeting with Ms Higgins and Mr Sharaz.

c. Upon being briefed by Ms Wilkinson and Mr Llewellyn , the meeting agreed the rape allegation itself was not the central feature of the story and our focus for the story should be on the failures of the government, as Ms Higgins' employer, in

their handling of the rape allegation and the fact that there appeared to be no internal human resources department (HR) who could deal with and investigate issues like this.

d. The attendees agreed that the next steps were for Ms Wilkinson and Mr Llewellyn to set up an interview with Ms Higgins. It was agreed (either on this call or subsequently) that Ms Smithies would attend this interview so that she could provide preliminary legal advice in relation to the proposed story.

e. The fact Ms Wilkinson was to conduct an interview with Ms Higgins did not mean the story would be broadcast.

f. The meeting discussed whether to name the alleged perpetrator in the story, and it was resolved that he would not be named.

g. Some preliminary legal advice was given.

h. There were some discussions about when the story might be broadcast. She recalled Ms Wilkinson had a preference for it to be broadcast on a Sunday night. Ms Thornton recalled there being discussion about the fact that Ms Higgins had advised Ms Wilkinson that she wanted to do a television interview with her and a print interview with Samantha Maiden from News Corp and that the two stories were to be published at the same or similar times.

211. Mr Campbell gave uncontested evidence that he believed he commissioned the story at or shortly after this meeting: Campbell [46]. As Mr Campbell explained at [17] in his affidavit: "*Asking someone to investigate a story or commissioning a story does not mean the story will be broadcast or published. Instead, it means the story will be investigated, produced and, if the Executive Producer deems it worthy, broadcast.*"

211A. The submissions at ACS[157]-[159] cannot be maintained in light of the unchallenged evidence from Mr Campbell and Ms Wilkinson about her conversations with Mr Campbell and the other evidence from the respondents including contemporaneous documentation. See also the unchallenged evidence from Ms Thornton in Thornton[22],[41](e), [64]-[69] about when the decisions were made to publish the Broadcast. Ms Wilkinson did not make the decision to publish the Broadcast – it was

Mr Campbell who made the decision to investigate and commission the story and then Mr Bendall who made the decision to publish the Broadcast, in conjunction with Network Ten. Any submissions otherwise are contrary to all the unchallenged evidence.

211B. The submissions at ACS[157]-[159] also elide the timeline to give a misleading impression that Ms Wilkinson's genuinely held beliefs were not based on:

a. material she independently knew or obtained throughout the investigation such as the matters outlined in paragraphs [213]-[219] below as relates to the then Liberal Party and its workplace culture; and

b. further her general knowledge and experience of political machinations from working in media including with persons such as Mr Kerry Packer and at all three commercial television networks over many years.

F.2 Preparation and Research

212. Although the story was not commissioned until on or after 29 January 2021, significant work on the matters including background research, preparation and initial fact checking had occurred by that time.

213. On or about 20 January 2021, Ms Wilkinson began doing background research into media reports on the workplace culture that existed in Parliament House, including rewatching the recently aired November 2020 ABC Four Corners "Canberra Bubble" story examining a number of alleged affairs and sexual encounters among staffers and senior members of government in recent years: Wilkinson 1 [47]. Due to the confidentiality of the investigation – for background – Ms Wilkinson relied upon her knowledge from decades of experience of Australian politics to conduct online research into the culture at Parliament House. It had become clear to her, from that experience, that as more women were taking on senior roles and positions of power within Parliament in recent years - both as elected politicians and as senior bureaucrats - bad behaviour, a toxic workplace culture, and systematic failures were now beginning to be exposed but were not yet being adequately addressed.

214. Ms Wilkinson studied the March 2020 Sexual Harassment National Inquiry Report by

Sex Discrimination Commissioner, Kate Jenkins. Ms Wilkinson was aware that the report outlined 55 recommendations the Morrison government should implement to make workplaces across the country - including Parliament House - safer for women. At this time Ms Wilkinson noted that ten months after the report had been delivered, and the Morrison government had not yet implemented a single one of Ms Jenkins' recommendations in its own principal workplace: Wilkinson 1 [48].

215. During the course of the preparation of the broadcast Ms Wilkinson looked into the background of Senator Reynolds (Wilkinson 1 [49]):

a. Ms Wilkinson noted that in 2018, Senator Reynolds had very strongly spoken out in parliament against the LNP's "bullying culture", and appeared to her to agree - with the widely held belief - that the Liberal party had a "women problem".

b. Ms Wilkinson also noted that shortly thereafter Senator Reynolds fell silent on both issues, at about the same time she was appointed as an Assistant Minister in cabinet by Scott Morrison.

c. Ms Wilkinson was aware of a common perception in media and social media that Senator Reynolds was not performing well in her new senior role during media interviews.

d. Ms Wilkinson began to form the view that Senator Reynolds herself had perhaps now fallen into line with that "bullying culture" she had previously spoken out against.

e. Ms Wilkinson began to form a view that Senator Reynolds had now perhaps fallen into line with the widely perceived "boys club" believed to be so prevalent in the Liberal Party, in order to save and possibly advance her political career.

216. During the 27 January 2021 meeting with Ms Higgins, Ms Wilkinson realised that Senator Reynolds was the person who responded in a manner she considered to be unnecessarily and unfairly adversarial in February 2019 after Ms Wilkinson posted a tweet about the many significant women who had recently resigned from the Parliamentary Liberal Party: T1762.19-24; Wilkinson 1 [49]. Ms Wilkinson denied that this experience made her badly want to hear criticism about Senator Reynolds or

pre-disposed to believe such criticisms: T1764.10-13.

217. Ms Wilkinson did research over the next days and weeks before broadcast about a number of matters (Wilkinson 1 [50]):

a. sexual assault statistics and conviction rates;

b. incidents of workplace sexual assault and harassment;

c. statistics in relation to female representation in Parliament and the Liberal Party;

d. articles in connection with Former Foreign Affairs Minister Julie Bishop's reasons for leaving Parliament;

e. articles in connection with Julia Banks and her comments regarding the Liberal Party's "women problem".

218. Ms Wilkinson had interviewed Julia Banks two years earlier in March 2019 about her resignation from the Liberal Party, her decision to become an independent and what she described to me as the continuing sexist, bullying culture that existed in the Liberal Party, particularly now under the leadership of Scott Morrison. Ms Wilkinson had a longstanding interest in women's issues during her career, focussing on domestic violence, sexual harassment, workplace inequality, gender pay gaps and sexism: Wilkinson 1 [50].

219. The events described to Ms Wilkinson on behalf of Ms Higgins about the Liberal Party's reaction to her rape allegation appeared to her to be consistent with her knowledge of each of Mr Morrison and Senator Reynolds, her previous research involving the culture of the Liberal Party and the research that she conducted in this period: Wilkinson 1 [51].

220. Before the pre-interview meeting, Ms Wilkinson did a Google search of Mr Sharaz and read an article about him: Wilkinson 1 [58]. On 25 January 2021, Mr Llewellyn sent Ms Wilkinson a link to the same article: Wilkinson 1 [59]: Ex r 186-187. Ms Wilkinson responded confirming that she had seen the article. This message exchange is a further contemporaneous example of the limited nature of the relationship between Ms Wilkinson and Mr Sharaz in January 2021.

221. During the pre-interview meeting Ms Wilkinson observed a photograph on Ms Higgin's

phone of a bruise on her leg that she said was taken a couple of days after 24 March 2019: Wilkinson 1 [72]. While Ms Wilkinson was looking at the photograph on Ms Higgins' phone, a notification came up of a text message asking if Ms Higgins was okay. Later in the meeting, Ms Higgins told Ms Wilkinson that during the course of the meeting she had received two messages from senior staffers in Minister Michaelia Cash's Parliamentary office - where Ms Higgins now worked - and showed her those messages. Ms Higgins also described to Ms Wilkinson in that meeting a pattern of communication from senior parliamentary staffers including senior figures from the Prime Minister's Office. Ms Higgins claimed that communication regularly coincided with breaking news stories regarding the toxic workplace culture in Parliament House such as the November 2020 Four Corners "Canberra Bubble" story. Ms Higgins also told Ms Wilkinson the communication also coincided with when Ms Higgins took personal leave. Ms Wilkinson observed Ms Higgins to appear concerned and disturbed when describing these communications. This, with the other information obtained in the course of the investigation, led Ms Wilkinson to conclude by the time of broadcast on 15 January 2021 that very senior members of the Prime Minister's Office were probably aware of Ms Higgins' rape allegation.

222. After the 27 February 2021 pre-interview meeting Mr Llewellyn and Ms Wilkinson talked at length about what they had been told. As Ms Wilkinson maintained her ordinary duties, it was Mr Llewellyn who responsible for researching and fact-checking the story: see Wilkinson I [76]-[80]. Ms Wilkinson does not recall particular details of her conversations with Mr Llewellyn over the following weeks but she gave evidence that they talked almost daily and often more than once per day.

223. Ms Wilkinson also understood that Network Ten's in-house lawyers were supervising the investigation at all levels and at all stages up until broadcast: Wilkinson 1 [63]. She understood that all materials would be reviewed by them. One of those lawyers was Myles Farley. Another was Ms Tasha Smithies. Tasha Smithies was at the time, and still is, Network Ten Senior Legal Counsel. Ms Wilkinson understood at the time from working at Network Ten that she was an experienced in-house media lawyer with more than 20 years' experience advising large media organisations in relation to legal matters for news, print and television. Further, from her experience and conversations with Mr Llewellyn, Ms Wilkinsons was aware that he was liaising with the Network Ten

legal team at every stage of the investigation leading up to and including the broadcast: Wilkinson 1 [89].

224. In Ms Wilkinson's experience, all content that went to air on *The Project* and *The Sunday Project* was the subject of legalling by the Network Ten in-house lawyers who she understood were experienced in daily news and current affairs and broadcast journalism, including issues regarding defamation: Wilkinson 1 [12]. During her time at The Project and The Sunday Project, it was the Executive Producers, not Ms Wilkinson, who generally interacted directly with the in-house lawyers and would pass on queries and directions to her, and others, from the lawyers. Ms Wilkinson's experience and belief at the time of broadcast of the matter was that the in-house lawyers at Network Ten were very conservative - more so than any other in-house lawyers she had encountered in her lengthy and diverse career in media.

225. It was not Ms Wilkinson's general practice directly to receive legal advice, and therefore the content of that advice, from the lawyers but she knew that any work she published while on The Project had been legalled by highly experience lawyers who were very conservative in their approach. In the production of this broadcast, it was Mr Llewellyn who was the conduit to Ms Wilkinson between the executive producers and lawyers: see for example Llewellyn [93]-[95] where he described speaking to Mr Farley almost every day from 25 January to 15 February 2021 and [242] where he set up a WhatsApp group with Ms Smithies and Mr Farley that did not involve Ms Wilkinson.

226. It is apparent from the documents in evidence that Ms Wilkinson depended almost solely on Mr Llewellyn to keep her apprised not only of his research, investigations and fact-checking but also of the views and advice, including legal advice, from others within the broader production team. Mr Llewellyn only informed Ms Wilkinson about what he judged she needed to know. An example of this approach includes that the messages and documents described in Llewellyn [139]/[257], Ms Higgin's screenshots of her Uber receipts, [143] bruise photo, [157] audio recording of Daniel Try, [159] Samantha Maiden messages, [161] various documents about Senator Cash and Mr Try including Ms Higgins' resignation letter, [169] photographs of Ms Higgins with Government Ministers, [229] contact details for Prime Minister and his staffers from Ms Higgins, [257] Ms Higgins' voicemails with the AFP, [263] Senator Reynolds

contact details, [279] Ms Higgins' message about The Dock CCTV, [309] Ms Higgins' messages with Ms Fiona Brown, [316] messages with Ms Maiden, and [351] voicemail messages with Mr Try and Senator Cash, that were never directly forwarded to Ms Wilkinson.

227. Throughout the investigation, Ms Wilkinson was in constant close communication with Mr Llewellyn and was aware of extensive fact checking and research he was undertaking of the allegations made - and the evidence provided - by Ms Higgins: Wilkinson 1 [91]. She was aware from those communications that at all times, Mr Llewellyn was being supervised and supported and his work was being checked and approved by Mr Meakin, Mr Campbell, Ms Thornton, second-in-charge Executive Producer Chris Bendall, and Ms Binnie. She was also aware that at least two of Network Ten's senior legal counsel - Ms Smithies and Mr Farley - were reviewing the investigation up to and including broadcast. See also the unchallenged evidence of Ms Thornton (Thornton [53],[55]) that there were multiple involvement of senior journalists behind the scenes, namely Mr Llewellyn (a very experienced and well regarded producer), Mr Meakin (a very experienced producer, executive producer and adviser, and Mr Bendall (highly regarded and very experienced), and the heavy involvement of Network Ten lawyers from the very start of the process to ensure that the story would be accurate and robust.

228. Ms Wilkinson believed Mr Bendall to be an experienced, careful and competent producer, with many years' experience in news and current affairs television journalism: Wilkinson 1 [92]. Prior to working with him at The Project and The Sunday Project, she had also worked with Mr Bendall for a number of years during my time at the Today show when he was Chief-Of-Staff. Ms Wilkinson relied on and had full confidence in the expertise of each of Mr Campbell, Ms Thornton, Mr Meakin, Mr Bendall, and Ms Binnie had in supervising, supporting and approving the work that Mr Llewellyn and herself undertook.

229. After 27 January 2021, Mr Llewellyn became the primary contact person for Ms Higgins and Mr Sharaz until broadcast: Wilkinson 1 [93]. Ms Wilkinson discretely communicated this to Ms Higgins on 29 January 2021, as recorded in a message sent to Mr Llewellyn and Ms Thornton on 30 January 2021: Ex R266; see also Wilkinson 1 [87]. Ms Wilkinson believed that Ms Llewellyn informed her of his communications

with them as and when they occurred. She understood from their conversations that he continued to investigate and fact check the allegations. She also understood from her conversations with him that Mr Llewellyn was also reporting back to the other members of the Production Team as to the progress of his enquiries.

230. Ms Wilkinson was aware from her conversations with Mr Llewellyn that he spoke directly to people who were involved with Ms Higgins at the relevant time: Wilkinson 1 [78]. He told her that he spoke to Ms Higgins' flatmate who had told him that after the night in question Ms Higgins spent the weekend in her room: see Ex R288; Llewellyn [181]-[182]. She cannot now recall who else he told her he spoke to - but she remembers that he expressed the view that the information he was gathering corroborated Ms Higgins' allegations. Mr Llewellyn also told her that he had the Canberra Rape Crisis counsellor: Ex R289; Llewellyn [177]-[180]. During this period, Ms Wilkinson asked Mr Llewellyn about specific people, the detail of which she cannot now recall, who she had identified as potentially having relevant information and on every occasion Mr Llewellyn satisfied her that he had made all appropriate inquiries of those people: see for example Ex R290.

231. Ms Wilkinson, some three years later, cannot now recall all the documents and information that Mr Llewellyn informed her of or showed her in the course of his fact-checking investigation after the more than five-hour pre-interview meeting with Ms Higgins on 27 January 2021: Wilkinson 1 [80]. She had a recollection of hearing a voicemail, through there is no evidence it was forwarded to her, that Minister Cash left for Ms Higgins: see Ex R708. She thought it was a strange and somewhat concerning message for a boss to leave their employee, especially in the circumstances of Ms Higgins' allegations, particularly the words "Daniel has got everything under control" and "Sleep tight". Ms Wilkinson understood "Daniel" to be Daniel Try, Minister Cash's chief of staff, who she understood from Ms Higgins to have been aware of Ms Higgins' allegations.

232. On 28 January 2021 at 1:48pm, Ms Wilkinson sent an email to the production team with a hyperlink to a 2019 Nine News segment about a number of Liberal Party sexual assault allegations which included an interview with Senator Cash and the Vice President of the Federal Liberal Party that she had watched and reviewed at this time Ex R228.

233. Ms Wilkinson received and read an email Mr Llewellyn sent to me and the production team on 28 January 2021 at 4:25pm with a hyperlink to the Australian Parliament House website page about the exercise of authority within the building: Ex R231; Wilkinson 1 [82]. Ms Wilkinson clicked on that link and read the material on that page. Mr Llewellyn and Ms Wilkinson had previously discussed the question of who was responsible for policing at Parliament House.

234. That research informed Ms Wilkinson that due to archaic laws the AFP officers operating within Parliament House were separate to every other AFP unit in the country and operated at the directive of the parliamentarians themselves: Wilkinson 1 [83]. At this time it had become obvious to Ms Wilkinson that no one was independently policing potentially criminal behaviour within Parliament House.

235. Ms Wilkinson also learned that Mr Llewellyn's research had confirmed that Parliament House had no central, independent HR department to which employees could report - with confidence and confidentiality - allegations of grave misconduct in the workplace: Wilkinson 1 [84]. She learned that the only avenue available was to report such conduct to a colleague of Senator Reynolds, the Finance Minister. She knew that Parliament House was a workplace employing thousands of people including staffers, public servants, security, IT, and service providers. Ms Wilkinson was very concerned that this created unacceptable occupational health and safety conditions for all the workers, particularly young women, in Parliament House.

236. This information corroborated what Ms Higgins had previously told Ms Wilkinson about the lack of independent work-place human resources support available to her to rely upon at Parliament House. Ms Wilkinson formed the view that as employers, Australian parliamentarians had a duty of care to provide a safe workplace with appropriate support mechanisms that were currently not available and it was in the public interest to broadcast Ms Higgins' allegations to highlight this issue.

237. The research Mr Llewellyn completed to 2 February 2021 also included:

    a. Confirming the policing statistics screenshot Mr Sharaz had provided with the timeline document accurately reflected the ACT Policing website: Llewellyn [81]-[82];

b. Researching Mr Lehrmann's social media: Llewellyn [172(a)];

c. Research to confirm that almost all the persons named in Ms Higgins timeline document held the positions claimed: Llewellyn [172(c)];

d. Communications with Professor Anne Twomey about constitutional arrangements at Parliament House: Llewellyn [187]-[189];

e. Communications with Dr Rosemary Laing, former clerk of the Senate, about policing in the Parliament: Llewellyn [191]-[193];

f. Checks on a telephone number for Mr Lehrmann that Mr Sharaz had provided him: Llewellyn [194]-[196].

238. Mr Llewellyn became satisfied that the documents and information provided by Ms Higgins and Mr Sharaz was accurate: Llewellyn [176]. The checks were taken to ensure that Ms Wilkinson and Network 10 were not provided with made up information or documents: Llewellyn [175]. To the extent that no new information was disclosed, these checks corroborated information from the primary sources for the story (Ms Higgins and Mr Sharaz) and meant that they could both be considered to be reliable sources of information.

239. After the pre-interview meeting on 27 January 2021, Mr Llewellyn proposed a meeting with just Mr Campbell, Mr Meakin and Ms Binnie to discuss the next steps: Ex R223. Mr Farley, Mr Brad Walker, Ms Binnie, Ms Thornton, Mr Llewellyn, and Mr Meakin and then Ms Smithies were invited to the meeting on Teams: Ex R229. At 12:23pm on 28 January 2021, Ms Wilkinson sent a message to Mr Campbell that stated "Just had a long debrief ad I think we've come up with where the story is after yesterday's marathon session with our Canberra couple. And it's strong. X": Ex R224-225. Mr Llewellyn's views after the pre-interview meeting are in Llewellyn [127], [135]. Mr Campbell responded inviting Ms Wilkinson to a call tomorrow just set to go thru it with Mr Llewellyn, Mr Meakin, Ms Binnie and Ms Thornton. The meeting was changed to Zoom so Ms Wilkinson could attend: see Exs R234 and R247 and occurred on Friday, 29 January as described in section F.1 above such that the investigation proceeded to a recorded interview with Ms Higgins on 2 February 2021.

240. Ms Wilkinson received and read an email Mr Llewellyn sent to her at 8:21pm on 28 January 2021 with a hyperlink to a Google Docs document entitled ACT Questions: Exs R262-263. Ex R263 is the most recent version of the document. The second draft of the document appears to be Ex R317. The document recorded proposed questions for a formal pre-recorded interview of Ms Higgins. Ms Wilkinson does not now remember how progressed that document was the first time it was sent to her. Google Docs enabled each of Mr Llewellyn and Ms Wilkinson to amend and update the same document, but meant that changes were overridden and lost.

241. On 29 January 2021, Ms Wilkinson put questions into the ACT Questions Google doc: Ex R258.

242. On 31 January 2021, Ms Wilkinson sent a WhatsApp message to Mr Llewellyn about why the bruise photograph remained on Ms Higgins' phone despite her claim the phone was wiped (Ex R295, Wilkinson 1 [94]):

> *I want to zero in a little on this whole phone things. Have a look at my questions I've just added. I need to know what Vodafone are saying about her phone going to black. And if she says she took screenshots of crucial messages she now no longer has, how come she still has the bruise shot? I'm confused on this point. And why she is delaying – or at least appears to be delaying getting answers on that. Without raising alarms bells with her do you think you can ask her today or first things tomorrow? It's a crucial point when it comes to further blocking of her being able to gather evidence.*

243. Ms Wilkinson held the concern at the time about this issue as recorded in that message. Mr Llewellyn sent me a message in response describing Ms Higgins' mobile phone issues as a "stuff-up": Ex R268. Ms Wilkinson is not a "tech savvy" person and relied upon Mr Llewellyn to investigate this issue. As recorded in her message, Mr Llewellyn was the only person talking with Ms Higgins at this time. She could recall Mr Llewellyn later telling her that Ms Higgins had access to multiple mobile phones in her role as a media adviser and issues had arisen in the transference of data. Ms Wilkinson gave oral evidence that she had one possibly two conversations about the issue with Mr Llewellyn and that she also communicated with other production teams members up the chain and that some time before broadcast she was satisfied this was not an issue: T1752.31-1753.16. She said that despite Mr Llewellyn's initial response she wanted to push further and she did so.

244. Ms Wilkinson could not recall the questions referred to in her message on 31 January 2021. When shown Ex R295 she was unable recall what questions she draft: T1754.32-36,40-41. Mr Llewellyn gave unchallenged evidence that the questions from page 4 were the first draft of questions: Llewellyn [203]. The nature of Google Docs means it is not possible to assess if any particular questions now were drafted by Ms Wilkinson.

245. It appears likely from the contemporaneous correspondence is that Ms Wilkinson's most significant contribution was to the first draft of those questions that drilled down on variety of issues including Ms Higgins' loss of data and that she likely added questions about that and other issues at some time – although the precise question cannot now be identified with any likelihood given the transient nature of the document.

246. As preparations for the pre-recorded interview commenced on Monday, 1 February 2021, Mr Llewellyn sent numerous emails to the broader production team (Mr Campbell, Mr Thornton, Ms Binnie, Mr Meakin, Ms Smithies, and/or Mr Farley) that excluded Ms Wilkinson: see for example Exs R301, R302, R303, R305, R306, R307, R311. That day Mr Llewellyn sent an email to Ms Binnie copied to Mr Meakin that read: "*I'm about to thrash through the questions again – I'll get you across them both once they're in a more reasonable shape. I'm doing my best to shorten Lisa's questions in pre-production rather than post-production.*": Ex R312. Also that day, Mr Llewellyn sent a message to Ms Wilkinson that said: "*I've restructured the questions. For almost everyone I deleted or combined with another I subsequently added another question. Oh dear. I'll keep working on them but I think it's starting to get there now.*" Ex R314. At 6:29pm, Mr Llewellyn invited Ms Wilkinson to edit the document: Ex R316. The inference from this exchange and the removal of questions relating to Ms Higgin's mobile telephone is that Mr Llewellyn not Ms Wilkinson decided the questions that she was required to ask.

247. Ms Binnie's unchallenged evidence at Binnie [48], [51] is that herself, Mr Meakin and Mr Myles Farley and that made minor changes to wording and structure to finalise the questions to be asked. The inference from the evidence is that Ms Wilkinson on 2 February 2021 only asked questions that she knew has been settled and approved by the senior producers after legal review and in accordance with her evidence she knew this was the case: see also Wilkinson 1 [95]; Llewellyn [203], [205]; Meakin [50].

248. On 2 February 2021, Ms Wilkinson received and read an email Mr Llewellyn sent her at 9:54am with quotes about the Liberal Party: Ex R318; Wilkinson 1 [96]. The quotes were from the Four Corners "Canberra Bubble" story and Hansard and provided context and further background for the interview and investigation regarding the Liberal Party's attitude to sexual harassment, women generally and the toxic culture at Parliament House.

249. On 2 February 2021, Ms Wilkinson received and read an email Mr Llewellyn sent to her at 10:28am with relevant paragraphs about security at Parliament House: Ex R322; Wilkinson 1 [97]. This information was necessary to ensure that the questions Ms Wilkinson asked Ms Higgins on this topic were worded correctly.

250. Ms Wilkinson knew from her many years in journalism and from having conducted thousands of live and pre-recorded television interviews that she needed to phrase all of her questions in a way that presented Ms Higgins' serious claim - that she had been raped on a Government minister's couch in Parliament House - as an allegation only: Wilkinson 1 [98]. Her intended focus of the interview was how the Australian Parliament and those in charge of its operation addressed sexual assault allegations and issues of workplace safety for women - and any possible political interference, improper pressure, or coverup which may have impeded an appropriate investigation of the matters raised. She was also very mindful of her duty of care to ensure that all her questions to Ms Higgins were asked sensitively. This was also to protect any viewers who may be triggered by the subject matter. She worked closely with Mr Llewellyn in the lead-up to formulate her questions for the pre-recorded interview, but was aware that her questions were subject to approval and review by Mr Llewellyn and other more senior producers and subject to legal review. Mr Llewellyn printed and hand-delivered the approved questions to Ms Wilkinson on the morning of 2 February 2021: Ex R324.

251. Ms Wilkinson would not have been comfortable with naming Mr Lehrmann in the broadcast unless he chose for that to occur by agreeing to an interview or otherwise agreeing that he be identified: Wilkinson 1 [99]. She did not include Mr Lehrmann's name in any questions she drafted with Mr Llewellyn and she agreed with the decision by the other responsible persons at Network Ten including Mr Llewellyn and senior managers and producers that his name not be mentioned in the interview. This was a decision made on about 29 January 2021 by the executive producer Mr Campbell and

other senior producers: see above. Ms Wilkinson did not mention Mr Lehrmann's name in her formal interview with Ms Higgins that followed on 2 February 2021. Mr Lehrmann's name was not important to the investigation that was undertaken other than to ensure that he was given an opportunity to respond before the broadcast.

252. On 2 February 2021 commencing at about 2pm, Ms Wilkinson interviewed Ms Higgins, in an interview that lasted more than two hours: Wilkinson 1 [100]; Llewellyn [208]-[210]; Ex 37. Mr Llewellyn and Ms Smithies, Network Ten Senior Legal Counsel and other including Mr Sharaz also attended the interview.

253. The 2 February 2021 interview reinforced the views that Ms Wilkinson had previously formed about Ms Higgins' credibility after their 27 January 2021 pre-interview meeting: Wilkinson 1 [101]. Having now spoken to her a number of times, Ms Wilkinson had not detected any material inconsistencies about what she alleged happened to her that night. Ms Higgins did not falter in her account and her demeanour throughout appeared to Ms Wilkinson to be indicative of someone telling the truth.

254. At the conclusion of the interview, at a time when Ms Higgins was not in the room, Ms Wilkinson asked Ms Smithies what she thought: Wilkinson 1 [102]. She said, words to the effect "she is credible". Ms Smithies attended the interview recording to assist in the assessment of Ms Higgin's reliability: Thornton [45]; see also Llewellyn [225].

255. Ms Wilkinson had a number of conversations with other members of the production team she believed had viewed the raw footage of the 2 February 2021 interview about their impressions of Ms Higgins: Wilkinson 1 [104]. Ms Wilkinson understood from her conversations with Mr Meakin he had watched the video of the formal interview. They discussed Ms Higgins' credibility and Mr Meakin's impressions on that - which were that he thought she was credible. She had similar conversations with other members of the production team that she cannot now specifically remember. Hearing the views of her colleagues on this topic bolstered Ms Wilkinson's confidence on this important issue. Her knowledge of the professionalism and expertise of each person involved was a factor relevant to her confidence in the fairness and accuracy of what was ultimately broadcast.

256. Other members of the production team gave the following evidence about the credibility of Ms Higgins having viewed her interview:

a. Mr Llewellyn having watched the interview in person "felt the story was strong": Llewellyn [222]-[224];

b. Mr Meakin saw Ms Higgins as a credible and impressive person and considered that her version of events was consistent and believable: Meakin [121];

c. Ms Binnie having watched the raw footage of the interview formed the view that Ms Higgins did not have any ulterior or sinister motives in coming forward to tell her story in the way that she did: Binnie [99];

d. Mr Bendall after watching the first WIP video of the story formed the opinion that Ms Higgins was credible and someone of high integrity: Bendall [73].

257. After the recorded interview, Ms Wilkinson continued to work closely with Mr Llewellyn: Wilkinson [105]. She cannot remember all the conversations she had with him but she was aware from those conversations that Mr Llewellyn continued to make enquiries and check the veracity of the allegations made by Ms Higgins. Ms Wilkinson was satisfied that Ms Higgins claims were truthful at the conclusion of that process and before the matters were broadcast. The interview was transcribed and Mr Llewellyn and Ms Wilkinson pored over it separately and together to check for inconsistencies and to decide which aspects needed further investigation: Wilkinson 1 [103]. They also discussed who we needed to approach for their version of events to ensure that we broadcast all sides of the matters raised fairly.

258. Ms Wilkinson was made aware before broadcast that Ms Higgins was provided with a copy of the transcript of the recorded interview and on 10 February 2021 she made a statutory declaration that what she had said in that interview was true and correct Wilkinson 1 [109]. Ms Wilkinson understood that a statutory declaration meant that Ms Higgins was swearing to the truth of her allegations and that signing a false statutory declaration was a criminal act. She considered the decision of Network Ten to ask Ms Higgins to sign a statutory declaration to be part of standard practice given the seriousness of Ms Higgins allegations. The fact that Ms Higgins signed the statutory declaration reinforced Ms Wilkinson's views about the credibility of Ms Higgins and her allegations. Ms Wilkinson never saw a copy of the statutory declaration and relied on persons more qualified than her: T1761.18-30.

259. Ms Wilkinson's evidence was that the new information she received up to broadcast on 15 February 2021 corroborated in her mind the version of events Ms Higgins told me on 27 January 2021 and 2 February 2021, and settled in her mind that Ms Higgins' allegation she was raped in Parliament House was true and a public broadcast of her allegations was in the public interest: Wilkinson 1 [110]. In particular statements from the AFP and Government confirmed that Ms Higgins made complaints about her allegations of rape to her employer and the police and her claims were not of recent invention: Wilkinson 1 [129].

260. On 15 February 2021, Ms Wilkinson reads the News Article. This was the first time she had any knowledge of, or had seen, Ms Maiden's account of the allegations: Wilkinson 1 [120]. She noticed that the details of Ms Higgins' allegations as reported in those articles were consistent with what Ms Higgins had told her. Ms Wilkinson was reassured to know that another major media organisation had approved Ms Higgins' allegations being published. Ms Wilkinson was aware that News Limited also has a large in-house legal team and presumed that the publication of Ms Higgins' allegations was approved by those lawyers. There was nothing that Ms Wilkinson read in Ms Maiden's articles that impacted negatively on her positive view of Ms Higgins' credibility or the truth of her allegations: Wilkinson 1 [122].

261. At the time when she presented the Broadcast on 15 February 2021, Ms Wilkinson intended to allege that Ms Higgins claimed to have been raped at Parliament House by a colleague in 2019 when she was an employee there, and based on the information and enquiries that she had made or been informed of by Mr Llewellyn, she believed Ms Higgins' allegations to be credible and that Ms Higgins had been raped by Mr Lehrmann in 2019 at Parliament House: Wilkinson 1 [134].

261A. As to ACS[161], Ms Wilkinson was transparent and provided all the information that she had received from Mr Sharaz to all the relevant producers and executives within Network Ten and the production company.

261B. As to ACS [162], it was remarkable that Ms Higgins' allegation had not reached the media in the two years that had elapsed between the night in question and her contact with Ms Wilkinson. It was an extremely serious allegation of an offence occurring in a Minister's office that a number of people within Parliament House were said to have

known and it was documented that it had been reported to police at the time. Moreover, the alleged perpetrator had been immediately dismissed. The fact that Ms Wilkinson formed the view that steps had been taken to keep the story "under wraps" or "covered up" was reasonable and rational. In any event, Ms Wilkinson was entitled to believe Ms Higgins unless the contrary was established or unless she was satisfied of major issues with the credibility of the account she had been given.

261C. The submissions at ACS[162]-[166], are untenable in light of the matters outlined above almost all of which was unchallenged evidence and supported by contemporaneous documentation. A document that was provided to Ms Wilkinson very early on (and independently verified from the internet, see Llewellyn [81]) recorded that an allegation of sexual assault in the Parliament precinct had been made in April-June 2019: see Ex R124 PG2787. Ms Higgins provided, through Mr Sharaz, documents that were genuine on their face, and were in fact genuine, showing communications with the Australian Federal Police about rape and sexual assault: see Ex R125 PG2794-2796. Until 15 February 2021, there had never been any public report of that police report of an allegation of sexual assault within Parliament House, or any other such allegation. The allegation had plainly been made in March-April 2019 as detailed in the Timeline. Contrary to ACS[164], there are no *contradictions* or material inconsistencies between Ms Higgins' account in the Timeline document and subsequently and what the Government or Ms Brown ultimately claimed to have done. Each of the versions are broadly consistent and only vary in aspects understandable given the elapse of time and ordinary variations of human memory and perspective, even without taking into account the fact that Ms Higgins was an alleged survivor of sexual assault in relation to which Ms Wilkinson had extensive experience: see Wilkinson 1 [74(g)-(h), [107].

261D. The so-called "problems" with the timeline listed in ACS[166] do not withstand closer scrutiny:

a. Mr Lehrmann was asked to leave on Tuesday, 26 March 2021, because of the events on 22-23 March 2019, and ultimately fired, in part, because of the allegations of sexual assault. Any additional information about his other misconduct or career decisions would not have changed the significance of the timing of him leaving Parliament House immediately after the events of that

night;

b. The reference to Wednesday (sic), 26 February 2021 is plainly a typo and immaterial. Ms Higgins did not make the same mistake when she gave her interview on 2 February 2021 as to going to the AFP after meeting with Senator Reynolds and Ms Brown – see aide memoire to Exhibit 37 p37 1:05:40.3;

c. There is nothing inherently serious about giving or explaining to a staffer those two options, particularly in the context of a political organisation and environment that had not implemented recommended workplace changes to protect women and had a reported toxic culture towards women, all of which Ms Wilkinson researched or was already aware of at this time: see paragraphs 213-219 above. In the context of politics, it is obvious that the failure to stay onboard with the team during an election campaign (whether stated or inferred/believed) would limit opportunities moving forward particularly if the election were to be lost. The Timeline document included a contemporaneous email as to Ms Higgins' state of mind sent to the police on 13 April 2019, that she would not proceed with her complaint because "*It's just not the right decision for me personally, especially in light of my current workplace demands*." Neither Ms Brown nor Senator Reynolds, were public servants, but a parliamentary staffer and politician respectively. Irrespective of how someone, including Ms Wilkinson, may characterise the propriety of their conduct, bearing in mind detailed questions were put to Ms Brown and Senator Reynolds, the seriousness of the allegations did not warrant investigation beyond those already extensive steps outlined above.

d. As outlined above, Mr Llewellyn and Ms Wilkinson had talked with Ms Higgins on a number of occasions including for over five hours, including directly with Ms Higgins only addressing the sexual assault allegations. They were each independently satisfied of her credibility in relation to the sexual assault.

261E. As to ACS[167]-[170], the applicant's submissions are misconceived in light of the submissions at paragraphs [559]-[566] below. The submission in ACS[168] about the apparent relevance of what Ms Wilkinson messaged to Mr Llewellyn on 20 January 2021 ignores the role and evidence of Mr Campbell and executives within Network

Ten: see paragraph [211A] above. There is no factual, legal or commonsense basis to suggest that the seriousness of an allegation affects the reasonable timeframe for a person to respond to a request for comment. It is only the complexity or number of questions or availability of information that might affect the ability of a person to respond to questions that day (let alone 80 hours later). A person in that situation could be reasonably expected to ask for more time.

261F. ACS[170] is also misplaced – Ms Higgins was an eyewitness – and Ms Wilkinson had assessed her credibility over telephone calls, a meeting and interview. Ms Wilkinson had the benefit of the views of many others as to Ms Higgins credibility – including significantly Ms Smithies who attended the pre-recorded interview and gave a binary response to Ms Wilkinson that "s*he is credible*": see Wilkinson 1 [102]. Further, a rape counsellor had followed up with Ms Higgins months after interviewing her: see Wilkinson 1 [36]. Mr Llewellyn confirmed from her refusal to speak with him that Ms Higgins was a client.

261G. A fundamental difficulty with the applicant's submissions to ACS[171] is that they wrongly presume that there is a wealth of information that materially contradicted Ms Higgins (it did not and does not exist) and further ignore or dismiss all the fact checking and research that did occur as not providing any new information. It is the very nature of fact-checking and corroboration that known information is checked and and therefore does not involve finding out any "new" information. The fundamentals of Ms Higgins' story were inherently credible, verifiable and documented, particularly the fact, timing and location of the sexual assault complaint, her position and employment with Senator Reynolds and Senator Cash, the impending Federal election, and her communications with the AFP and Canberra Rape Crisis Centre.

261H. The submission at ACS[175] is untenable in light of the unchallenged evidence of Mr Campbell and Ms Thornton: see paragraph [211A] above.

261I. As to ACS[176]-[177], it was Ms Wilkinson's unchallenged evidence that she would not ordinarily go to these meetings: Wilkinson 1 [66]. The nature of commercial television production required her to rely upon her producer, the production company, and Network Ten as to the timing and nature of any responses from persons such as Ms Brown and Mr Lehrmann. These were matters entirely outside of Ms Wilkinson's

knowledge, role and control. The submissions in ACS[176]-[177] proceed upon erroneous and unproven contentions as discussed in paragraph 1A above as to:

a. The hypothetical reasonable journalist; and

b. Generalised unsubstantiated claims about so-called discrepancies in Ms Higgin's account.

261J. As to ACS[178]-[180], when assessing the credibility of a sexual assault complainant, save testing the means and opportunity for the alleged crime to have occurred, talking with them is the best way to test their credibility. Ms Wilkinson relied upon a wealth of experience in interviewing and talking with sexual assault survivors to undertake that assessment. Nonetheless, the applicant's submissions are unsustainable in light of the extensive fact-checking and research outlined above.

261K. As to ACS[180], the contentions suggesting that either Ms Wilkinson or Mr Llewellyn held a false belief as to the constraints on policing within the Parliament House have no merit. Mr Meakin, one of the most experienced journalists in this country, and clearly an impressive witness who does not tend to fancy – agreed that the policing arrangements meant that Parliament House was one of the safest places to commit sexual assault: see paragraph 264 below. Reasonable minds may differ about the importance of parliamentary privilege (although the privilege may reasonably be thought to be an archaic concept that arose from the unique circumstances of the English Civil War between the then parliament and monarch) - the fact is that different rules apply. The police that serve in Parliament House are under the direction of the presiding officers, contrary to what the applicant seems to suggest, and that ought fairly be subject to public discussion and criticism where it does not reflect modern values. Whatever may be said about these practices, it is established fact that in the time SACAT investigated, they obtained the video from The Dock (a fact Ms Higgins disclosed in the 27 January 2021 meeting, aide memoire to Exhibit 36 p6121) but did not obtain the video from Parliament House despite the written request being made on 3 April 2019. The applicant's submissions in ACS[180] ironically illustrate the reasonableness of Ms Wilkinson's conduct.

261L. As to ACS[198]-[199], Ms Wilkinson's evidence in Wilkinson 1 [94] about Ms Higgins' mobile phone is addressed in paragraphs [24F], [243]-[244] above. There

is no inconsistency between what Ms Wilkinson's evidence and what Ms Higgins had explained on 27 January 2021. They are directly consistent, and based on common sense and experience. What Ms Wilkinson described in her evidence was the most likely thing to have happened. Any person who has transferred data between mobile telephones more than one time will likely have experienced different levels of transfer of existing data on at least one occasion – that Ms Higgins had claimed this had not happened to her before does not in any relevant manner undermine her credibility.

261M. As to ACS[214]-[215], the applicant conflates the term metadata when used about digital photographs and stored telecommunications data. They are completely different and Ms Wilkinson understood metadata to refer to phone logs and emails and things like search histories on browsers: T1849.6-7. The submissions in ACS[214] otherwise suffer from the "*reasonable journalist*" fallacy (see paragraph [1A] above) and a mischaracterisation of Ms Wilkinson's role in publishing the Broadcast. It is unsurprising that a person who was a cadet journalist in 1978 would not have regard to photographic metadata. There is no evidence for the contention that most journalists are aware or should be aware of photographic metadata or have regard to such data (or that such data cannot be manipulated or is stable). In any event, the agreed expert facts that the photograph did not have metadata illustrates the fallacy underlining the applicant's submissions. If the applicant relies upon judicial notice – it was only this century that photographic films sales began to drop and digital cameras did not become popular until the late 1990's. It is not the case that photographs without metadata or using photographic film cannot be used and reliable upon as evidence or a documentary source for publications. Ms Wilkinson relied upon Mr Llewellyn and the production team as to what they decided to publish. Given her knowledge and belief about their experience and expertise of those persons and the conservative approach of the Network Ten lawyers, this was an entirely reasonable approach.

261N. As to ACS[222], the applicant's submissions ignore that Ms Wilkinson and Mr Llewellyn were engaging and building rapport with an alleged sexual assault victim and the informality of the meeting. The applicant in this paragraph selectively quotes and then mischaracterises the informal five hour meeting:

a. As to (c), Ms Wilkinson specifically queried Ms Higgins as to whether Ms Brown said those words.

b. The applicant's submission at (d) makes an erroneous assumption that Ms Brown was a senior public servant – she was a parliamentary staffer, someone who has advanced her career through her service to Liberal Party parliamentarians – someone described as a "*legend*" of the Liberal Party (Llewellyn [354]), not someone who had advanced and trained under the independent processes of the *Public Service Act* 1999 (Cth). There is nothing peculiar about what Ms Higgins claimed to have felt at this time given the circumstances of the election and the rape allegation.

c. As to (f), Ms Wilkinson put that proposition because in the immediate preceding answer Ms Higgins said "I was told I'd lose my job if I proceeded". Ms Wilkinson was gently probing seeking to clarify between Ms Higgins' perception and what Ms Brown actually said.

d. As to (i), the applicant's submission cannot stand in light of the gentle probing that Ms Wilkinson had just undertaken, let alone the remainder of the five hour meeting.

261O. As to ACS[223], the applicant's submissions misrepresent the content of the 2 February 2021 interview and the Broadcast:

a. As to (a), Senator Reynolds being "*apologetic*" and nice and the "*If I chose to go to the police, we would support you*" were included in the Broadcast – line 99. Ms Higgins said she "*felt like a weird sort of ticking the box*" moment – also included in the broadcast. The remainder of the quotes in that subparagraph were not included in the Broadcast.

b. As to (b), there is nothing inconsistent between this passage and the offer of support if she chose to go to the Police. It is clear from everything Ms Higgins wrote and said (and was in fact what happened) that Ms Higgins had to act with the police independently, that it was her decision whether or not to go to the police. There is a fundamental difference between "*we will support you if you chose to go to the police*" and "*you should go to the police we will support you*" or "*we will support you to go to the police*".

c. As to (c), the applicant does not identify anything Ms Higgins said that is an actual

contradiction. Ms Higgins did not say she was not told she would be supported if she *chose to go* to the Police. What she said was she was not told "*you should go to the police we will support you*" and they were not encouraging her to go to the Police. In terms of likely effect there is no difference or inconsistency between "*if I chose to go to the Police, we would support you*" and if you choose to go to the Police we wouldn't stop you.

d. As to (d), in the Broadcast at line 121 immediately preceding this line Ms Higgins was quoted as saying: "*Essentially, I could … I could go home. They'd pay me. I would technically be employed. In six weeks' time our contracts were going to expire anyway, and I could just sort of take leave and I could just sort of just process what had happened to me, and I could just go home.*"

e. As to (e), Ms Higgins did point to the fact (including in the Broadcast) about the "*strange culture of silence in the parties and you just, you don't, the idea of sort of, speaking out on these sort of issues, especially around a campaign is just. .. it's like letting the team down. You're not a team player*" – line 135. As published, in the Broadcast she had the option to be a team player and go to Western Australia or of going home where her contract would expire. She also explained the culture of silence, in speaking out on such matters, particularly during an election – that is why the audience is told Ms Higgins believes her job is on the line.

f. As to (f), the culture of silence is not a different explanation to realising her job was on the line – it is part of that explanation and consistent with the explanations she had given, how she felt and how she perceived people were acting towards her. On 27 January 2021, early in the meeting (p6091 0:47:43) she said "*it's staffer culture, if something weirds going on, you put your head down and don't ask questions. It's just a part of sort of what it is.*" Ms Higgins emailed the Police on 13 April 2021 (an email provided to the respondents) that "*Its just not the right decision for me personally, especially in light of my current workplace demands*".

g. As to (g), this was not included in the Broadcast. As referred to above line 121 that everybody would lose their jobs was included. Both Ms Brown and Senator Reynolds were specifically asked if they were "*dismissive, indifferent or uncaring*

in your dealings with Brittany Higgins" amongst numerous other detailed questions about their interactions with Ms Higgins: see Exhibits R666-R667.

Notably, the applicant identifies no particular part of the meeting, interview or Broadcast as directly pertains to himself or the events on 22-23 March 2019 that was inconsistent, contradictory or warranted further investigation – save the desperate submission that the applicant should have been approached earlier.

261P. As to ACS[224]-[226], [229]-[230], reflecting her role in the production and publication, Ms Wilkinson was not party to those communications and they cannot affect the Court's assessment of her conduct.

261Q. As to ACS[227]-[228], as quoted above from early on in the interview on 27 January 2021 (p6091 0:47:43), Ms Higgins described the unique staffer culture of mind your own business in the Australian Parliament. At p6115-6116 0:17:53ff, Ms Higgins described the intense pressure she was under at the time with the impending election and at 0:18:49 that this was her "dream job". What was published was the culture of silence that stopped her proceeding with the police investigation – not any specific allegation against Ms Brown or Senator Reynolds.

261R. The applicant's submission in ACS[232] are untenable and should be rejected. Lines 132-135 the Broadcast refer to the pressure Ms Higgins felt and her feelings. What was published was that Ms Higgins had stopped the investigation due to the effect from toxic culture within Parliament House. The Broadcast did not imply that Senator Reynolds and Ms Brown directly applied pressure on Ms Higgins not to go to the Police:

a. Line 72, Ms Brown is reported by Ms Higgins that she gave her the employee assistance program and was allowed to take the rest of the day off.

b. Line 76, Ms Brown is reported by Ms Higgins as notifying her that the police were already involved.

c. Line 83, Ms Wilkinson tells the audience that Ms Higgins spoke with the Police after speaking with Ms Brown.

d. Line 99, Ms Higgins describes Senator Reynolds as apologetic, nice and she said nice words. Ms Higgins said Senator Reynolds told her if she chose to go to the

police they would support her. The audience is informed how Ms Higgins "felt".

e. Lines 107-108, the Broadcast includes the Government's response that they two women encouraged Ms Higgins to speak to the Police and guaranteed there would be no impact on her career prominently at the start the segment. The Prime Minister was reported stating that the Government aimed to provide Ms Higgins her agency and to provide support to make decisions in her interest.

f. Lines 110-117, Ms Higgins describes that she went to the SACAT and explains that despite getting footage from The Dock the police were in a battle with Parliament House to get the footage.

g. Line 118, the impending Federal Election is mentioned.

h. Lines 121-131, Ms Higgins describes how she came to go to Western Australia for the Federal Election. Again, Ms Higgins is presented describing her perceptions and internal thought processes. These passages do not refer to the police investigation.

i. Lines 132-135, Ms Higgins describes the pressure she felt from "a strange culture of silence in the parties", speaking out on these sorts of issue especially around a campaign and not being a team player not to pursue the police investigation. Neither Ms Brown or Senator Reynolds are accused being directly responsible for the pressure. See also paragraph [261O] above.

The problem with the applicant's submission is the Broadcast identifies both what Ms Higgins alleged that persons said and did and then what she felt. The viewers were expressly told Ms Brown and Senator Reynolds said one thing, but Ms Higgins felt it a different way. When asked to describe the pressure she felt to discontinue, Ms Higgins is not presented as blaming either woman, but blaming the generic culture that applies to all parties within parliament. Ms Wilkinson's answers under the pressure of cross-examination are entirely reasonable and consistent with the actual content of Broadcast viewed as a whole (as opposed to the lines the cross-examiner chose to refer to). That the applicant might argue that the Broadcast carried hypothetical, unpleaded, imputations about Senator Reynolds or Ms Brown about their conduct towards Ms Higgins does not make unreasonable a state of mind that those imputations were

not carried. Otherwise, the belief or state of mind of Ms Wilkinson on these issues are entirely irrelevant to credit or the evaluative assessment the Court must undertake under s30.

261S. As to ACS[240]-[242], the applicant conflates timeframes within these submissions and are entirely misleading. The full passages quoted at ACS[241] is:

> No. So I asked them during the process but as soon as I'd gone to the police, I was, I hadn't decided whether or not I wanted to proceed and I was really terrified. The moment I informed the Liberal Party that I was formally going to the police, it would have just exploded. And so, I just, I wanted to keep it under wraps until I could figure out or ascertain what my prospects were. I needed to figure that out. [double underline identifying missing quote.]

261T. Ms Higgins was explaining that she had previously asked about the footage but once she went to the Police, she was too terrified to inform Ms Brown. The evidence is that Ms Higgins informed Ms Brown that she would not proceed and did not inform Ms Brown when she did in fact proceed with the Police. Senator Reynolds was told that Ms Higgins was meeting with SACAT through the Assistant Commissioner of Police and not by Ms Higgins who clearly felt she should not disclose it to either Senator Reynolds or Ms Brown.

261U. As to ACS[243], the evidence contradicts the submission that Ms Higgins' claims were fanciful or ought to have been known to have been fanciful to the respondents. Ms Brown was a chief of staff to a Commonwealth Minister. Her evidence was that she directly consulted with Mr Stefanic, secretary of DPS about the incident: see Brown [72]-[77]. That documents demonstrate that the person who replaced Ms Brown was in fact consulted about the AFP request for the CCTV footage: see Exhibit 60 p21. Ms Brown did not leave Canberra until 7 April 2019 and continued to communicate with Ms Higgins about her roles with Senator Reynolds until 18 April 2021: see Brown [160]-[167]. It was not unreasonable, given her relative seniority to her replacement, for Ms Higgins to believe that she was still exercising her authority in that role. The Court should reject the submission that Ms Higgins' claims were fanciful.

261U. As to ACS[247], Ms Higgins did not allege a conspiracy in suggesting that the CCTV footage was quietly destroyed or lost. What she reported from a Police officer friend

was not a serious allegation or conspiracy but reflected the practice within Parliament House, if not more broadly, for the storage and maintenance of CCTV footage. After an initial quarantining in April 2019, the CCTV footage was scheduled to be deleted after 90 days but only due to the pro-active actions from the AFP was the quarantine order maintained: see paragraphs [145],[147], [158]-[175] above. The business records in Exhibit 60, see pdf pages 89-90 emails dated 4 March 2021 suggest that all relevant footage from entry to entry of the cleaner was, despite the request, not quarantined – see also R886-R887. It is also common sense that after a period of time where CCTV has not been obtained by the Police that, due to the passage of time, footage would be destroyed, deleted or lost. The Broadcast did not make any allegation about this and the viewer was aware that in fact the CCTV footage still existed – line 167. The AFP statement was made available to the public on the Network Ten website: see Exhibit R41 p4527.

261V. As to ACS[248]-[249], the suggestion that the Police complaint that was active from 1 April 2019 to 13 April 2019 was "so brief" does not withstand scrutiny. Ordinary community standards would expect that evidence in such serious crimes as sexual assault or murder to be secured and obtained immediately. Although the alleged crime occurred in the Australian Parliament, that relevant evidence that was being requested by the Police was not released, irrespective of parliamentary processes, immediately (let alone five, ten or twelve days later) is unacceptable delay. In stark contrast during that same time, CCTV footage was obtained from The Dock. The business records in Exhibit 60 show that, whether by necessity or design, there were delays in the parliament AFP even viewing the CCTV footage – the footage was not viewed until 16 April 2019 by which time the complainant, in part, frustrated with the delay did not proceed: see Exhibit 60 pdf p25 email dated 17 April 2019. As outlined above, it appears that the parliamentary processes resulted in not all potentially relevant CCTV footage being actually quarantined and preserved. Ms Higgins' complaints about the CCTV footage and police processes were not conspiratorial but reflected reality and the research of which Ms Wilkinson was aware about the constraining effect of parliamentary control on policing within Parliament House – see also lines 80-82 of the Broadcast per Prof. George Williams. Ms Wilkinson was also aware that Mr Meakin had agreed that Australian Parliament appeared to be the safest place to get away with sexual assault.

261W. As to ACS[251]-[284], these submissions illustrate the constrained role that Ms Wilkinson had as a publisher of the Broadcast. The general approach in applicant's submissions in these paragraphs is incorrect, but the following specific matters are highlighted:

a. As to ACS[261], see paragraphs [296]-[302], [559]-[572] below.

b. As to ACS[271], Mr Carswell's email was not sent to Ms Wilkinson, but nonetheless the contents did not undercut Ms Higgins' claims. The first email from Ms Barrons confirmed that a complaint of sexual assault had been made and there were discussions about managing the relationship with the Police. The idea that a junior staffer would thank a more senior staffer, in circumstances, where all staffers were about, win or lose the election, to go into deferral does not undercut how she felt Ms Brown was treating her. That Ms Brown was not prepared to go on record and the two documents were the best she could put forward to respond to the detailed questions did not contradict Ms Higgins.

c. As to ACS[272], Exhibit R718 does not evidence an intention to materially undercut what the Government said. The statements were given the prominence of the introduction to a segment. The applicant's submissions about the word "*insists*" reflect the view of applicant's lawyers not the average ordinary viewers. It may be difficult to recall but at the time the Government and Prime Minister were broadly popular due to their handling of the first wave of the Covid-19 pandemic. The presentation needs to be viewed in that perspective not with the benefit of history in the lead up to the May 2022 election and later perceptions of the Prime Minister.

d. As to ACS[273], it was directly put to Senator Cash whether she was "*dismissive, indifferent or uncaring*" towards Ms Higgins – the effect of Ms Higgins' words were put to Senator Cash.

e. As to ACS[274], the various responses from the AFP did not clear up the suggestion that CCTV footage had been withheld from the investigation – in fact the footage had never been provided despite repeated request to obtain a copy if Ms Higgins decided to proceed.

f. As to ACS[276]-[277], the applicant's submissions involve a characterisation of events that is disputed. Mr Meakin did not agree that Network Ten had to re-interview Ms Higgins. The commercial imperative given the business environment in which Network Ten operates and the expediency to publish due to the public interest in Ms Higgins allegations on 15 February 2021 are factors specifically recognised in s30(2)(e)-(f) that support, not detract, from the reasonableness of the respondents' conduct. This is particularly the case for Ms Wilkinson whose conduct must be assessed within the commercial environment of her employer and the fact that decisions as to timing are being made by the executives and outside her control.

g. As to ACS[279]-[280], this was plainly an edit Ms Wilkinson was not involved with or aware of, but nonetheless Ms Wilkinson was not directed to line 43 where the actions of the security guard who called in the office was already discussed. This was not an insidious edit as presented to Ms Wilkinson but an economical edit that did not change the information presented to the viewers.

The applicant's complaints about the edits and presentation of the Broadcast, illustrate both that Ms Wilkinson's conduct was reasonable and that complaint is not made about the Broadcast in respect of the applicant and the allegations of rape or that those allegations had been anything other than reasonably reported, given the self-evident public interest in an allegation that such a serious crime had been reported in the Australian Parliament.

F.3 Publication

262. After 2 February 2021, Ms Wilkinson from discussions with Mr Llewellyn that he and the other members of the production team were producing a broadcast from her 2 hours interview with Ms Higgins: Wilkinson 1 [108]. Ms Wilkinson understood and gave evidence that Mr Llewellyn was generating a rough paper edit after discussions with her and other production team members. The reality, unbeknownst to her, was that Mr Llewellyn was transforming without her assistance the raw footage from the interview into a near final product: see, for example, Llewellyn [230]-[254], [256], [262], [264]-[275], [281]-[283], [285]-[292], [294]-[295]. It was not until late 10 February 2021 that Ms Wilkinson was first sent the draft paper script: Llewellyn

[296].

263. On 2 February 2021, Ms Wilkinson made two initial suggestions asking Mr Llewellyn to try very hard to keep the line about *Parliament being the easiest [safest] place to rape a women* and the line that *I don't just think it's a Liberal thing, I think it's a Labor thing, I think it's an everyone thing*: Exs R327-R335. The former line was included in the broadcast but despite Ms Wilkinson's request to try very hard and Mr Llewellyn's apparent approval of both those suggestions, the second did not. She then made a second suggestion that she was really keen on "*all the stuff on the women in the office passing judgment on the women in the 4 Corners story*". Despite Mr Llewellyn's apparent agreement this third suggestion also did not make the broadcast.

264. Ms Wilkinson had expressed her belief in the first statement "*safest place to commit sexual assault*" on 28 January 2021 based on the policy and internal security at Parliament House: Ex R230. Mr Meakin responded "*Sad but true*". Mr Llewellyn then forwarded a link to the Australian Parliament website that Ms Wilkinson read about policing and the exercise of authority in Parliament: Ex R231; Wilkinson 1 [256]. That Parliament House was the safest place to commit sexual assault due to the policing and security was an entirely reasonable opinion and belief for Ms Wilkinson to hold and it was agreed to by Mr Peter Meakin, one of the most professional and experienced journalists in Australian and a particularly impressive witness.

265. The inclusion of all three suggestions would have made the broadcast more about the broader cultural issues of the treatment of women in workplaces generally and Parliament specifically irrespective of party and less focused on individuals.

266. On 2 February 2021 at 7:10pm, Mr Llewellyn sent an email seeking a transcript of the interview to Ms Karen Bunting copied to Ms Binnie, Ms Bree Valvo, Mr Campbell, Ms Nol, Mr Bendall, Mr Farley, Ms Smithies, and Mr Meakin, but not Ms Wilkinson: Ex R336: see also Exs R338, R342, R349. The exclusion of Ms Wilkinson from this email is striking as every other significant person involved in the production is copied, including Mr Meakin who a consultant at this stage, except for her. This is consistent with the approach by Mr Llewellyn, the production company 7PM and Network Ten from immediately after the 27 January 2021 meeting.

267. A communication on 3 February 2021 between Ms Thornton, Mr Campbell, Ms Binnie

and Mr Meakin (the senior producers) excluded Ms Wilkinson and were forwarded only to Mr Llewellyn: Ex R335.

268. Mr Llewellyn received a copy of part of the transcript of the interview on 3 February 2021 copied to Ms Smithies and Mr Farley that he forwarded to Mr Meakin: Exs R354-R355. He received and forwarded the remainder of the transcript also copied to Ms Smithies and Mr Farley to Mr Meakin the next day: Exs R364, R365, R366. On 4 February 2021, Peter Meakin responded to email correspondence between the production team discussing Ms Wilkinson copied to Ms Binnie, Mr Campbell, Ms Thornton, Mr Llewellyn, Mr Farley, and Ms Smithies: Ex R363. Mr Llewellyn received and forwarded links to the raw footage to Samuel Moncur, Ms Smithies and Mr Farley: Ex R367.

269. On 5 February 2021, Mr Meakin made the first suggestion for the intro to Mr Llewellyn: Ex R368.

270. On 5 February 2021, Ms Wilkinson received and read an email from Mr Llewellyn sent to Mr Campbell, Ms Thornton, Mr Farley, Ms Smithies, Mr Meakin, Ms Binnie, Mr Bendall, and Ms Wilkinson at 3:35pm about the wellbeing of Ms Higgins. It was unsurprising to Ms Wilkinson that Ms Higgins was in a fragile state: Wilkinson 1 [107]. Ms Wilkinson had previously interviewed many survivors of sexual assault. Ms Wilkinson found Ms Higgins anxiety ahead of broadcast to me to be completely understandable, expected and consistent in her experience with the behaviour of other survivors she had spoken to. Ms Wilkinson had warned Ms Higgins that there was likely to be intense public scrutiny of her allegations; however, Ms Higgins did not at any time communicate to her that she did not want to proceed with the broadcast.

271. Ms Wilkinson's defence and affidavit in this proceeding were prepared before Network Ten's discovery. Ms Wilkinson knew that her involvement, especially as to late changes to the final broadcast, was constrained by her extensive ongoing duties throughout the investigation and production period (see Wilkinson 1 [10]-[11]) but was unable to know until after discovery the extent to which she was excluded from relevant communications and meetings.

272. On 4 February 2021, Mr Llewellyn started work on the paper edit or script for the broadcast: Llewellyn [243]. Mr Llewellyn highlighted the parts on the transcript he

thought were the most important, what could be substantiated and what had been expressed well: Llewellyn [244]-[247]; Ex R220. He worked on an initial script in Word: Exs R862-R863.

273. On 4 February 2021, Mr Llewellyn sent a Google Doc link to his draft Part I script to Ms Binnie and Mr Meakin and the lawyers (Ms Smithies and Mr Farley): Ex R245; see also Ex R355 and R365 where he re-sent the link to Mr Meakin and Llewellyn [249].

274. On 5 February 2021, Mr Llewellyn sent a Google Doc link to his draft Part II script to Ms Binnie and Mr Meakin: Exs R385-R386. Mr Meakin responded on Saturday 6 February 2021, "Excellent work", and some comments on the draft script. Neither Ms Binnie, Mr Llewellyn, or Mr Meakin indicated that these draft scripts should be sent to Ms Wilkinson – although Mr Meakin stressed they needed lawyers' feedback and to send to Ms Smithies and Mr Farley. Mr Llewellyn confirmed in an email to Mr Meakin that Ms Smithies and Mr Farley were also looking at the script over the weekend: Ex R387.

275. Mr Llewellyn worked on the draft paper edit/script with Ms Binnie, Mr Meakin, Ms Smithies and Mr Farley but not Ms Wilkinson: Llewellyn [250]-[253].

276. On 5 February 2021, Ms Binnie sent an email to Mr Llewellyn, Mr Campbell, Ms Thornton, Mr Brad Walker, Mr Meakin, Mr Farley the Network Ten legal clearance email address to hold a meeting to discuss the story. Ms Wilkinson was not copied to this email sent to all other significant members of the production team: Ex R377; see also Ex R378-R383. In a response to this email Ms Binnie refers to conversations with Ms Wilkinson but does not copy her into the response: Exs R379 and R381. In Ex R381, Ms Binnie states that they will need to manage Ms Wilkinson's expectations.

277. On 6 February 2021, Mr Llewellyn sent an email to Mr Sameul Moncur asking him to start the edit of the broadcast from the draft script: Ex R392; Llewellyn [259]. The email was copied to Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies but not Ms Wilkinson. It appears from the email correspondence that Mr Darryl Brown started the edit on 8 February 2021: Ex R393.

278. On 8 February 2021, Mr Llewellyn and Mr Meakin and Ms Binnie communicated about the opening for the broadcast: Ex R396.

279. On 8 February 2021, Mr Llewellyn sent an email to Mr Antony Steele and Mr Isaac Madden requesting items of footage for the story, copied to Mr Moncur, Mr Brown, Mr Farley, Ms Smithies, Mr Sean Marsicovetere, Ms Binnie, and Mr Meakin: Ex R399.

280. What is clear from these communications is that it was Mr Llewellyn, Mr Meakin, Ms Binnie, Ms Smithies, Mr Farley and Mr Brown (as the editor) who primarily prepared, produced and published the broadcast. The response later that day was copied to the same people: Ex R409; see also Ex R434.

281. On 8 February 2021, Mr Llewellyn worked with Mr Brown to prepare the first cut of the broadcast: Llewellyn [267].

282. On 8 February 2021, Mr Llewellyn and Ms Wilkinson exchanged messages where Mr Llewellyn mentioned that his first paper edit was 25 min: Ex R403-R404. It was only after this that Ms Wilkison saw and made comment on the edit of the broadcast. Later that day Mr Llewellyn sent an email to Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies with a proposed opening and reference to a piece to camera Ms Wilkinson wanted: Ex R 407. Mr Meakin responded to Ms Binnie, Mr Farley, Ms Smithies and Mr Llewellyn commenting on a suggestion that Ms Wilkinson made about the opening that he did not agree with: Ex R407. Ms Wilkinson wanted to start the story with reference to Grace Tame and the Prime Minister that would have related the story to broader women issues in the Liberal Party and society generally that Ms Tame at that time represented. This approach would have reduced the focus on the individuals the subject of the broadcast. Mr Llewellyn in response dismissed Ms Wilkinson's suggestion out of hand: Ex R408: see also Ex R410. Ms Wilkinson's suggestion was discussed and dismissed behind her back.

283. On 8 February 2021, Mr Llewellyn had a discussion with Ms Maiden about their upcoming stories and plans for the week: Ex R411; see also Ex R413. Mr Llewellyn sent an email to Mr Campbell, Mr Meakin, Mr Farley and Ms Smithies about this conversation. Ms Wilkinson had not communicated with Ms Maiden in any way about Ms Higgins or her allegations during the course of the investigation - as far as she was aware Ms Maiden's publications were independently investigated and prepared: Wilkinson 1 [121]. Mr Campbell copied Ms Thornton but not Ms Wilkinson to this exchange: Ex R412; see also R414.

284. On 8 February 2021 at 5:43pm, the exchange continued when Mr Llewellyn replied to Mr Meakin copied to Mr Campbell, Ms Thornton, Mr Farley and Ms Smithies stating "Lisa still thinks we are looking at airing on Sunday. I've not mentioned Monday to her as such.": Ex R418. At 5:44pm, Mr Campbell copied Mr Campbell but not Ms Wilkinson to this ongoing exchange: Ex R419. The exchange continued to 6:49pm without Ms Wilkinson: Ex R462. Immediately afterwards, Mr Campbell asked Mr Brad Walker to arrange a meeting with Ms Smithies, Ms Thornton, Mr Llewellyn, Mr Farley, Mr Meakin, and Mr Bendall who were copied into the request: Ex R420. Ms Wilkinson was not notified that the Broadcast had been moved to Monday 15 February 2021 until Wednesday 10 February 2021: see Ex R482. Ms Wilkinson's views about the preparation of the Broadcast were lightly considered by the senior management, indicative of her true role in the Broadcast.

285. At 7:28pm on 8 February 2021, Mr Bown sent links to the part I work in progress edit of the Broadcast to Mr Meakin, Mr Llewellyn, Ms Binnie copied to Mr Moncur: Ex R421.

286. On 9 February 2021, Mr Campbell sent an email to Mr Bendall, Mr Llewellyn, Ms Binnie, Mr Meakin and Ms Bunting copied to Mr Farley notifying them that the story was now referred to as ENVIRO: Ex R424. Mr Campbell in the email notified that a person (Sean) was deliberately kept of the email as he was to kept unaware of the story as is everyone else in the organisation. Mr Llewellyn did not copy Ms Wilkinson into the response to this email: Ex R425; see also Ex R431. At 9:25am, Mr Llewellyn forwarded links to the draft script and Broadcast to Ms Binnie and Mr Meakin renamed to ENVRIO: Ex R426. At 9:28am, Mr Llewellyn sent an email to Mr Brown, Mr Moncur, Mr Steele and Mr Madden copied to Mr Farley and Ms Binnie about the ENVIRO name: Ex R427.

287. At 9:33am on 9 February 2021, Mr Meakin sent some an email with links to proposed trims to the draft edits to Mr Llewellyn and Ms Binnie: Ex R428. At 11:26am, Mr Llewellyn sent a link to copy of Part I of the Broadcast to Ms Binnie, Mr Meakin, Ms Smithies and Mr Farley: Ex R429. At 12pm, Ms Binnie sent Mr Meakin's promo suggestion to Ms Smithies, Mr Farley, Ms Thornton copied to Mr Campbell and Mr Llewellyn, but not Ms Wilkinson: Ex R430.

288. At 4:02pm on 9 February 2021, Mr Brown sent an email to Ms Binnie, Mr Meakin, Mr Llewellyn, and Mr Moncur with links to the draft work in progress video of Part II of the Broadcast: Ex R433; Llewellyn [281].

289. On 9 February 2021, Mr Llewellyn emailed Mr Meakin and Ms Binnie about using George Williams for the Broadcast: Ex R435. Mr Llewellyn sent an email about this to Ms Bree Valvo copied to Ms Binnie, Ms Bunting, Mr Moncur, Mr Farley and Ms Smithies: Ex R440.

290. On 9 February 2021, Mr Llewellyn emailed a link to the work in progress video for both Parts of the Broadcast to Mr Campbell, Ms Thornton, Mr Bendall, Mr Binnie, and Mr Meakin: Ex R436; Ex R437.

291. On 9 February 2021, Ms Wilkinson sent a message to Mr Llewellyn asking about any news on story length, changes, promo, date and content: Ex R441. Mr Llewellyn responded "it's also really compelling and looking good at a very early stage": Ex R442.

292. Later in that exchange, Mr Llewellyn identified to her that comment was being sought from Parliament Police, AFP, Senator Reynolds, Ms Brown, the Prime Minister's Office, Mr Finkelstein, Senator Cash, Mr Try, and the applicant Ex R449. At 10:43p, Mr Llewellyn sent a Google Doc link to a first draft of the requests to Mr Farley, Ms Smithies, Ms Binnie and Mr Meakin: Ex R453; Llewellyn [286]. On 10 February 2021, Mr Meakin responded to all the recipients stating there are too many questions: Ex R455.

293. On 10 February 2021, Mr Bendall suggests moving the 'safest place to rape a women" line to the end of the Broadcast for dramatic effect: Ex R462. Mr Meakin described this as a good idea. Ms Binnie, Mr Llewellyn, Mr Campbell and Ms Thornton were copied into this exchange but not Ms Wilkinson: Ex R462. This change was implemented. Neither Mr Bendall nor Mr Meakin were cross-examined about this change to the edit.

294. On 10 February 2021, Mr Campbell, Mr Bendall, and Ms Thornton made a decision that Ms Wilkinson would replace Ms Carrie Bickmore as the host for the first three segments on the Monday *The Project* on 15 February 2021: Ex R464. The management team clearly considered that Ms Wilkinson would have no relevant involvement in the

inevitable last-minute editing of the Broadcast that would be required given the extra commitment that those three preceding segments would add to Ms Wilkinson's workload on that day and in the preceding days.

295. It was not until 8:50pm that Ms Wilkinson was provided for the first time with either the draft script or the work in progress videos for the Broadcast edit: Ex R490-493. That night Ms Wilkinson immediately pored over the draft script and made recommendations to Mr Llewellyn: Exs R496, R500, R504, R508, R510, R512, R513, R515, R516, R517, R518, R519, R523, R525, R526. None of the recommendations that involved the insertion or deletion of words were adopted save one corrective edit relating to a date that was missed. The proposed edit that she considered her most crucial about an ambulance, doctor and police was ignored: Ex R526.

296. Mr Llewellyn finally sent his draft request for comment and interview to Ms Wilkinson at 12:00am on 11 February 2021: Exs R 533-534. Mr Llewellyn forwarded to Ms Wilkinson links to the work in progress videos for the Broadcast at 12:02am – shortly after receiving them from Mr Brown copied also to Mr Meakin, Ms Binnie and Mr Moncur: Ex R535, see also Ex R538. Mr Llewellyn forwarded the same links to Mr Campbell, Mr Bendall, Mr Farley, and Ms Smithies copied to Ms Binnie and Mr Meakin: Ex R537. Mr Llewellyn did not copy Ms Wilkinson into the emails with the broader production team and senior management.

297. Mr Llewellyn and Ms Wilkinson had discussed the importance of putting questions to those individuals at various times throughout the investigation and production: Wilkinson 1 [112]. Ms Wilkinson was aware from her discussions with Mr Llewellyn that to maintain the confidentiality and integrity of the investigation and to avoid an injunction against the broadcast, comment needed to be sought from those individuals close to airtime. Ms Wilkinson's view was that the allegations made by Ms Higgins were serious and everyone concerned should have an appropriate opportunity to reply. Ms Wilkinson was not part of the decisions as to the timing of the broadcast or when, given the need to maintain confidentiality, requests for comment were sent.

298. Ms Wilkinson became aware from Mr Llewellyn that it was decided that 2:30pm on Friday 12 February was a fair and reasonable amount of time to allow the individuals concerned to respond before the proposed broadcast at 7pm on Monday 15 February:

Wilkinson 1 [113]. In television, it is part of the producer's role to gather and check contact details of and seek responses from relevant persons associated with the broadcast. Mr Llewellyn informed her that he completed this task and she had no reason to doubt he had done so using his considerable talents and experience. Ms Wilkinson was made aware throughout the weekend and on Monday 15 February 2021 that responses were being received from almost all such persons and believed that Mr Lehrmann had also received a request to respond to the allegations to be aired in the broadcast.

299. Ms Wilkinson was aware from Mr Llewellyn that Mr Lehrmann was given until 10am on Monday 15 February 2021, two hours after Ms Maiden had planned to go to print, to respond to the questions: Wilkinson 1 [114]. Ms Wilkinson's knowledge was that senior management had agreed that if Mr Lehrmann had responded at any time before or even during the Broadcast, *The Project* would have included that response in the broadcast. Live news and current affairs television allows for that flexibility up until just before the conclusion of the broadcast.

300. Ms Wilkinson worked on the questions Mr Llewellyn sent her on 11 February 2021 using Google Doc to progress the draft questions: Wilkinson [115]. Ms Wilkinson was of the view that Mr Lehrmann should be given as much detail as possible about the allegations being made against him and she proposed amendments to the draft questions to be put to Mr Lehrmann to ensure that occurred. Ms Wilkinson added extra question to Mr Llewellyn's document on 11 February 2021: Ex R539. Mr Llewellyn responded the next morning (Ex R541) and said that he would go though the questions with the lawyers. Mr Llewellyn's response suggests that the other questions that Ms Wilkinson had added were going to be kept for potential interviews and not included in the request for comment. Ms Wilkinson's response at Ex R545 was an apparent acceptance of this advice from Mr Llewellyn and the views of the lawyers he referred in his email.

301. At all times Ms Wilkinson was of the view that Mr Lehrmann would not be named in the broadcast unless he chose for that to occur - or if he sought to be interviewed and effectively identified himself for that purpose: Wilkinson 1 [116]. Ms Wilkinson considered that there was insufficient information in the working drafts of the proposed broadcast she saw for audience members to identify him as the alleged perpetrator - other than those persons who were already aware of Ms Higgins' allegations against

him.

302. Ms Wilkinson was not copied in the correspondence about the final approval of the email request for comments on the timing, that were sent by Mr Llewellyn to Mr Farley, Ms Smithies, Mr Campbell, Mr Bendall, Ms Binnie, Mr Meakin and Ms Thornton: Ex R570-572, R583 particularly as to its coordination with Ms Maiden. Ms Wilkinson did not make the final decision as to the content, who to approach and timing of the approaches.

303. On 11 February 2021, Ms Binnie sent an email to Mr Llewellyn, Mr Campbell, Mr Bendall, Ms Thornton, Mr Farley, Ms Smithies, and Mr Meakin: Ex R542. Ms Binnie agreed with the new ending with the "easiest place" line. Mr Llewellyn had described Mr Bendall's ending as breathtaking. See also Ex R543 sending links to the same people with Mr George Williams grabs inserted into part II scripts, and Mr Meakin responded with comment on the grabs: Ex R544, and see Exs R546 and R547 as to Mr Llewellyn's response to the criticism. Ms Wilkinson is not copied to these discussions.

304. On 11 February 2021 at 10:51am, for the first time Ms Wilkinson is copied to an email relating to work in progress links for the Broadcast from Mr Llewellyn to Mr Campbell, Mr Bendall, Ms Thornton, Mr Moncur, Mr Meakin, Ms Binnie, Mr Farley, Ms Smithies copied to Mr Brown and Mr Heriot: Ex R549; see also Exs R551, R576.

305. Mr Llewellyn sent a message to Ms Wilkinson at 11:36am on 11 February 2021 stating: "At the moment, in short, I can't add anything in. I can only make cuts": Ex R557.

306. On 11 February 2021 at 10:23pm, Mr Wilkinson sent an email to Mr Brown, Mr Llewellyn, Mr Campbell, Ms Thornton, Mr Moncur, Mr Meakin, Ms Binnie, Mr Farley, Ms Smithies and Mr Heriot with recommendations for the edit having watched the work in progress video: Ex R584. The recommendations were to add content to provide better context to Ms Higgins' motivations and reference to Mr Finkelstein and were entirely appropriate and did not add to the defamatory sting about the applicant. As a result Mr Llewellyn, Mr Meakin and Ms Binnie, having previously ignored all her previous recommendations, worked on minor edits to accommodate these recommendations: see Ex R585, R586, R588, R589, R590, R592, R593. Ms Thornton responded to Mr Llewellyn that she also questioned if they had

asked the question about Ms Higgins motivations: Ex R587. Mr Meakin responded to Ms Wilkinson' original email confirming they had added the two elements she suggested: Ex R594.

307. After 2:40pm on 12 February 2021, Mr Llewellyn sent emails and text messages seeking comment to questions from Mr Ryan MP, Senator Smith, the AFP and individual AFP officers, Minister Reynolds, Ms Brown, Mr Kunkel, Mr Finkelstein, Minister Cash, Mr Try, and the applicant: Exs R619-R632. Mr Llewellyn received legal advice in relation to the requests for comment: Llewellyn [315].

308. On Saturday 13 February 2021, Ms Wilkinson was sent an email by Mr Brown also sent to Mr Meakin, Mr Llewellyn, Mr Campbell, Mr Bendall, Ms Thornton, Mr Moncur, Ms Binnie, Mr Farley, Ms Smithies, and Mr Heriot with links to the latest work in progress videos for the Broadcast. Mr Meakin then responded copied to Ms Wilkinson "Really, really good. I love the sensitive way the interview is edited": EX R 653.

309. On 13 February 2021, Mr Llewellyn informed Mr Brown, Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies of two further recommendations from Ms Wilkinson: Ex R654. At 10:00am, Ms Wilkinson responded to Mr Meakin's email stating "So happy with the new edit guys [emjoi] As Pete said, so wonderfully sensitive.. Thanks so much for making those changes too." and repeating two additional recommendations. Although the first recommendation about the presented of Ms Wilkinson was apparently approved by Mr Meakin (Ex R655) those changes were not implemented in the final script but resulted in changes to images used (EX R672). The second recommendation relating to Ms Higgins privacy was implemented in a substantially amended format. Mr Meakin discussed alternative wording to implement the second recommendation in an email sent to Ms Binnie, Mr Brown, Ms Smithies and Mr Farley: Ex R660.

310. On 13 February 2021, Mr Campbell passed on notes through Mr Moncur on the latest edit that were sent to Mr Brown, Mr Heriot, and Mr Llewellyn: Ex R706. Mr Brown sent an email to make the changes Mr Campbell recommended and the changes from Ms Wilkinson: Ex R661.

311. On Saturday 13 February 2021, Ms Wilkinson travelled by car from Sydney to Canberra and back with Mr Llewellyn to film a piece to camera (PTC) for insertion in the

investigation, as well as a promo to go to air at a time and date to be decided by Network Ten management: Wilkinson 1 [118]. Throughout that car trip she discussed extensively the investigation with Mr Llewellyn. Ms Wilkinson recalls that Mr Llewellyn told her on this trip about the attempts he had made the previous day to seek a response from Mr Lehrmann and other concerned persons. Ms Wilkinson was not copied into the emails between Mr Llewellyn, Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies about the approval of that PTC: see for example Exs R565, R569, R579.

312. On Sunday 14 February 2021:

a. Mr Llewellyn sent an email about the latest developments on the story that was only copied to Mr Meakin, Ms Binnie, Mr Bendall, Mr Campbell, Mr Moncur, Mr Brown and Ms Karen Bunting: Ex R673.

b. Ms Wilkinson recorded the most up-to-date version of the script as a voiceover for the investigation to be aired the following night. She understood that the final script wording would be updated, as needed, right up to the broadcast depending on any late-breaking additions or changes that were required: Wilkinson 1 [119(b)].

c. Ms Wilkinson viewed in one of the edit suites at Network Ten the most up-to-date version of the investigation with the editor, Darryl Brown: Wilkinson 1 [118(c)]. At that time, there were still a number of gaps in the edit to allow for a number of elements in the investigation to be added, the soundtrack was unfinished, and her voice track was not fully synced. The unfinished nature of what she saw was in line with her understanding of normal practice for a story that was still developing, including in relation to the responses we were waiting on from the individuals concerned.

313. Mr Llewellyn received a response from ACT Policing at 8:26pm on 14 February 2021 that he forwarded to Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies: Ex R705. Mr Llewellyn did not forward this response to Ms Wilkinson until 10:51am on 15 February 2021: Ex R760.

314. Mr Llewellyn received a response from Andrew Carswell by text message that he forwarded to Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies at 14 February 2021

at 10:42pm: Ex R713. Mr Meakin responded at 11:03pm about the CCTV: Ex R715. Mr Llewellyn responded at 8:20am the next day: Ex R723. This response was not forwarded to Ms Wilkinson until 10:50am on 15 February 2021: Ex R759.

315. By this time on 14 February 2021, Mr Llewellyn had spoken to Mr Carswell from the Prima Minister's Office who yelled at him for potentially naming Ms Fiona Brown: Llewellyn [354]. He exchanged messages with Mr Carswell to 15 February 2021 as he issued changing statements on behalf of the PMO, Minister Reynolds, and Ms Brown: see Llewellyn [363]-[365], [384]; Ex R717.

316. At 11:45am on 15 February 2021, Mr Llewellyn sent Mr Bendall, Mr Farley, Ms Smithies and Mr Meakin an updated from Mr Carswell: Ex R775. Mr Llewellyn forwarded the amended statement to Ms Wilkinson at 11:46am.

317. Ms Wilkinson's only recollection about responses or communications with the Prime Minister's Office is of Mr Llewellyn keeping her updated with the changing responses from the Prime Minister's Office up to and including 15 February 2021.

318. On 15 February 2021, Mr Meakin proposed additions as a result of the government responses sent to Mr Campbell, Mr Llewellyn, Mr Bendall, and Ms Binnie: Ex R718.

319. At 8:22am on 15 February 2021, Mr Llewellyn sent a link to the News Article to Ms Thornton, Mr Bendall, Mr Brown, Mr Farley, Ms Binnie, Ms Smithies, Mr Meakin, Mr Moncur, Mr Campbell, Ms Bunting, Ms Alexandria Funnell, Mr Mike Mulgrew, and Mr Chris Harrison but not Ms Wilkinson: Ex R725. Ms Wilkinson was sent links to the News Article separately at 8:36am: Ex R776.

320. At 10:43am on 15 February 2021 at 10:43am, Mr Llewellyn received a response from Minister Cash's office: Ex R756. He forwarded the response to Mr Meakin, Mr Farley, Ms Binnie and Ms Smithies at 10:48am: Ex R757. He forwarded the response separately to Ms Wilkinson at 10:50am: Ex R758.

321. Throughout Monday 15 February 2021, as one of the co-hosts of that night's episode of The Project, Ms Wilkinson was called in to do recorded voiceovers for the other segments to be aired on The Project, as well as Network promos to be aired that night not involving Ms Higgins' allegations: Wilkinson 1 [124].

322. Ms Wilkinson was informed across the day of responses which were arriving from some of those to whom Mr Llewellyn had sent questions. Ms Wilkinson continued to record updated voiceovers for changing elements of the investigation as required Wilkinson 1 [125]. As she was preparing as normal for that evening's broadcast, she was aware that the script was being altered to accommodate each of those responses and was communicating with Mr Llewellyn and others when possible about the content of those responses.

323. At 11:09am, Mr Llewellyn sent Mr Meakin a proposed voice over change as a result of Senator Cash's statement making it about Ms Higgins belief and that the Minister disputed her account: Ex R762. Mr Llewellyn sent Ms Wilkinson a message to record this new voice over: Exs R763, R764.

324. At 12:05pm, Mr Meakin, sent proposed closing remarks updated for the responses to Mr Llewellyn, Mr Bendall, Ms Smithies, Mr Farley, and Ms Binnie: Ex R780.

325. At 12:21pm, Mr Llewellyn received a response from the Australian Parliament presiding officers: Ex R782. Mr Llewellyn forwarded this response to Mr Bendall, Mr Farley, Ms Smithies, Mr Meakin and Ms Binnie at 12:28pm with comments: Ex R784. Mr Meakin responded to the comments querying which detectives had watched the footage: Ex R787, see also Exs R788 and R791. Ms Wilkinson was not copied into this exchange.

326. At 12:21pm, Ms Wilkinson sent an email to Mr Llewellyn proposing a change to the voice over about Michaelia Cash that was not adopted: Ex R783.

327. At 12:39pm, Mr Llewellyn received an updated statement from ACT Policing: Ex R792. Mr Llewellyn forward the updated response to Mr Meakin, Mr Farley, Ms Smithies and Ms Binnie copied to Mr Bendall at 12:45pm: Ex R793.

328. Ms Wilkinson asked Mr Llewellyn a number of times whether Mr Lehrmann had contacted him: Wilkinson [125]. Ms Wilkinson was told by Mr Llewellyn that he had sent follow-up communications that morning to Mr Lehrmann because he had not yet received any response: see also Llewellyn [373]-[375], Ex R756. Mr Llewellyn gave evidence that Ms Wilkinson specifically asked him whether the applicant had responded to the request for comment: Llewellyn [378].

329. Ms Wilkinson presumed that Mr Lehrmann had seen the emails and texts that Mr Llewellyn had sent to him, as well as Ms Maiden's article, and the promos and social media for The Project broadcast: Wilkinson 1 [126]. Ms Wilkinson anticipated that they would hear from him, or his lawyers, during the day if he wished to respond or go on the record. In order to prepare for the possibility that Mr Lehrmann might want to go on the record and participate in a sit-down interview in response to Ms Higgins' allegations, Ms Wilkinson wrote out questions by hand that afternoon as she was preparing for the Broadcast. Ms Wilkinson understood that the production team was also on standby to include in the broadcast any written response from Mr Lehrmann - even if it came at the last minute: Wilkinson 1 [127]; see Llewellyn [376].

330. Mr Llewellyn sent an email to Mr Meakin copied to Mr Bendall and Ms Binnie at 1:12pm about intro and back announces: Ex R803.

331. At 1:54pm, Mr Llewellyn sent an email to @ATV-7pm-Writers distribution list so the statements they had received could go on the Network Ten website for the night's program: Ex R805; Llewellyn [393]. The email was copied to Mr Farley, Ms Smithies, Ms Binnie, Mr Meakin, and Mr Bendall. A copy of the statements as appeared on the Network Ten website is Ex R41. Ms Wilkinson was not forwarded all these statements.

332. At 2:18pm, Mr Llewellyn sent an email to Mr Farley, Ms Smithies, Ms Binnie and Mr Meakin about a follow-up with the Australian Parliament presiding officers: Ex R809.

333. At 2:22pm, Mr Llewellyn sent an email to Mr Farley, Ms Smithies, Mr Meakin, Ms Binnie and Mr Bendall forwarding documents from Ms Brown on background: Ex R811. Mr Meakin in his evidence said that information provided on background was not the most reliable source of information in his view: T1960.11-13.

334. At 2:41pm, Mr Llewellyn sent Mr Meakin an email proposed a new opening: Ex R812. This intro was sent to Ms Ana Milutin, Mr Bendall, Ms Binnie, Mr Meakin, Ms Lagourette and Mr Brearley at 2:46pm. Mr Bendalll responded at 3:03pm with criticisms of the intro: Ex R819.

335. Ms Wilkinson also watched live Mr Morrison's comments about Ms Higgins' allegations during Question Time in Parliament that day. Some of those comments were included in the Broadcast. She also saw other parliamentarians including Senator

Reynolds and Senator Wong comment on the allegations in the Senate: Wilkinson 1 [125]. Mr Wilkinson believed that Ms Reynolds was lying about her knowledge of the alleged sexual before her meeting with Ms Higgins and Ms Brown in the same office: T1895.3-1896.8. Ms Wilkinson sent a message to Mr Llewellyn about this at 2:46pm: Ex R814.

336. Commencing from 2:50pm, Mr Llewellyn emailed Mr Marsicovetere, Mr Bendall and Ms Binnie about getting clips from Parliament for the Broadcast: Ex R815-R817, R827.

337. Ms Wilkinson attended the normal 3pm production meeting that afternoon, but she doe not recall the specifics of what was discussed: Wilkinson 1 [128]. Ordinarily those daily meetings involved all on-air talent going through all segments for that evening's broadcast. Typically this is when changes are made to existing scripts, talking points are canvassed and discussions are had about any late breaking news.

338. At 3:02pm, Mr Llewellyn sent work in progress videos to Mr Farley, Ms Smithies, Mr Meakin, Ms Binnie, Ms Thornton and Ms Wilkinson: Ex R818. Part III was sent to the same persons at 3:48pm: Ex R830. Mr Llewellyn forwarded the links to Mr Campbell at 4:06pm. There was no time or opportunity for Ms Wilkinson to watch these updated videos.

339. At 3:43pm, Mr Meakin proposed a further intro to Mr Llewellyn, Mr Bendall, and Ms Binnie: Ex R828. Mr Llewellyn responded he liked it: Ex R829.

340. Ms Wilkinson reviewed or was informed about responses as they came in from each person to whom Mr Llewellyn had sent questions but she was not sure that she saw all of them because of her other production commitments on 15 February 2021: Wilkinson 1 [129].

341. The reaction to Ms Higgins' allegations in Canberra that day emphasised in Ms Wilkinson's mind the significant public interest in this investigation. She did not become aware before broadcast of any complaint, comment or denial from Mr Lehrmann about Ms Higgins' allegations that, by early afternoon, had been widely publicised and commented on throughout the country both on News.com.au and elsewhere including in Federal Parliament. The evidence establishes that Mr Lehrmann was aware of the allegations, Network Ten's promos for the Broadcast from before

lunch and that he received media inquiries in the morning that could only be from Network Ten. This evidence is comprehensively detailed in Network Ten's submissions on which Ms Wilkison relies. Mr Lehrmann's denials of seeing the Llewellyn emails from 12 and 15 February before Broadcast should be rejected as false.

342. Mr Meakin at 4:08pm sent an email to Mr Llewellyn, Myles Farley, Ms Smithies Mr Bendall, and Ms Binnie proposed a changed line about CCTV footage: Ex R834. At 4:59pm, Mr Llewellyn sent links to the Broadcast with script to Ms Milutin, Ms Binnie, Mr Bendall, Mr Marsicovetere, Ms Lagourcette, Mr Brearley, Mr Meakin, Ms Smithies, and Mr Farley: Ex R837. Mr Llewellyn exchanged emails in response about finalising the video edit: see Ex R838-R841, R843.

343. At 5:22pm, Ms Binnie sent a Google Docs link to ATV-7pm-Writers email address copied to Mr Llewellyn and Mr Meakin with the Final approved script: Ex R842. The intro in this version, however, was different to that in the Broadcast.

344. At 6:22pm, Ms Binnie sent a further update to the script to Ms Lagourette, Mr Brearley, Mr Marsicovetere, Mr Bendall and Mr Farley: Ex R846, see also Ex R847 and later Ex R85- at 6:50pm.

345. At 6:29pm, Mr Llewellyn sent an updated response from the Australian Parliament presiding officers to Ms Smithies, Mr Farley, Mr Meakin, Ms Binnie, and Mr Bendall: Ex R848, see also Ex R849.

346. Ms Wilkinson was aware that draft paper and video edits were being made right up until just before broadcast at 7pm on 15 February 2021: Wilkinson 1 [131]. She tried to keep up with the script drafts and changes and made comments when possible until the afternoon of the broadcast. Her preparation for the live broadcast, however, meant that it was not possible, practical or reasonable to review each version being sent around that afternoon and evening or watch the multiple video edits that day. She relied upon the producers and executive producers to finalise the script and edits. She was in the studio in Sydney with the other co-hosts from shortly before 5pm and was in contact with other members of the production ream who were keeping me informed of significant developments.

347. On 15 February 2021, an edited version of Ms Wilkinson's interview with Ms Higgins

was broadcast by Network Ten as part of a special edition of *The Project*: Wilkinson 1 [131]; Ex 1. Ms Wilkinson was aware of and informed the viewing audience at the end of the broadcast that the full statements provided by the concerned persons who had responded to Mr Llewellyn's questions were published for immediate viewing on *The Project* website: Wilkinson 1 [133].

348. As Ms Wilkinson's role on *The Project* was as a host and presenter on the live broadcast and editing decisions were still being made up to and during her time in studio during rehearsals and the broadcast itself, Ms Wilkinson did not have the capacity to review or control the final audio and visual content of the Broadcast. The evidence overwhelmingly establishes that Ms Wilkinson did not have the capacity to control the final audio and visual content of the publication even if she had time to do so – all she could do, as she did, was make recommendations. The power to control the content and presentation of the programme, and the decision whether or not to broadcast, rested in Mr Bendall, Mr Llewellyn, Ms Binnie, and Mr Meakin and to some extent Ms Thornton, Ms Smithies, and Mr Farley. Ms Wilkinson knew that the decision to publish the Broadcast was subject to the combined review and approval of all those highly qualified and experienced professionals.

349. Ms Wilkinson relied upon the trusted and experienced producers of *The Project* she had been working with for the past four weeks, and previous years, to prepare and produce a product that was accurate, reasonable and fair. Given the extensive experience of the producers and executive producers and her previous experiences with them both at Network Ten and elsewhere she had no reason to doubt their ability to produce such a program.

349A. The applicant's submissions about Publication are misconceived:

a. As to ACS[285]-[286], the Government statement was given prominence and was not undercut by the Broadcast: see paragraph [261W(c)] above. Ms Higgins' response at lines 109, 133-135 were presented as her feelings. Inconsistently with the applicant's submissions on this point, Ms Higgins' claims about Senator Cash were included immediately with Senator Cash's response. Nonetheless, Ms Wilkinson did not have the means or capacity to affect these changes to the edit on 15 February 2021.

b. As to ACS[287]-[289], again these were edits about responses received throughout the afternoon that Ms Wilkinson did not have the means or capacity to affect changes to. She had to rely on her production team to draft an accurate script for her. The exact representation the Broadcast made was "We of course approached all the people named in our story, and all our requests for interviews were declined." That statement was substantially, if not entirely, true. The statement did not say that every person who was approached was asked for an interview. Irrespective of the view of Mr Meakin under cross-examination, most viewers would not have assumed that Mr Lehrmann was a person named in the Broadcast. In any event the applicant had ignored the request for an interview – it was inherently reasonable to include that representation about him.

c. As to ACS[290]-[292], these were further edits about a response received that afternoon that Ms Wilkinson did not have the means or capacity to affect the edit. The statement does not, and could not, claim that the CCTV footage was available to the sexual assault investigators but that it would be provided at their request. The statement claimed that AFP National viewed the security footage as part of the security breach not that sexual assault investigators had viewed the footage. The statement by Ms Wilkinson did not have any effect on the credence given to Ms Higgins' claim – the full statements were available on the website. To the contrary it showed the responsiveness of the AFP and Government to Ms Higgins' public allegations.

G EVENTS FOLLOWING PUBLICATION OF THE PROJECT PROGRAMME

350. On 24 February 2021 Ms Higgins gave a record of interview to police: Ex R884.

351. On 25 February 2021 the AFP sought the CCTV footage and it was released by the Presiding Officers the same day: Ex 60.

352. On 22 March 2021 Ms Brown gave a record of interview to police.

353. On 19 April 2021, the applicant gave a record of interview to police in which her told a series of lies: Ex 31. He was accompanied by Mr John Korn, because Mr Rick Korn had "*a conflict*".

354. On 16 May 2021, the second matter was no longer available for streaming.

355. On 26 May 2021 Ms Higgins participated in a second record of interview: Ex R885.

356. On 7 August 2021, the applicant was charged with sexual intercourse without consent in the Australian Capital Territory.

357. That day the third matter was removed from YouTube.

358. Also on 7 August 2021, Mr John Korn issued a statement to the effect that Mr Lehrmann denied any interaction with Ms Higgins.

H EVENTS OF RELEVANCE TO DAMAGES

359. On 5 April 2019, Mr Lehrmann was terminated for serious misconduct, including for occupational health and safety issues, due to his conduct in the early morning of 23 March 2019 in the Ministerial Offices of Minister Reynolds: Exs 23-26. This information was known to Minister Reynolds, Minister Hawke, Mr Chamberlain, Ms Brown, Mr Kunkel, Mr Wong and other unknown persons throughout the PMO and Liberal Party with such gossip reaching Ms Quinn and Ms Abbott.

360. On 15 February 2021 at 8:00am, the News Article was published. The News Article remained online from that time (and a second article published later that same morning describing the alleged rape in less detail Ex R761). It was online throughout the criminal prosecution of the applicant. On about 25 May 2023 a notation was added naming the applicant in both articles but stating that News.com.au does not suggest he was guilty of the criminal charge brought against him.

361. On 15 February 2021, at some time mid-morning or early afternoon, Mr Sharaz and Ms Higgins gave out her Timeline document naming Bruce Lehrmann to Canberra media including Rosie Lewis: T840.28-35.

362. At about midday the promos for the Project began airing.

363. On 15 February 2021 at 1:55-2pm, Ms Murphy, Mr Albanese and Prime Minister Morrison addressed Ms Higgins' allegations in the House of Representatives. Mr Morrison named Ms Higgins.

364. On 15 February 2021 before 2pm, Rosie Lewis of the *Australian* contacted British American Tobacco naming Mr Lehrmann as the subject of the News Article causing him to be suspended: T160ff.

365. On 15 February 2021 at 2:00-2:54pm, Senators Gallagher, Reynolds, Wong and Waters addressed Ms Higgins' allegations in the Senate. Ms Higgins is named: Ex R859.

366. On 15 February 2021 at 3:26pm, Senator Waters addressed Ms Higgins' allegations in the Senate. Ms Higgins is named: Ex R859.

367. On 15 February 2021 at 4:03pm, Ms Coker addressed Ms Higgins' allegations in the House of Representatives. Ms Higgins is named: Ex R858.

368. Afternoon 15 February 2021, the applicant informed close friends and girlfriend before The Project and engages Rick Korn as his lawyer: R36.

369. At 7pm on 15 February 2021 the Broadcast was published.

370. On 17 February 2021, *True Crime Weekly* published an online article and tweet naming the applicant: Exs 3 and 7.

371. Commencing on 19 February 2021ff, Kangaroo Court website published articles naming applicant: Exs 4-6.

372. On 20 February 2021, Rosie Lewis published an article on the front page of the *Weekend Australian* accusing the unnamed applicant of second assault: Ex R48.

373. On 21 February 2021, Rosie Lewis published an article on the *Australian* website accusing the unnamed applicant of third assault: Ex R49.

374. On 22 February 2021, Louise Milligan of the ABC published an article accusing the unnamed applicant of sexual touching: Ex R50.

375. On 22 March 2021, Four Corners broadcast "*Don't Ask, Don't Tell*" program with an interview with security guard Ms Anderson: Ex R51. This programme is damming of Mr Lehrmann, wholly accepts Ms Higgins' allegations without disclaimer, and highly prejudicial in so far as the criminal trial was concerned – given it included a key witness. That broadcast stayed online throughout the duration of the criminal prosecution and is

online to this day. Mr Lehrmann settled with the ABC and is happy with the settlement despite this publication still being available.

376. On 18 June 2021, the applicant admitted to British American Tobacco that at that time in his view "*these false allegations have not hindered the relation within my political network*": Ex R96.

377. On 7 August 2021:

(a) the applicant was charged with a charge of sexual intercourse without consent and named in mainstream media for the first time;

(b) Mr John Korn on behalf of the applicant made a public statement, reported in mainstream media, that the applicant denied any sexual activity with Ms Higgins (Ex R98);

(c) the Broadcast was no longer available from this date.

378. On 30 November 2021, the Jenkins report into Workplace Safety in the Commonwealth Parliament was released stating:

> "*In February 2021, Brittany Higgins courageously shared her experience. In this context, our Parliament as a workplace came under intense scrutiny, resulting in the Australian Government, with the support of the opposition and crossbench, establishing this Independent Review of Commonwealth Parliamentary Workplaces Parliament.*" (Ex R54)

379. On 8 February 2022, the then Prime Minister was reported by mainstream media for saying:

> "*I am sorry. We are sorry. I am sorry to Ms Higgins for the terrible things that took place here. The place that should have been a place for safety and contribution, turned out to be a nightmare. I am sorry for far more than that. All of those who came before Ms Higgins. And enjoyed the same, but she had the courage to speak and so here we are apologising.*"
>
> Ex R52. Online reports of the apology and words spoken by the Prime Minister remain online until today.

380. On 9 February 2022, Ms Higgins made statements to the National Press Club broadcast on the ABC that "*I was raped on a couch in what I thought was the safest and most*

secure building in Australia; in a workplace that has a police and security presence 24 hours a day, seven days a week": Ex R57. The broadcast of this speech remained online until after this trial commenced: Ex R79. It was therefore online despite the criminal trial being listed in June and then October 2022. It was a public retelling by Ms Higgins, the complainant of the rape allegation.

381. On 26 February 2022, Ms Maiden won the Gold Logie for the News Article*: 7NEWS Spotlight - – Trial and Error part 2*, Ex R44.

381A. On or before 25 May 2022, Network Ten was informed that it was nominated for a Silver Logie for the Broadcast: Ex X1 p40-41.

381B. Between 3 and 7 June 2022, Ms Wilkinson sought and received legal advice about the wording of proposed public statements that were answers given to questions about that nomination: Ex X1 pp28-31.

381C. In or about early June 2022, Ms Wilkinson was asked by Network Ten to deliver the speech if Network Ten won the Silver Logie for the Broadcast: Wilkinson 3 [4].

381D. By 15 June 2022, Ms Wilkinson drafted an acceptance speech and emailed it to Myles Farley, in-house lawyer, to review: Wilkinson 3 [5]. He suggested one change re-ordering some words: Ex X1 p44-46.

382. On 15 June 2022, Ms Wilkinson accompanied by Ms Smithies met with the DPP Shane Drumgold and Ms Wilkinson read out the part of her proposed Logies speech referring to Ms Higgins. She was not warned to not give the speech or in any way counselled against it: Wilkinson 2 [23]-[24]; see also email file note Ex X1 p50.

382A. On 15 June 2022, immediately after the Drumgold meeting, Ms Wilkinson showed and read out the speech to Tasha Smithies and Ms Smithies approved it upon making some minor revisions: Wilkinson 3 [7]-[10]; Smithies [34].

382B. On 19 June 2022 Ms Wilkinson provided her proposed acceptance speech to Network Ten for final review and approval, including a final review by the in-house lawyers: Wilkinson 3 [11]-[14]; Wilkinson 2 [26]-[29]; Ex X1 pp92-96.

382C. On 19 June 2022, Ms Thornton showed the speech to Ms Smithies, who reviewed it again and gave it legal clearance. Ms Thornton informed Ms Wilkinson of the approvals: as for paragraph 382B above; see also Smithies [38].

383. On 19 June 2022, Ms Wilkinson gave a speech at the Logie Awards after The Project, Network 10 received Silver Logie for the Broadcast: Ex 12.

383A. As to ACS[295]-[297]:

a. Ms Higgins' allegations were not mentioned in the speech; and

b. After that answer, the applicant did not call for production of the advice on which Ms Wilkinson relied upon in giving that speech. It was open to the applicant to do so and to test that evidence – bearing in mind that he bears the onus of establishing any facts adverse to Ms Wilkinson on this issue and the gravity of the allegations levied against her.

384. In the morning on 20 June 2022, on the 101.7 WSFM Jonesy and Amanda radio program broadcast the following words:

> "*And if you do any sort of reading into the Brittany Higgins story - how it was handled was dreadful, just absolutely dreadful you know. Just the very fact that she had to have a meeting in the very room that she was raped with her superiors in Sydney*": Ex R55.

385. On 20 and 21 June 2022 McCallum CJ heard an application to stay the criminal trial.

386. On 3 October 2022, the criminal trial of the applicant commenced.

387. On 26 October 2022, the jury in the applicant's criminal trial is discharged. Ms Higgins gave a speech outside Court: Ex 51.

388. On 2 December 2022, ACT DPP announced an intention not to proceed with the prosecution of applicant:

> *"I've made the difficult decision that it is no longer in the public interest to pursue a prosecution…*
>
> *There was a reasonable prospect of conviction and this is a view that I still hold today."*

389. On 7 December 2022 Ms Higgins tweeted about the criminal trial, criticising the process whereby the applicant was not subjected to cross-examination: Ex 53.

390. On 16 December 2022, the applicant gave concerns notices to:

a. Christopher Bendall and Network Ten about the Broadcast: Ex 13;

b. Samantha Maiden and News Life Media Pty Ltd about the News Article and second article: Ex R56 [8(e))]; and

c. Australian Radio Network Pty Limited about 20 June 2022 Jonesy and Amanda broadcast alleging it had caused serious harm to his reputation: Ex R55.

391. On 7 February 2023, the applicant commenced these proceedings and the News proceedings: Ex R57.

392. On 21 March 2023, the applicant gave a concerns notice to the ABC about the National Press Club broadcast: Ex R56 [9].

393. On 5 April 2023, the applicant commenced proceedings against the ABC about the National Press Club broadcast: Ex R56.

394. On 21 April 2023, the applicant signed a media exclusivity agreement with 7 Network – that includes the subject matter of these proceedings (clause 1(a)(ii)): Ex R38. It provided for the payment of his accommodation for 12 months, which an invoice demonstrates was $4,000 per fortnight, so $104,000 in total: Ex R37.

395. On 22 May 2023, an interview with Steve Whybrow SC was published in *The Australian* where he is reported as saying Ms Wilkinson's Logies Speech about Brittany Higgins kept Bruce Lehrmann out of gaol: Ex R53.

396. On 25 May 2023, the applicant settled the News proceeding on the basis that the News Article and second article remain online but with a notation and payment of $295,000: Ex R62. The settlement included a release of all related entities which include the publisher of the *Australian*.

397. On 4 June 2023, an interview with the applicant wad broadcast on Seven Network Spotlight program: Ex R43. During that episode the applicant gave an account of what occurred on the evening of March 2019 which was inconsistent with other versions. The further material was included:

Shane Drumgold (DPP): I've made the difficult decision that it is no longer in the public interest to pursue a prosecution.

Lehrmann: He took my opportunity for a not guilty verdict away from me. He then told Australia, oh I still could have won it. What the [bleep]

…

Bartlett: Mr Drumgold was the first witness to be called and Bruce Lehrmann was determined to be there.

Lehrmann: This is the guy who ruined my life. He commenced the prosecution based on no evidence and the cards are going to fall that way and he's going to have a very tough week Bartlett.

Bruce: was back in Canberra but this time it was the chief prosecutor under pressure…

Bruce: It was [bleep] outrageous. It was [bleep]. This entire case was [bleep] um and Drumgold was central to that. He kicked things off and we're finding out things that we should have had, we tried to ask for things, were denied them and it's just [bleep].

398. For the purpose of the broadcast below, in early August 2023 the applicant gave an interview with the Spotlight program (see Ex R39) in which he admitted:

3:29–4:13

Bartlett: Uh, do you intend on suing the ACT government?

Lehrmann: Absolutely, well, I– I intend on doing that, absolutely. I'm going to hold them to account. I mean, the ACT government needs to, um, sort their mess out here. I mean, the Territory is a joke at the moment, it's a joke.

Barlett: What would be satisfying for you. In terms of, what? Compensation? Are you looking for millions of dollars?

Lehrmann: Oh, [scoffs], n– well, it will, it will have to be a multi-million dollar claim, because my lawyers need to be paid, my criminal lawyers, I have outstanding fees. Um. My mum and my uncle, others who have supported me, um, need to be looked after. And then I need to consider, um, the very real possibility that I may never work again, not that I might have, um, 40 years of economic loss, I will never, ever be able to work again. So that needs to be factored in.

5:25–6:05

Barlett: Well, according to your own counsel, you were very close to being convicted, if it hadn't been, perhaps, for that Logies speech, and the delay in the trial, you would've been in more trouble.

Lehrmann: Well, it, it afforded us the opportunity to, um, dig deeper, go down the rabbit holes and find the golden nuggets, uh, and it's a credit to my legal team, um, Steve Whybrow and Rachel Fisher, um, the solicitor. Amazing job. I mean. We– The material, um, that they gathered, uh, in such a short amount of time, I, uh… The result–The potential result, if we–if they had not done what they did would've been catastrophic.

10:14–11:49

Barlett: This is–is looking like a–a very, very bad trainwreck.

Lehrmann: Mmm.

Barlett: So, thirteen Federal Police officers not– not at their workplace, some of them never coming back. Brittany Higgins says she will never work again. Fiona Brown has never come back to work again. Lisa Wilkinson looks never to go back to work again. You're virtually unemployable. Uh, is there anyone else? I mean, Drumgold's lost his job.

Lehrmann: Well, let's talk about Drumgold and the list of people you've just talked about. He is central to, um, to the– to the effects on all of those people you've just listed. It's, um… he's been central to, um, um, you know, allegations of, um, unethical treatment of Fiona Brown, um, how he treated Linda Reynolds, even how he's treated Miss Wilkinson. I mean, I'm against her in another set of proceedings, but how she was treated by the Director is also pretty bad. So, to varying degrees, we all– we've all been touched by, um, Shane Drumgold and his social justice crusade that he was on. He's not interested in, about, being a minister for justice and independence and getting to the truth of the case, he's interested in getting, in getting, um, in meeting his quotas of prosecuting sexual assault cases.

Barlett: So you think he's the root cause of all this trouble?

Lehrmann: Absolutely. This case should never have gone to trial. The police said that, and he's he he used it to ram it through the court system for his own agenda.

12:41–12:59

Lehrmann: Wake up, people need to wake up. The findings in this report are damning. They're so bad. This bloke was the director, a statutory office holder.

Barlett: Is there a hint of bitterness in there, too, Bruce?

Lehrmann: Yeah, well, I'm, I'm fired up. Because, he–he– he stuffed my life, like, he– [laughs], this is all because of him.

20:05–20:15

Barlett: So you say she's telling a fib and Samantha Maiden swallowed it?

Lehrmann: Oh, absolutely, I mean, Samantha Maiden was ground zero here, really. I mean, Samantha Maiden got the story first.

399. On 13 August 2023, that second interview with the applicant was broadcast on Seven Network *Spotlight* program: Ex R44.

400. On 14 August 2023, the applicant gave live interviews on:

a. Sunrise breakfast program: R46; and

b. Sharri show (Sharri Markson) on Sky News Australia: Ex R45.

401. During the Sunrise programme the following exchange occurred:

BARR: There's so much out there, and the trouble is, everyone in the country has a view on this which you would know.

LEHRMANN: Yep

BARR: Everyone talks about it

LEHRMANN: Yep

BARR: Ahh, at every coffee shop, at every dinner party, at every barbeque.

LEHRMANN: Yep, I get all the looks, yep.

BARR: Do you?

LEHRMANN: Yep, yep.

BARR: What do you get?

LEHRMANN: Ohh you know, just side eyes and things like that but, at, by the same token, I get a lot of support as well, umm, I've been quite heartened to see a lot of people, umm, particularly, ahh, since the brilliant work the Spotlight team have done, ahh, in just the, Liam Bartlett has been like a dog with a bone with this stuff and I think it's changed a lot of people's views and I think they've got the courage now to come up.

BARR: You know, you (Cut off by SHIRVINGTON)

SHIRVINGTON: What do people say to you, what, when they come up?

LEHRMANN: Ohh, just, just that I've been hard done by, they don't express a view either way and I'm not expecting that, but everybody is entitled to the presumption of innocence, and everybody is entitled to a fair trial.

402. On 21 November 2023, the ABC proceedings settled with removal from YouTube of the Press Club Speech and payment of $150,000 but no agreement to remove the 4 Corners program or the Louise Milligan article from February 2021 alleging a fourth complainant: Ex R63.

402A. As to ACS[304]-[308]:

a. For the reasons explained below in Section I, the number of persons who identified Mr Lehrmann was limited and not extensive. The matters the applicant propounds in ACS[318]-[356] do not support the bold contention that the Court should infer extensive identification to a large and indeterminate number of people. This is particularly problematic because there were independent mechanisms in mainstream media and social media on 15 February 2021 arising from the political controversy of that day independent of the Broadcast. The applicant could have attempted to identify republications or gossip attributable solely to the Broadcast but instead attempts to rely upon all mentions of the allegations as attributable to the second in time publication. As the applicant bears the onus on this issue the Court should not draw the favourable inferences the applicant seeks in these circumstances.

b. The applicant's claim about the effect on him from the publication including as to hurt to feelings and reputation must be assessed in light of the independent causes of that hurt resulting from the News Article, discussion of Ms Higgins' allegations in Parliament on 15 February 2021, the dissemination by Ms Higgins and Mr Sharaz of the dossier naming him, Ms Rosie Lewis' inquiries, the media coverage unrelated to the Broadcast following the News Article, and his suspension from British American Tobacco: see paragraphs [617]-[622] below.

c. The applicant's claims about his hurt to feelings and reputation based on his own evidence must be assessed in light of his dishonesty as a witness and his failure to call evidence from close family and friends: see paragraphs [615]-[616] below.

I IDENTIFICATION

I.1 Relevant Principles

General principles

403. To succeed in relation to the matters, the applicant must establish that the matter identified him: *Plymouth Brethren (Exclusive Brethren) Christian Church v the Age Company Ltd* (2018) 97 NSWLR 739 (***Plymouth***) at [58] (McColl JA, Beazley P agreeing). Since the matters do not name the applicant, it must have been such as reasonably in the circumstances to lead persons acquainted with the applicant to believe that he was the person referred to: *Plymouth* at [60] (McColl JA, Beazley P agreeing).

404. The principles and authorities relating to the identification of a plaintiff/applicant in a defamatory publication in which they are not named were summarised by Bryson JA (with whom Mason P and Tobias JA agreed) in *Gardiner v Nationwide News Pty Limited* [2007] NSWCA 10 at [43] – [46], and [50] and more recently by Bromwich J in *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845 and *Hanson v Burston* [2022] FCA 1235 at [106]-[110] (*Hanson v Burston* [2023] FCAFC 124 allowed an appeal against judgment on different issues and did not challenge these principles).

405. If the person referred to in the matter could be one of a small group different principles apply. A statement which imputes misconduct against some members of a clearly defined group may be capable of identifying every member of the group. However, where the group is identified but only one member is impugned, then the imputation that is capable of arising is that there are reasonable ground to suspect each member of the group (not that each such member has engaged in the misconduct).

405A. As to ACS[311]-[313], Simpson JA in *Fairfax Media Publications Pty Ltd v Pedavoli* (2015) 91 NSWLR 485 at [81] recognised that questions of remoteness may arise as to whether or not the applicant has been identified as a matter of fact. Questions of remoteness can only be answered with reference to the pleaded case.

Small group identification

406. In *McCormick v John Fairfax & Sons Ltd* (1989) 16 NSWLR 485 the publication alleged that one person of a class of three was responsible for perverting the course of justice and for dealing with stolen property. Where there was nothing in the matter itself which pointed to the plaintiff, Hunt J held it was incapable of conveying an imputation of guilt because the matter did not impugn every member of the class: at 91C. See also *Channel Seven Sydney Pty Ltd v Parras & Ors* [2002] NSWCA 202 at [30] per Mason P with whom Handley JA and Ipp AJA agreed; *Lane & Hurley v Channel Seven Adelaide Pty Ltd* [2008] SASC 180 at 67 per Lander AJ

407. This issue was considered by the Full Court in *Re Arnold Mann v the Medicine Group Limited* (1992) 38 FCR 400. In that case the appellant was an ACT medical specialist who used the bulk billing system and was known to advocate its use amongst medical practitioners generally. The respondent published a newspaper which circulated to medical practitioners nationally and in which it printed a letter to the editor that severely criticised doctors who bulk-billed. The respondent lived in Tasmania and had no association with the ACT. At the time of publication there were 810 doctors practising in the ACT – twenty-five to thirty percent participated in bulk-billing and the appellant was the only bulk-billing specialist.

408. The appellant commenced action for defamation in respect of publication in the ACT only and called ACT medical practitioners who read the letter and thought of the appellant. Wilcox J (with whom Neaves J agreed) noted (at 402-403):

> *Whatever view might be taken in the High Court of Australia, in the light of these authorities this Court should act on the basis that a statement concerning members of a class generally is actionable at the instance of a member of that class only if the member is able to point to circumstances which would indicate to a reasonable reader or hearer that the statement refers particularly to him or her. A plaintiff does not discharge that onus merely by establishing that one or more people thought of the plaintiff when they read or heard the statement. In Knupffer there were only 24 members of the British branch of the defamed group, the Young Russia Party. For about three years before publication of the defamatory article the appellant had been head of the British branch. Four witnesses gave evidence that, when they read the article, their minds went to the appellant. Yet the House of Lords unanimously held that the publication did not defame the appellant. In Dowding the trial judge refused to act on the evidence of three witnesses, whose probity was not in question, that they had understood the offending advertisement as referring to the plaintiff. The Full Court upheld that refusal.*

> *In the way in which the law has developed, it seems clear that, in considering whether a statement about a group is defamatory of an individual member of the group, much will depend upon the precise nature of the statement. For example, in Knupffer at 123 Lord Russell of Killowen referred to the content of the subject newspaper report. He pointed out that the named organisation had some thousands of members, world-wide. He said that all that could be said of the article was that a reader who knew that the appellant was a member of the organisation "would know that he was one of the numerous individuals from whose ranks Hitler hoped at some time to nominate a puppet fuehrer in Russia". No doubt it would have been defamatory to say that a particular person was likely to be selected, or suitable for selection, by Hitler as a puppet fuehrer. It is less clear that it was defamatory (even in 1941) to say that a particular individual was a member of an organisation out of whose ranks a puppet fuehrer might be selected. Mere membership of the organisation might not indicate that the particular individual has the necessary odious qualifications for selection as a puppet fuehrer.*

409. In *Christiansen v Fairfax Media Publications Pty Limited* [2012] NSWSC 1258, after reviewing the authorities (at [20]-[32]), Nicholas J specifically considered the question of the type of imputations that are capable of being carried when an unnamed person amongst a small group is accused of misconduct in a publication. The allegation in the matter was that one of three casino managers had been dismissed for possessing pornographic material. His Honor found that the imputation capable of arising was that there were reasonable grounds for suspecting that the plaintiff engaged in the misconduct: at [35].

I.2 Whether the Applicant was Reasonably Identified

Pleaded case

410. The applicant's pleaded case on identification is that (CA.2, p7-9):

(a) he worked for Minister Reynolds in a position senior to Ms Higgins;

(b) he attended Friday night drinks organised by Ms Higgins on 22 March 2019;

(c) he started packing up his belongings on the Tuesday morning following a meeting with Fiona Brown;

(d) he was working in Sydney in February 2021;

(e) he was the person alleged by Ms Higgins to have sexually assaulted her; and

some viewers of the Broadcast were aware of the matters in (a)-(e).

411. An alternative case is propounded (at (h)) by reference to classes of persons – inter alia persons who worked at APH and friends and family. However, no particulars have ever been provided as to the facts known by those persons to enable such identification or to make it reasonable.

412. Particulars were sought by the second respondent about this allegation on 14 February: CA.5, p2 [1(iv)].

413. By letter dated 27 February the only further particulars given were to name:

(a) Lyndon Biernoff of Toowoomba for the first matter;

(b) Paul Farrell of Vaucluse for the second matter;

(c) David McDonald of Toowoomba for the third matter,

and otherwise "*the issue as to identification…will be the subject of our client's outlines of evidence/affidavits to be served in the proceedings*": CA.7.

414. Mr Biernoff and Mr Farrell did not give evidence and Mr McDonald gave evidence, but not about the third matter. Mr McDonald's evidence, such as it is, is dealt with below.

415. The assessment of reasonableness cannot occur without disclosure (whether by direct evidence or by inference based on evidence) of the facts known to the viewers who so identified the applicant, whether they are individuals or a class. So to the extent persons in Canberra who viewed the Broadcast believed it was Mr Lehrman, whether that identification was reasonable in the circumstances depends on what additional information to form that view. The same goes for his friends and family.

416. A further alternative case is put (at (i)), that the Broadcast "*invited readers to speculate about the identity of the person*" the subject of the allegations, and readers had already read social media posts and articles published on the internet which named the applicant.

417. Particulars were sought by the second respondent about this allegation on 14 February: CA.5, p2 [1(v)], [1(vi)]. No particulars were provided other than to, again, state "*the issue as to identification…will be the subject of our client's outlines of evidence/affidavits to be served in the proceedings*" and otherwise it was not a proper request for particulars: CA.7.

418. His claim is therefore limited to a case that requires him to establish that:

(a) viewers of the Broadcast;

(bi) identified him as the person the subject of the allegations of Ms Higgins by reason of their knowledge of the facts in (a)-(e); or

(bii) identified him as the person the subject of the allegations of Ms Higgins by reason of the invitation to "speculate" and read social media posts and articles published on the internet which named the applicant; and

(d) that identification was reasonable in the circumstances.

419. The particulars for the second matter (**10Play website**) and the third matter (**YouTube publication**) were pleaded in identical terms as those for the Broadcast: [6] and [8] CA.2, pp9-15.

<u>What is not pleaded</u>

420. Mr Lehrmann has not pleaded any reliance on persons who read the News Article. His case does not include persons who already knew or believed that the allegations concerned Mr Lehrmann because of the content of that publication made about 11 hours before the Broadcast and conversations that then occurred or other information that came to light that day, before the Broadcast.

421. This is not a case the respondents came to meet. It was plainly a tactical decision made by the applicant to exclude such persons given he sued the publishers of the News Article at the time the pleading in this matter was filed (**News proceedings**). He alleged in the News Proceedings that he was identified by the Article and was "*greatly injured in his personal and professional reputation*" as a result: Ex R56, CB.1126. The applicant settled the News proceedings in relation to the Article, and is very happy with

the outcome, which includes leaving the Article on the internet: T508.24-509.14; Ex R62.

422. Related to the issue in the preceding paragraphs, evidence was adduced in the cross-examination of Ms Higgins that Mr Sharaz handed out a timeline that named Mr Lehrmann to journalists shortly after the publication of the News Article and before the Broadcast: T840.10-842.11. To the extent that viewers of the Broadcast understood that the allegations made by Ms Higgins were about Mr Lehrmann because of that document, this cannot be sheeted home to the respondents. It is also not pleaded that anyone identified the applicant because of the Article, read with the timeline handed out by Mr Sharaz.

423. The applicant has not pleaded the alternative, small class identification case explained in *Christiansen*.

424. No amended pleading has been propounded to rely on these matters.

Evidence

425. No evidence was adduced that any person, who identified the applicant, watched the 10Play website or the YouTube publication. There is no evidence to found an inference that any such persons exists. The causes of action in relation to those publications should fail.

426. The applicant has adduced evidence from 3 witnesses who were cross-examined about the issue:

(a) Karly Simone Abbott: CC.1070; T36 ff.

(b) David John McDonald: CC.1069; T54 ff.

(c) Kathleen Quinn: CC.1073; T111ff.

<u>Karly Abbott (CC.1070)</u>

427. Ms Abbott worked at APH from March 2011 until February 2020 when she established her own business with Kathleen Quinn in early 2020, being a consulting business that specialises in government relations and strategic communications: [5].

428. During her period at APH, Ms Abbott worked with the applicant from 2016 when he was working for George Brandis until he left in March 2019: [6]. She worked with Ms Higgins at APH from October 2018 until Ms Abbott left in February 2020 at which time they were both working for Senator Cash.

429. In July 2019, while she was working at APH, Drew Burland told her that "*there was an incident involving Brittany and Bruce in the office, and Bruce was fired.*": [9(c)].

430. In October 2019 when she was working for Senator Cash, Ms Abbott became aware that a story was about to break concerning Ms Higgins and she assumed that it related to what Mr Burland had told her in July: T41.7-35.

431. On the morning of 15 February 2021 Ms Abbott received a text message from Ben Dillaway which included the link to the News Article and then the text "*it was your mate*": CB.1147; T42.1-45.34. She identified Mr Lehrmann after her interaction with Mr Dillaway that morning and before she saw the Broadcast: T37.1-5. The reasons that Ms Abbott therefore gives in [9] must therefore be no more than confirmatory matters, rather than the reasons why she identified the applicant. Relevantly in relation to those issues, she knew that the applicant was not a senior advisor, which was a description used a number of times in the Broadcast.

432. Her evidence does not fall within the pleaded case other than perhaps as a person who knew that the applicant was the person that Ms Higgins had accused. Her evidence did not rise to that level.

433. In any event, any damage to Mr Lehrmann's reputation was done by the publication of the News Article in so far as Ms Abbott was concerned, for which the applicant has already been happily compensated.

<u>David John McDonald</u>

434. David McDonald has known the applicant since he was a chid in 2008 and until he moved in 2014 at age 18: [4]; T55.34-46. He kept in touch with the applicant through the applicant's mother but did not otherwise have much interaction with him.

435. Despite the content of his affidavit, it is plain that the only thing that Mr McDonald knew about the applicant when he watched the Broadcast on 15 February 2021 was that

he worked for Minister Reynolds: T56.44-57.22. He plainly was not aware of the specific matters in paragraph 6 (that appear to be somewhat of "*a cut and paste*" for each of the identification affidavits).

436. Mr McDonald agreed that he did not know how many such other men worked in Minister Reynold's office and that all he knew was that Mr Lehrmann was one of those people: T57.24-44.

437. Mr McDonald did not identify the applicant from watching the Broadcast in any sense within the pleaded case. His evidence was the identification of Mr Lehrmann as one of a class, the size of which he was not aware. At law therefore, the defamatory meaning of rape (as opposed to reasonable grounds to suspect rape) was not capable of being carried to Mr McDonald. That is not within the applicant's pleaded case.

Kathleen Quinn

438. At the time of Broadcast Kathleen Quinn had been running her business with Ms Abbott since February 2020.

439. She had also met the applicant in about 2016 at APH ([3]) and also knew Ms Higgins: [4].

440. Although it is not referred to in her affidavit, Ms Quinn agreed that she read the News Article that morning, before seeing the Broadcast: T114.34-115.24.

441. Ms Quinn had been told by Ms Abbott:

a. about the Drew Burland conversation in mid-2019;

b. what happened in Senator Cash's office relating to Ms Higgins in October 2019; and

c. Ms Abbott's interactions Drew Burland had told her that morning: T113.16-34.

442. Ms Quinn says that she identified the applicant upon watching the Broadcast, despite knowing that the applicant was not a senior advisor ([6(a)]) because she knew that he had moved with Minister Reynolds from her former portfolio ([6(b)]) and she knew he had left APH in March 2019 and moved to Sydney: [6(c)].

443. In fact none of those reasons are why she identified the applicant – she already believed it was him being referred to before Broadcast because of the events referred to above. Like Ms Abbott, in so far as damages are concerned, Ms Quinn's identification has already been the subject of compensation.

Other witnesses

444. Nicky Hamer watched the Project because she worked at Parliament that day and previously received a media inquiry from Ms Maiden: T1065.1-39. She was aware of the Article before that and during that day before the Broadcast she had heard his name mentioned as the person involved, amongst other names: T1065.41-45; T1068.42-47.

445. Lauren Gain watched the Project and knew it was about Mr Lehrmann. That is because she received a message a few days earlier from Ms Higgins informing her of the allegations: Gain [62]; Ex 46.

446. Austin Wenke became aware of the allegations by Ms Higgins the morning of the Broadcast, he saw News Article: T1124.46-1125.38. He identified Mr Lehrmann from that article as the subject of the allegations by Ms Higgins because he remembered his night at the Dock. He heard chatter around the building, but did not hear the applicant's name. He only saw a part of the Broadcast: T1126.7-8.

447. Nikita Irvine spoke to Ms Higgins on 27 or 28 March 2019 and was told by Ms Higgins at that time of her allegation against the applicant: T1180.15-1181.5. When she saw the media on the morning of 15 February 2021 she already knew who Ms Higgins was accusing: T1206.1-36.

448. Ben Dillaway read News Article and knew that the allegations were about the applicant because he had been told by Ms Higgins on 26 March 2019 that it was him. He sent a text to Karly Abbott with a link to the Article. He also received a text from journalist Geoff Chambers about the News Article and was asked who it was about. Mr Dillaway said it was the applicant: T1276.4-45. No one he spoke to knew that the alleged perpetrator was Mr Lehrmann: Dillaway [10] CE.1146.

449. The applicant has already been compensated by his settlement of the News proceedings for any damage caused to his reputation by the publication of the rape allegation to each

of these persons who each read the News Article first, and identified him by reasons of that publication.

Messages from friends

450. The applicant also gave evidence that he received a number of messages from friends. When one looks at each of the messages in paragraph [24] of the applicant's affidavit (CC.1071) they are incapable of giving rise to any inference that such persons watched the Broadcast and identified the applicant upon watching it. If each person is in fact referring to the rape allegations (which is doubtful), they may have only read the News Article and not viewed the Broadcast.

451. Even if they do, the basis upon which it occurred is unknown, therefore the court cannot assess the reasonableness of such identification.

True Crime Weekly and Kangaroo Court

452. Mr Lehrmann claims he saw a True Crime Weekly article that was published on 17 February 2021 while in Northside Clinic: Ex 3; T482.42-43. This is not evidence of reasonably identification based on the content of the Broadcast. At the time Mr Lehrmann thought that the True Crime Weekly article was "a silly Twitter article" and silly: Ex R36 p33564.

453. There is a reference in his evidence to some material published by "*Kangaroo Court*": Ex 4-6. No contemporaneous document evidences that he saw that material in 2021. They were printed in July 2023. In any event, "*Kangaroo Court*" plainly identified Mr Lehrman having read True Crime Weekly: see Ex 4. The article identified that True Crime Weekly had identified Mr Lehrmann not from the Broadcast but from several source. This is not evidence of reasonable identification by either author based on the content of the Broadcast. "*Kangaroo Court*" is known to this Court and the Supreme Court of New South Wales: see *Porter v Australian Broadcasting Corporation* [2021] FCA 863 at [62]-[74] per Jagot J and *Seven Network (Operations) Ltd v Dowling (No 2)* [2021] NSWSC 1106 at [64]-[73] per Rees J and the other cases involving "Kangaroo Court" cited within. There is no evidence that any person who watched the Broadcast reasonably identified Mr Lehrmann because of this material.

Tweets

454. The applicant claimed in his oral evidence that he saw hundreds of tweets that named him. When asked about this, he conceded that he and his lawyers did searches for such tweets for the proceedings and they could only locate one: T484.33-485.33. The lone tweet was by the author of True Crime Weekly publicising his article on 17 March 2021: Ex 7.

455. The Court should not accept that there were any tweets that named Mr Lehrmann in connection with Ms Higgins' allegations before he was charged in August 2021. If they existed they could have been retrieved for the proceedings like the True Crime Weekly tweet. In any event, even if they did exist it is impossible to know without the dates and content that such identification was by persons based on reasonable identification from the Broadcast

Removal of social media

456. The applicant gave evidence under examined that he suspended his social media accounts shortly after 15 February 2021 to minimise fall-out on his girlfriend and friends and use of his photographs and such: T475.44-26. The available inference from the Court was that he suspended his accounts to avoid being identified. His Twitter account was removed in January due to offensive emails he received to his Hotmail account: T161.37-162.6; Ex 32.

Group identification

457. The applicant has not excluded the likelihood that viewers of the Project reasonably identified him as one of small group of possible persons that Ms Higgins was accusing during her interview broadcast during the Project. In fact there is direct evidence that others in the office could have met the description.

458. Jesse Wotton worked for Senator Reynolds in March 2019 when she was sworn in as Minister for Home Affairs and previously worked with Senator Reynolds when she was Assistant Minister for Home Affairs: [4]-[9] CC.1084.

459. Mr Wotton gave evidence that he watched the Broadcast in February 2021 with his wife, who said to him "*Oh my goodness, that sounds like you*.": [48] CC.1084. Views

on his LinkedIn spiked after the program aired in the days after the Broadcast – 2,650% compared to the previous week: [49] CC.104; Ex R58, CB.922.

460. The applicant had a LinkedIn profile at the time of Broadcast: T83.31-36. He gave evidence that there was a drastic change and that he deactivated his LinkedIn profile in the days following Broadcast – but that change was a decrease in activity: T83.36-84.6.

461. He presumably had the ability to obtain the activity report that Mr Wotton has produced in relation to his LinkedIn account, described above. He has not done so on an issue in which he bears the onus, despite asserting based only on his oral testimony and the inference is that there was no spike.

Responsive submissions

461A. As to ACS[318]-[356], the applicant's case on identification is now in effect that viewers learnt through some subsequent or earlier inquiry that the applicant was the person Ms Higgins accused in the News Article and the Broadcast. Notwithstanding the attempt to suggest that the Broadcast included more detail that allowed identification, these particulars were unsurprisingly almost entirely abandoned in closing submissions to prove "extensive" identification. The significance is that the Broadcast did not, on the evidence and case now promulgated, add more to the identification of the applicant as the alleged perpetrator than the publication of Ms Higgins allegations prior to Broadcast. The difficulty for the applicant is his asserted case is not based on knowledge of verifiable facts but on the claim that unknown viewers must have participated in gossip and rumour or read internet publications making unverified and inherently unreliable claims. Whenever someone is not named, the Internet, Twitter particularly, is replete with speculation including that supported by apparent evidence, often completely false, about the identity of the unnamed person. It is not possible for the Court to be satisfied, given the onus is on the applicant, that any of asserted indeterminate identification occurred, that identification was reasonable, or that the method by which the applicant was identified was not too remote.

J SECTION 25 DEFENCE

J.1 Relevant Principles

462. The second respondent maintains a defence under s25 of the *Defamation Act* 2005 *(*NSW*)* (**DA**):

> **25** ***Defence of justification***
>
> *It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.*

463. "[S]ubstantially true" means true in substance or not materially different from the truth: s4 DA.

464. It is the natural and ordinary meaning of the word rape at the time of publication that is relevant to the assessment of substantial truth, not the legal meaning.

J.2 Whether Mr Lehrmann Raped Ms Higgins in Parliament House in 2019

Actus reus

465. The Court should believe Ms Higgins' evidence that she woke up to find Mr Lehrmann having sex with her.

466. In any event, by reason of the objective circumstances set out above, the Court should find that Mr Lehrmann (and perhaps Ms Higgins) went to APH with the intention of having sex and did have sex.

467. The version put forward by Mr Lehrmann is inherently improbable and inconsistent with his admissions to Ms Brown that "*they chatted*" and she was "*happy when I left*".

468. When Ms Higgins disclosed what occurred in the following days she said "*I remember him on top of me*" and "*I really don't feel like it was consensual at all*" and "*I just think if he thought it was okay why would he leave me there like that*" – clearly indicating that sexual intercourse occurred.

469. In fact, it makes no sense that the applicant just left Ms Higgins there at 2:30am when

they arrived there together after an evening socialising. He rushed out, without returning his girlfriend's calls. If nothing untoward had occurred, why did he not wake her up so she could leave too?

470. Further, the first time that Ms Higgins was told by Samantha Maiden in August 2021 that the applicant was denying any sex at all, you can hear the genuine shock in her reaction to that information. That recorded phone call is consistent with her belief that sexual intercourse occurred, and the only issue would be on the question of consent.

Lack of consent

471. Ms Higgins gave evidence that she did not consent to sex with Mr Lehrmann – she was not challenged on that evidence.

472. By reason of the toxicology evidence, the Court should find that Ms Higgins was incapable of consent due to her level of intoxication.

Knowledge of lack of consent

473. If the Court accepts that Ms Higgins was unconscious when sex was initiated by Mr Lehrmann, then he plainly knew Ms Higgins was not consenting.

474. Ms Higgins gave evidence that she told him to stop, repeatedly. That is also, if accepted, evidence of knowledge of lack of consent, or at least withdrawal of consent. Thus the continuation of intercourse by Mr Lehrmann would thereafter amount to sexual assault.

475. Alternatively, if Ms Higgins' account is not accepted, he had knowledge of her lack of consent by the fact that he observed her drinking heavily throughout the night, saw her fall over and observed her going through security and being unable to put on her shoes.

476. If the sexual intercourse had been consensual, then it is likely that she and Mr Lehrmann would have left together as they arrived together. Leaving her there, semi lucid is indicative of his knowledge that Ms Higgins did not consent to what he had just done.

Recklessness as to consent

477. Recklessness is something lesser than knowledge and involves a failure to consider if the person is consenting. This could involve a failure on the part of Mr Lehrmann to

take some step to ensure that Ms Higgins was consenting.

478. If the Court concludes that Mr Lehrmann was aware that Ms Higgins was intoxicated and failed to consider whether she was capable of consent, this would amount recklessness.

479. Again, rushing out is consistent with this state of mind – leaving her there naked, drunk and alone without a care as to her well being or comfort.

J.3 Whether Carried Imputations are Substantially True

480. The second respondent alleges that each of the imputations pleaded in paragraphs [4], [6] and [8] of the applicant's SOC does not differ in substance from an imputation "*The Applicant raped Brittany Higgins in Parliament House in 2019*" and each is substantially true: second respondent's Defence (**Defence**) at paragraph [12].

481. The second respondent understands from the Agreed Issues and submits that the primary and only question on justification is question 4: "*Whether the Applicant raped Brittany Higgins in Parliament House in 2019?*"

482. The respondents are only obliged to prove the material parts of the imputations substantially true. The differences in the imputations are a rhetorical flourish and do not add to the sting of the imputations.

482A. As to ACS[386], there are no material differences between the applicant's imputations that add to their seriousness. Further:

a. As to Imputation D, the rhetorical flourish on this imputation about Ms Higgins being left half-naked on the couch is plainly substantially true.

b. As to Imputation C, the applicant does not make any submission how the bruise adds the to the sting of a rape allegation.

c. As to Imputations A and B, recklessness involves a state of mind and knowledge as to the sufficient chance in the circumstances known to Mr Lehrmann that Ms Higgins was not consenting. A finding that the applicant was reckless involves such a serious finding about the applicant's state of mind and knowledge that the rhetorical flourish as to what Ms Higgins may have said or did during the

rape does not add to the sting of the imputation. In the circumstances of this case those additional details would not further hurt the applicant's reputation if the Court is satisfied he raped Ms Higgins. The sting of each imputation is the allegation of rape.

K SECTION 30 DEFENCE

K.1 Relevant Principles

Confession and avoidance

483. Positive defences at common law in defamation are pleas in confession and avoidance: see *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at [2], [8] and [16] per Brennan CJ and McHugh J (fair report, justification or qualified privilege).

484. A plea that defamatory matter was published on an occasion of qualified privilege is predicated upon the existence of a defamatory imputation to which the privilege attaches and to speak of qualified privilege attaching to a non-defamatory statement is to ignore this fundamental characteristic: see *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [135] per Gummow J. The court cannot determine the plea without determining meaning to characterise the subject matter of the defamation. See also *Australian Broadcasting Corp v Chau Chak Wing* (2019) 271 FCR 632; [2019] FCAFC 125 at [19] in relation to justification, honest opinion, or common law comment.

485. The defences in ss25-33 including s30 in their language and structure, like the common law, grant a defence by way of confession and avoidance, which is to say that it assumes that the applicant's case is established (that is, it confesses the defamatory meaning), but seeks to avoid liability on the nominated statutory basis.

Defamatory matter

486. The subject matter of the defamation, in relation to statutory defences other than justification and contextual truth is expressed as the *defamatory matter* not the *defamatory imputations*: see the chapeaux to each of ss25 to 33 *Defamation Act 2005*, c.f. ss25-26 where : see also *Feldman v Polaris Media Pty Ltd (as Trustee of the Polaris Media Trust) (t/as The Australian Jewish News)* (2020) 102 NSWLR 733; [2020]

NSWCA 56 at [66] per Emmett AJA, *Massoud v Nationwide News Pty Ltd; Massoud v Fox Sports Australia Pty Ltd* (2022) 109 NSWLR 468 at [194] per Leeming JA that confirm the *defamatory matter* not the defamatory imputations were the subject of the consideration of the s31 defence.

487. In *Massoud* at [195], however, the NSW Court of Appeal held that the assessment of whether "*the matter was an expression of opinion of the defendant rather than a statement of fact*" is made on the matter published:

> *insofar as it conveys the defamatory imputation .... Thus when seeking to apply the distinction between fact and opinion, the words that matter are the question "true or false — Josh Massoud was a respected Rugby League journalist?", and the answers "false", "massively false", the further question "why false?" and the further "answer" which was in fact provided by the host: "because he was never respected". However, those words are not assessed in a vacuum. It is necessary also to have regard to the way in which they were used in the publication, including its visual and aural aspects.* [underline added]

488. The construction and approach given by the NSW Court of Appeal in *Massoud* is plainly correct because each of the defences from ss25-33 are defences of confession and avoidance and the phrase *defamatory matter* in the chapeau to s31 (and ss25-30, 32-33). That part of a *matter* that does not give rise to a defamatory imputation does not need to be defended. *Matter* is a defined term in the DA except in so far as the context or subject-matter otherwise indicates or requires: *Interpretation Act 1987* (NSW) s6. As recognised in *Massoud*, it may be only a part, not necessarily all, of a *program, report, advertisement or other thing communicated by means of television, radio, the Internet or any other form of electronic communication* that is defamatory of the applicant to which the defence is directed; see also in terms ss25-26 that are directed towards the substantial truth of that part of a matter that is defamatory of the applicant. In ss28-29, the *defamatory matter* may be *contained within* a public document, a fair copy, summary or extract of a public document, a fair report, a fair copy, summary or extract from an earlier published report, that is the *defamatory matter* may be only part of what is defined as *matter* in s4.

489. Accordingly, the *defamatory matter* is that portion of the *program, report, advertisement or other thing communicated by means of television, radio, the Internet*

or any other form of electronic communication that is defamatory of the applicant.

490. Ms Wilkinson relies on the defence in s30 of the DA which relevantly provides (pre-1 July 2021):

> *(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the "recipient") if the defendant proves that:*
>
> *(a) the recipient has an interest or apparent interest in having information on some subject, and*
>
> *(b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and*
>
> *(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.*
>
> *...*
>
> *(3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:*
>
> *(a) the extent to which the matter published is of public interest, and*
>
> *(b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and*
>
> *(c) the seriousness of any defamatory imputation carried by the matter published, and*
>
> *(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and*
>
> *(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and*
>
> *(f) the nature of the business environment in which the defendant operates, and*
>
> *(g) the sources of the information in the matter published and the integrity of those sources, and*
>
> *(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and*
>
> *(i) any other steps taken to verify the information in the matter published, and*
>
> *(j) any other circumstances that the court considers relevant*

491. Section 30 must be interpreted in light of s8 of the DA that reads a "*person has a single cause of action in relation to publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter*" and that the defence is one of confession and avoidance. The *defamatory matter* described throughout the DA is the matter the subject of the action in defamation that is the matter that is defamatory of the person bringing the action. The defences only come to be considered in relation to a pleaded matter if, and only if, the Court finds that the matter was defamatory of the applicant.

492. The applicant now concedes that viewers of *The Project* broadcast had an interest or apparent interest in having information on the subjects particularised in paragraph 13 of Ms Wilkinson's Defence. He also concedes that the respondents published the broadcast in the course of giving viewers information on those subjects. Therefore, the applicant concedes that the respondents have made out the elements of the defence in s 30(1)(a)-(b), and the only element in dispute is s 30(1)(c), whether Ms Wilkinson's (and in relation to the first respondent only, Network Ten's conduct) in publishing the broadcast was reasonable.

493. As a matter of statutory construction based on s8 and s30, what is left for Ms Wilkinson to establish is that her conduct in publishing the *defamatory matter about the applicant* was reasonable in the circumstances. This construction is reflected in s30(3): *[i]n determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances* [underline added]. The obvious consequence is that notwithstanding s8, a matter (that is for relevant purposes, a *program … communicated by means of television, [or] … Internet*) such as the broadcast may give rise to different causes of action in defamation for different persons identified within, and that those persons may have different defences with different prospects to the same matter including as to s30.

494. Section 22 *Defamation Act 1974* (NSW) was the predecessor to s30. Section 22(1) provided, inter alia, throughout while enforce:

> *(1) Where in respect of matter published to any person:*
>
> *(a) the recipient has an interest or apparent interest in having information on some subject,*
>
> *(b) the matter is published to the recipient in the course of giving to the recipient*

information on that subject, and

(c) the conduct of the publisher in publishing the matter is reasonable in the circumstances,

there is a defence of qualified privilege for that publication.

495. Section 22 was introduced based on the recommendations in Law Reform Commission (NSW) Report 11 – Defamation (1971) (**1971 Report**). The report explained that:

> *Section 22 makes the interest or apparent interest of the recipient the determining factor. If there is an appropriate interest or apparent interest, and the conduct of the publisher in publishing the matter in question is reasonable, then the section would give a qualified privilege. The section puts a test of reasonableness in the place of the common law doctrines of interest or duty in the publisher. The section is intended to supplement the common law in this field and not to hinder its development by judicial decision.*
>
> *The requirement of reasonableness in section 22 (1) (c) will allow a wide range of matters affecting the publisher to be considered. ...*

496. Section 22 was clearly intended to widen the scope of qualified privilege: see *Austin v Mirror Newspapers Pty Ltd* (1985) 3 NSWLR 354 at 359 per Lord Griffiths on behalf of the Privy Council. The Privy Counsel at 354C, 363G in that case, consistent with a defence of confession and avoidance, identified that the starting point of the assessment of reasonableness under s22(1)(c) is the facts on which the attack (that is the defamatory meaning or allegation as opposed to the matter) was based, which the jury has found were not true.

497. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 the High Court considered the requirement of reasonableness under s22 of the 1974 Act, finding that it involved the following assessment (at 574):

> *Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.* (emphasis added by underlining)

498. This passage of *Lange* was applied in relation to s30 by the Full Federal Court in *Herron v HarperCollins* (2022) 292 FCR 336 at [171] and [177] per Rares J (with whom Wigney and Lee JJ agreed); and at [251] per Wigney J (additional observations).

499. In *Griffith v Australian Broadcasting Corporation* [2010] NSWCA 257, the NSW Court of Appeal dismissed an appeal against a judgment finding the ABC acted reasonably under s22(1) in publishing the matter (a *4 Corners* television program segment) about Mr Grifith but acted unreasonably in publishing the same matter about Mr McCartney-Snape. The Court per Hodgson JA (Basten JA and McClellan CJ at CL agreeing) explained at [116]-[120]:

> *[117] Dealing with the first issue, I note that s 9(2) of the Act identifies the cause of action as being one in respect of the defamatory imputation for the publication of the matter that makes the imputation. What has to be shown to be reasonable under s 22(1)(c) of the Act is the conduct of the publisher in publishing that matter, in its character as making the imputation complained of; not, in my opinion, the matter in all of its aspects.*
>
> *[118] This view is supported by the following passage from Morgan at 383:*
>
> [extract from Morgan removed]
>
> *[119] This passage indicates that the relevant conduct is the conduct of a defendant in publishing the particular imputation, not its conduct in publishing the whole matter; so that different results might eventuate in relation to different imputations: [authorities removed].*
>
> *[120] Accordingly, in my opinion, unreasonableness of the respondents' conduct in publishing matter in its character of making imputations against Mr Macartney-Snape does not constitute relevant unreasonableness so as to defeat a defence under s 22 to the appellant's claim. It may conceivably have some factual relevance to the question whether the respondents have proved they have acted reasonably in publishing the matter in its character as making the imputation against the appellant, but not otherwise. In my opinion, the appellant has not identified any respect in which the primary judge should have taken unreasonableness as against Mr Macartney-Snape into account in this way, but did not do so.* [underline added]

500. Section 30(1) was enacted in almost identical terms to s22 save the substitution of *defamatory matter* for *matter* and immaterial rearrangement. Consequently, *Griffiths* is authority that under s30 the publisher need only prove that its conduct in publishing the matter, insofar as it makes the imputations pleaded and found to be carried, that is defamatory of and concerning the applicant giving rise to the pleaded cause of action in defamation, that is the *defamatory matter*; not, the matter in all of its aspects. This

is the essence of a plea of confession and avoidance and consistent with the approach taken to other statutory defences including justification, fair report and honest opinion and at common law.

501. Although the DA introduced s8 that means there is a single cause of action for *defamatory matter* the subject of s30, those changes do not affect the authority of the underlying ratio of *Griffiths* to s30, particularly as it relates to the relevance of the publishers' conduct in publishing parts of the pleaded matter that are not defamatory or are defamatory of a person other than the applicant. Ms Wilkinson, in making these submissions does not suggest that s30 is anything other than a defence to the entire matter or that the publisher's conduct in publishing the whole of the matter may not have some conceivable factual relevance to the assessment in respect of the *defamatory matter*.

502. In 2002, subsection (2A) was introduced in s22. The chapeau to that new subsection read: *"In determining for the purposes of subsection (1) whether the conduct of the publisher in publishing matter concerning a person is reasonable in the circumstances, a court may take into account the following matters and such other matters as the court considers relevant".* The differences between s22(2A) and s30(3) are of form not substance. The clear intention in NSW, where this action is brought, was to maintain a similar test for reasonableness when the DA came into force in the context of a uniform national scheme.

503. On 12 November 2002, Mr Stewart MLA gave the 2nd reading speech introducing subsection 2A:

> *The current section 22 of the Defamation Act provides a defendant with a defence of qualified privilege when certain conditions are met, including when the conduct of the publisher was reasonable in the circumstances. There are currently no criteria set out in the Act to provide guidance on what is reasonable, and I appreciate that publishers need a practical means of interpreting what is and is not reasonable. Accordingly, the bill adds section 22 (2A) to the Act, which sets out the factors that a court may take into account when determining whether a publisher has acted reasonably. These factors include the extent to which the matter published is of public concern; the extent to which the matter published concerns the public functions or activities of the plaintiff; the seriousness of the imputations; the extent to which the matter distinguishes between facts,*

suspicions and allegations; whether it was necessary for the matter to be published expeditiously; the sources of the information and the integrity of those sources; and any attempts to verify the information or to get the plaintiff's side of the story.

504. Mr Stewart also explained that these amendments were *introduced to give effect to the principal recommendations of the Report of Attorney General's Task Force on Defamation Law Reform* released July 2002. That report recommended:

> *A proposed statutory list: The Task force believes that the 'reasonableness requirement' in s22 should have attached to it a statutory set of factors to be considered by a court in determining whether the publication is protected by qualified privilege. Such a list ought to make clear to decision makers that it is not necessary for a publisher who wishes to invoke qualified privilege to prove that they had objective grounds for believing in the truth of the matter published. A clear Australian analogy for such a statutory list would be the 'best interests' factors in Family Law Act 1975 (Cth), s 68F(2)).*
>
> *Recommendation 13: Section 22 should be amended to include a set of factors for courts to consider when assessing reasonableness. That list should provide as follows:*
>
> *[insert into section 22]:*
>
> *In the determination of whether the conduct of the publisher is reasonable under sub-section (1), the following matters are relevant:*
>
> - *The extent to which the subject matter is a matter of public interest;*
> - *The extent to which the matter complained of concerns the performance of the public functions or activities of the plaintiff;*
> - *The nature of the information;*
> - *The seriousness of the imputations;*
> - *The extent to which the matter distinguishes between proven facts, suspicions and third party allegations;*
> - *The urgency of the publication of the matter;*
> - *The sources of the information and the integrity of those sources;*
> - *Whether the matter complained of contained the gist of the plaintiff's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the plaintiff; and*
> - *Any other steps taken to verify the information in the matter complained of.*
>
> [underlined added]

505. Subsection 22(2A) when enacted provided the following matters a court may take into account and such other matters as the court considers relevant:

a. the extent to which the matter published is of public concern,

b. the extent to which the matter complained concerns the performance of the public functions or activities of the persons,

c. the extent to which the matter published distinguishes between suspicions, allegations and proven facts,

d. whether it was necessary in the circumstances for the matter published to be published expeditiously,

e. the sources of the information in the matter published and the integrity of those sources,

f. whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the person,

g. any other steps taken to verify the information in the matter published.

506. The amendments also introduced the objects to s3 of the *Defamation Act 1974* on the following terms:

3 Objects of Act

The objects of this Act are as follows:

(a) to provide effective and appropriate remedies for persons whose reputations are harmed by the publication of defamatory matter,

(b) to ensure that the law of defamation does not place unreasonable limits on the publication and discussion of matters of public interest and importance,

(c) to promote speedy and non-litigious methods of resolving disputes concerning the publication of defamatory matter,

(d) to promote the resolution of proceedings for defamation before the courts in a timely manner and avoid protracted litigation.

507. The substantially same objects were introduced in the DA:

> *3 OBJECTS OF ACT*
>
> *The objects of this Act are--*
>
> *(a) to enact provisions to promote uniform laws of defamation in Australia, and*
>
> *(b) to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance, and*
>
> *(c) to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter, and*
>
> *(d) to promote speedy and non-litigious methods of resolving disputes about the publication of defamatory matter.*

508. The consequences of these changes were intended again to widen the scope of the statutory qualified privilege defence. Subsections (b) and (c) identify that the objects of the DA and the *Defamation Act 1974* are to balance freedom of expression against the rights of persons whose reputation is harmed by the publication of defamatory matter.

509. An intended consequence of the 2002 changes was to confirm that it was not necessary for a publisher who wishes to invoke qualified privilege to prove that they had objective grounds for believing in the truth of the matter published. These changes were again enacted into s30.

510. The list of factors for determining whether the respondent's conduct was reasonable in s30(3) is an illustrative list of relevant considerations, not a prescriptive checklist: see *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733; [2020] NSWCA 56 at [99]-[104] per White JA.

511. A statutory qualified privilege defence arises in circumstances where a mistake may have been made and reasonableness does not equate to "*a counsel of perfection, given that the predicate on which it operates is that the imputations in question are not true and that the conduct of the defendant is accordingly not beyond criticism*": see *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at [228] per White J.

512. The matters listed in s30(3) are not to be regarded as "*a series of hurdles to be negotiated by a publisher before [it can] successfully rely on qualified privilege*": *Hockey*, per White J at [228], quoting *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44; [2007] 1 AC 359 at [33].

513. In a media context, s30 (or its predecessor s22 of the *1974 Act*) has succeeded on a number of occasions, for example: *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541; [2020] NSWCA 352 (Meagher and White JJA, Simpson AJA upholding notice of contention); *Feldman v Polaris Media (No. 2)* [2018] NSWSC 1035 (McCallum J) (upheld on appeal (2020) 102 NSWLR 733; [2020] NSWCA 56); *Griffith v ABC* [2008] NSWSC 764 (Kirby J) (s.22 upheld on appeal even though truth finding overturned [2010] NSWCA 257 per Hodgson, Basten and McClellan JJA); *Field v Nationwide News* [2009] NSWSC 1285 (Johnson J) (s.22); *Millane v Nationwide News Pty Limited* [2004] NSWSC 853 (Hoeben J); *Seary v Molomby* [1999] NSWSC 981 (Sully J); *Barbaro v Amalgamated Television Services Pty Ltd* (1985) 1 NSWLR 30 (Hunt J) (upheld on appeal (1990) 20 NSWLR 493 per Hope AP, Samuels and Priestley JJA).

514. The NSW Court of Appeal in *Bailey v WIN Television NSW Pty Ltd*, in upholding a notice of contention to find that the s30 defence was established in a television broadcast context, outlined the principles at [67]-[89], [123]-[127] (Simpson AJA, Meagher and White JJA agreeing) that apply to determining that defence. That decision confirmed the law reform intention of ss 22(2A) under the *1974 Act* to make clear that it was not necessary for the publisher to prove that they had objective grounds for believing in the truth of the matter published to establish the defence: see *Bailey* at [65].

515. The test for whether a person is a publisher for the tort of defamation at common law is low. The common law rule as to publication, that also applies under the DA, has long captured all persons who have intentionally assisted in the process of publication and that all degrees of that intentional participation in the process of publication constitutes publication for the tort of defamation: see *Fairfax Media Publications Pty Ltd v Voller* (2021) 273 CLR 346; [2021] HCA 27 at [88]-[89] per Gageler and Gordon JJ, see also at [30]-[32] per Kiefel CJ, Keane and Gleeson JJ; see also *Callan v Chawk* [2021] FCA 1182 at [25] per Halley J.

516. The test for publication recognises degrees of participation or a spectrum of conduct that make a person a publisher. Section 30 on its terms provides a potential defence to each person who is a publisher based on their degree of participation. A person who is a publisher at common law does not fail to establish the statutory defence only because their degree of participation is such that they could not conduct themselves in respect of the publication in a manner that would reasonably be expected of other publishers in different circumstances and degrees of participation. Similarly, a publisher's defence does not fail merely due to the unreasonable conduct of another publisher to the same matter.

517. Due to vicarious liability, or other contractual obligations between the publishers of a matter in defamation proceedings, s 30 defences are often, rightly or wrongly, pleaded and run for all respondents based on the conduct of the publisher with greatest degree of participation and control over the defamatory publication. The greater the participation and control, the more difficult it is to establish that publishers' conduct was reasonable in the circumstances. The persons controlling the litigation have generally adopted an all or nothing approach to running s30 defences to defamation claims, and accordingly the courts have had limited opportunity to rule on the application of the s30 defence to the different degrees of participation in publication of the same matter.

518. The Full Court in *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336; [2022] FCAFC 68 (at [159]-[160] per Rares J, at [254] per Wigney J, at [305] per Lee J), however, recognised that the role of a publisher may lead to different evidence and considerations as to reasonableness of their conduct. Rares J identified that the publisher's knowledge and state of mind about the reliability and reputation of the book's independent author was likely to be significant. In that case, had HarperCollins adduced evidence of its state of mind about the recognised skill and experienced of the Walkley-award winning author and what they knew about the years of interviews and meticulous research, as recorded on the book cover, then they may have proved they acted reasonably in publishing his book with limited or no additional checks or review.

519. The Privy Council in *Austin* at 363C-D described different considerations in assessing the reasonableness of a newspaper in publishing an article that depended on their legal relationship with the writer.

520. In the similar context of a s29A defence, Lee J in *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 at [387] recognised that a journalist who published an article, the second respondent, was entitled to rely upon the work from another journalist, approved by the editor and published by the ABC the previous year that was linked to his article.

521. In the circumstances of a television production, involving many parts and responsibilities, it is important to consider the circumstances of the actual role and involvement of publisher in the publication. The ability of a production company to prove they acted reasonably with respect to an in-house production involving producers, executive producers, editors, presenters and other production staff, who may each individually be publishers at law of the broadcast, will inevitably be significantly harder than establishing that one or more of those employees or agents who are publishers acted reasonably in their discrete role and circumstances as a publisher.

K.2 Interest or apparent interest

522. These elements are no longer in issue due to belated concessions by the applicant.

K.3 Reasonableness

Applicant not named

523. The producers made a deliberate decision to not name the applicant in the Broadcast. Given the seriousness of the allegations that was an reasonable decision in the circumstances.

524. Mr Llewellyn also ensured that Ms Maiden did not intend to name the applicant in the News Article – ensuring that the number of persons who identified the applicant was limited to a small group.

525. Ms Wilkinson considered, from the working drafts of the broadcast that she saw, that there was insufficient information to enable members of the audience to identify Mr Lehrmann unless they were already aware of Ms Higgins' allegations against him: Wilkinson 1 [116].

526. The fact that Mr Lehrmann was not named has a significant effect on the consideration

of reasonableness of the publishers – including because the audience to which he was identified would be very limited.

Public interest

527. The subject matter was of extreme public interest - involving serious criminal allegations about the conduct of a male Ministerial staffer in Parliament against a more junior female staffer.

528. The timing of the broadcast, following the reporting of Samantha Maiden in the print media (at 8am that morning, some 11 hours before publication) and the consequences of that reporting, including heightened public interest, commentary about the allegations that day in Parliament by the Prime Minister and an interest by the public to view Ms Higgins' video interview to form their own assessment of the veracity of her allegations.

Role in publication

529. The question of the reasonableness of Ms Wilkinson's conduct in publishing the matters must be assessed in the circumstance of Ms Wilkinson's actual role in the publication.

530. The source approached Ms Wilkinson and she then brought forward Ms Higgin's story to her executive producers for consideration.

531. Mr Campbell has given unchallenged evidence as to his decision to proceed with the story from 19 January 2021 until he went on sick leave on 12 February 2021: Campbell generally and especially at [17]-[27], [37]-[38] and [58]-[59].

532. Ms Thornton has given unchallenged evidence as to her involvement when the story was conceived up until the recorded-interview was shot (Thornton [27-[63]) and then seeking approval from Network Ten Chief Executive Officer Beverley McGarvie to progress and then broadcast the matters and the timing of requests for response: see [65]-[71], [77].

533. The final approved script was not distributed until 5:22pm (Ex R842) when sent as a Google Docs link to the 7pm Writers email address and copied to Mr Llewellyn and Mr Meakin. It was only at this very late stage that the Studio Intro was added. Ms

Wilkinson has denied in her evidence that she wrote it: T1898.30. Due to her preparation for the live broadcast it was not possible for Ms Wilkinson to be involved with these late additions: see Wilkinson 1 [131]; T1873.33-41.

534. The person who made the decision the broadcast the matter was Mr Chris Bendall: see Bendall [92]-[114].

535. On no view was Ms Wilkinson a decision maker in relation to any aspect of the final production, broadcast and publication of the matters. Her role in relation to the final Broadcast was to read the pre-prepared script (Ex R857), she acted not only reasonably in reading that pre-prepared script but perfectly, in that she read it word for word.

Reliance on expert team

536. Ms Wilkinson gave unchallenged evidence that as her role on The Project was as a host and presenter she did not have the capacity to review or control the final audio and visual content of the publication before broadcast. She relied upon the trusted and experienced producers of The Project she had been working with for the past four weeks to finalise what was published: Wilkinson 1 [132].

537. Ms Wilkinson gave unchallenged evidence as to her knowledge about the expertise of those persons who she worked with and who were responsible for producing, reviewing, checking and approving the publication of the matters: see Wilkinson 1 [24] (Campbell), [26] (Thornton), [30]-[31] (Meakin), [33] (Llewellyn), [39] Binnie, [63] (Farley), [89] (Smithies), [92] (Bendall).

538. Ms Wilkinson has given unchallenged evidence that she relied upon and had full confidence in the expertise of each of Campbell, Meakin, Binnie, and Bendall had in supervising, supporting and approving the work undertaken: [92].

Fact-checking

539. Ms Wilkinson relied on the production team to fact-check Ms Higgins' allegations as she continued with her daily commitments as a host of the Project and The Sunday Project: Wilkinson 1 [76].

540. Mr Llewellyn and Ms Wilkinson spoke often and he informed her of what he was

researching and to whom he had spoken: Wilkinson 1 [77]; [93].

541. Ms Wilkinson understood that Mr Llewellyn was engaging in extensive fact checking of the allegations made and the evidence provided by Ms Higgins and was being supervised and supported by Mr Meakin, Mr Campbell, Ms Thornton, Mr Bendall and Ms Binnie: [91].

542. After 27 January Mr Llewellyn became the primary contact person for Ms Higgins and Mr Sharaz – so Ms Wilkinson relied on him to make any further enquiries of them that he considered necessary and appropriate: [93].

Legal advice

543. As to legal advice, in Ms Wilkinson's experience, all content that goes to air on the Project was the subject of legalling by Network Ten in-house lawyers. She understood that they were experienced in daily news and current affairs broadcast journalism, including issues regarding defamation: Wilkinson 1 [12].

544. Ms Wilkinson further gave evidence that it was her belief and experience that the in-house lawyers at Network Ten were very conservative – more so than any other in-house lawyers that she had encountered in her career in the media: Wilkinson 1 [12].

545. Tasha Smithies was (and still is) Network Ten's Senior Legal Counsel, who Ms Wilkinson understood was an experienced in-house media lawyer with more than 20 years experience advising media organisations in relation to legal matters for news print and television: Wilkinson 1 [89].

546. Her evidence that it was the role of the Executive Producers to interact with the in-house lawyers and pass on queries to Ms Wilkinson was also unchallenged: Wilkinson 1 [12].

547. Ms Wilkinson was aware that Network Ten's in-house lawyers were supervising the investigation resulting in the Broadcast "at all levels and at all stages". She understood that the investigation, any related promotional material and any social media would be reviewed by them: Wilkinson 1 [63]. She understood that they were reviewing the investigation up to and including broadcast: [91].

548. She understood that Mr Llewellyn was liaising with the Network Ten legal team at every stage of the investigation leading up to and including the broadcast: Wilkinson 1 [89].

549. Ms Wilkinson was aware that Mr Llewellyn spoke to Network Ten's in-house lawyers about the meeting on 27 January 2021 and that he was going to continue discussions with the lawyers, but she was not directly involved: Wilkinson 1 [69].

550. Throughout the four week period Mr Llewellyn liaised with Network Ten in-house lawyers: Wilkinson 1 [77].

551. Network Ten lawyers reviewed the questions that Ms Wilkinson asked Ms Higgins during the 2 hour interview on 2 February: Wilkinson 1 [95]. Ms Smithies also attended the interview and told Ms Wilkinson at the end that she thought that Ms Higgins was credible: [100]; [102].

551A. Ms Wilkinson, through her counsel, pleaded in a draft defence provided to Network Ten (Ex X1 pp1120-1121) the following facts about legal advice:

a. Wilkinson was informed that the matters would be thoroughly checked by Network 10 lawyers prior to broadcast to ensure that no legal wrong was being committed by the publication of the matters;

b. Wilkinson was informed and understood that the matters were legalled by more than one lawyer, a number of times prior to broadcast, and were cleared to be broadcast by the Network 10 lawyers;

c. Wilkinson understood that any legal change or request that was necessary to ensure compliance with the law in relation to the matters would have been notified by the lawyers to her producer Llewellyn and any necessary changes, additions or further enquiries made as a result;

d. Wilkinson would have complied with any and all advices or requests made by the Network 10 lawyers to alter the matters or to make further enquiries or additions to ensure that the matters complied with the law.

551B. In an email chain dated 28 February 2023, Network Ten directed Ms Wilkinson to delete those parts of those facts from her s30 defence said to constitute a waiver of their jointly held privilege. The emails were tendered without objection or limitation on the cross-claim: see Ex X1 p1120-1121. The directions from Network Ten forced Ms Wilkinson to make deletions to paragraphs 15.10, 15.16, 15.55-15.58 of her defence to maintain privilege over the legal advice referred to.

551C. At T2483.1, counsel for the applicant expressly agreed with the proposal of the Court to "*allow evidence in the cross-claim to be evidence in the separate hearing of the principal proceeding and allowing any additional cross-examination or submissions made on the basis of that additional evidence to the extent the additional evidence is adduced.*" The purpose of this proposal was because it "*would be artificial to ignore the additional evidence following the waiver of legal professional privilege that has occurred on the cross-claim.*" The joint tender by Network Ten and Ms Wilkinson means that the substance of the pre-publication legal advice Ms Wilkinson was informed and understood had been given is in evidence and the privilege over that advice, at least as pertains to Ms Wilkinson, has been jointly waived.

551D. The applicant elected not to seek any limitation on the evidence adduced on the cross-claim or cross-examine Ms Wilkinson or Ms Smithies despite that position and now seeks to take advantage of that approach by relying upon some of the evidence adduced to advance his claim in defamation. The evidence adduced on the cross-claim about the draft defence were Ms Wilkinson's instructions to her senior counsel about her understanding about the nature of the legal advice she relied upon and is inherently reliable and probative evidence in that form.

551E. The evidence establishes that Ms Wilkinson relied upon that advice to ensure that no legal wrong was being committed, and that the legal advice she was aware of was in a binary form, much like the Logies advice referred to below, that cleared the Broadcast to be published. Ms Wilkinson's evidence as to her understanding of the experience and conservative approach of the lawyers providing that advice was unchallenged.

551F. To the extent it was unclear, it is now beyond doubt from that material, and totality of the evidence (including on the cross-claim) that Ms Wilkinson was duty bound to proceed on the basis of the advice provided about the Broadcast to the producer and

executive producers by the in-house lawyers for Network Ten. Having seen Ms Smithies in the witness box, the Court can infer that the advice was given confidently.

551G. In circumstances where Ms Wilkinson raised such matters as the photograph, missing phone data, extra questions to ask Ms Higgins or the other recipients of questions prior to publication, or any changes to the Broadcast, she had no entitlement to force the issue in the face of assertions that the producer was acting under instructions and on the advice of the lawyers.

551H. Relying upon such legal advice is a circumstance that weighs strongly in the favour of the reasonableness of Ms Wilkinson's conduct, particularly as it provides a reasonable explanation why she has published matter that is submitted to be problematic: c.f. *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327; [2003] HCA 52 at [28]-[29] per Gleeson CJ and Gummow J and at [172]-[173] per Heydon J.

Sources of information

552. There is no challenge to Ms Wilkinson in relation to her communication with sources or her reliance on those sources.

553. Although Mr Sharaz made the first approach, on behalf of Ms Higgins, the information that Ms Wilkinson ultimately relied on came from Ms Higgins directly. In any event, there is no challenge to her conduct in receiving emails from Mr Sharaz, and communicating with him initially on the phone.

554. Ms Wilkinson spoke to Ms Higgins on two occasions leading up to a meeting on 27 January 2021 – on 21 and 23 January 2021: Wilkinson 1 [54]; [57]. She was not challenged about the fact or content of those telephone calls.

555. Her meeting on 27 January 2021 was recorded and it was Mr Llewellyn who was responsible for fact checking any of the claims that Ms Higgins made: CB.1141.

556. On 2 February 2021, Ms Wilkinson conducted an interview with Ms Higgins: CB.377.

557. Ms Wilkinson also relied on her own background knowledge and experience and her own background research on the workplace culture that existed at Parliament House and the March 2020 Kate Jenkins report on sexual harassment: Wilkinson 1 [47]-[48].

558. Ms Wilkinson believed Ms Higgins as a source. She believed the allegations that Ms Higgins made about the applicant and others: Wilkinson 1 [134]. She was not provided with any information that led her to doubt the allegations made by Ms Higgins that were ultimately published. The fact that she considered some of the allegations "coloured" by Ms Higgins' trauma, did not mean that undermined the key allegations.

Fairness to applicant

559. The applicant was given a fair and reasonable opportunity to respond to the allegations made about him in the Broadcast.

560. The decision about the content of the questions and when to send them was not a matter for Ms Wilkinson. She made suggestions to the questions posed to the various persons from whom response was sought, but it would appear that those suggestions were not taken up. Mr Llewellyn was responsible for those questions on the advice of the Network Ten lawyers. Mr Meakin and Ms Binnie were also provided with the draft questions before they were sent.

561. The timing of the questions was reasonable in so far as Ms Wilkinson was concerned: Wilkinson 1 [113].

562. Ms Wilkinson relied on Mr Llewellyn to ensure that the questions reached the applicant and she was told that they had been sent: Wilkinson 1 [113].

563. Much was made in the cross-examination about the fact that a 23 year old would struggle to respond in 80 hours. It is not evidence why that would be the case. If he needed more time he could have asked for it.

564. Ms Wilkinson assumed that they would hear from the applicant on Monday, as the production team received responses from other recipients of questions. In addition to the questions he was sent, he would have been alerted to the Broadcast by the News Article, and promos and social media for the Project. She drafted questions for a potential interview with him if he decided that he wanted to go on the record: [126].

565. Ms Wilkinson understood that although he was given a 10am Monday deadline, it had been agreed by senior management that his response would have been published if received at any time before broadcast: Wilkinson 1 [114]; [127].

566. The notion that the producers of the Broadcast did not want a response from Mr Lehrmann is non-sensical and should be rejected.

Questions to others

567. Much has been made about the allegations concerning the "obstruction" issue in the Broadcast. What is alleged against third persons is of little relevance to the assessment of reasonableness in relation to the defamatory matter about Mr Lehrmann.

568. In any event, to the extent it is held to be relevant to s30, each of those allegations came directly from Mr Higgins, who Ms Wilkinson believed and relied on as a source. She believed that the allegations had been fact checked and were credible and had been approved by lawyers. As stated under the principles above, it is not determinative of a s30 defence that Ms Wilkinson have reasonable basis to make the defamatory allegations.

569. What is important is that each of the persons referred to were given the opportunity to respond, which they were. Those government officials and politicians and police officers elected to give statements that were non-responsive to the direct questions they were asked.

570. Further, Ms Wilkinson understood that the production team was amending the Broadcast as the responses came in. For example, when Mr Llewellyn told her on Sunday 14 February at about 11pm that he had received a response from the Government she asked "*utterly fascinated by their response!!! Have we had to cut much*": Ex R203. This text message is a contemporaneous record of Ms Wilkinson's belief that the programme was being edited to account for new information and responses from those persons from whom comment was sought. Also, it demonstrates that she was relying on the production team to carry out that important task.

571. The "*background*" information provided by Mr Carswell (a political operative) to Mr Llewellyn was not passed onto Ms Wilkinson. In any event, background is "*not the most reliable source of information*" according to Mr Meakin: T1960.12-13. Mr Llewellyn did not say that he was not allowed to use such information, what he said was that "*I would never use something that someone just tells me on background*": T1662.1-16. That is no doubt because of that inherent unreliability, particularly when

coming from a political staffer.

572. The responses received were fairly included in the Broadcast and included in full on the Project website. The responses from the Prime Minister, Senator Cash and on behalf of Linda Reynolds and Fiona Brown were directly referred to in the Broadcast in contradiction of claims made by Ms Higgins: [107], [108]; [139]; [167] Ex 1.

Basis for other allegations in Broadcast

573. The second respondent does not accept that this is a relevant factor, beyond what is alleged against the applicant.

574. In any event, as to the roadblocks to the investigation – there were many. The fact that some occurred before the police were contacted does not remove them from this category. A failure to gather proper evidence is a roadblock to a sexual assault prosecution:

a. No police, ambulance or medical assistance called by security for Ms Higgins at 4:30am;

b. No police, ambulance or medical assistance called by security for Ms Higgins at at 10:00am;

c. No HR Department at Parliament House independent from political operatives to whom Ms Higgins could confidentially report the matter;

d. Ms Brown's inexperience and attitude to Ms Higgins and her disclosures;

e. Chris Payne telling Ms Higgins that she had been found naked, making her concerned that people had seen the CCTV and everyone was gossiping about it;

f. Meeting with Ms Higgins in the Minister's office where the Minister and Ms Brown knew the assault was said to have occurred;

g. Referring Ms Higgins to APH police (no rape counsellor) instead of SACAT who specialise in these matter and ensure a rape counsellor;

h. The fact that the internal police in APH answer to politicians and different rules apply;

i. Delay in viewing and obtaining CCTV;

j. Failure to tell Ms Higgins that CCTV had been quarantined;

k. Culture amongst political parties (especially in the lead up to an election) and the pressure Ms Higgins felt to be a team player.

575. Ms Higgins felt betrayed by the Government by reason of:

a. the way that she considered she was unsupported;

b. that the Minister conducted their meeting in the office where the assault took place;

c. that she was being offered time to go to the Gold Coast with no prospect of return and felt obliged to go to Western Australia where she had no support;

d. their refusal to let her see the CCTV – because she felt that everyone else had information on her own assault that she did not have;

e. the fact that Fiona Brown was her only support person.

576. Ms Higgins was forced to choose between her career and the pursuit of justice because of the pressure she felt because of the culture of silence, leading up to the campaign and not being a team player.

577. The easiest place in this country to rape a woman and get away with it is APH because of the unsatisfactory systems in place, no independent HR, no independent police, requirement to seek approval from presiding officers necessarily delays police inquiries, and failures by security to call medical assistance or police: Ex 230.

<u>Views held that were not published</u>

578. The fact that Ms Wilkinson held other views about persons referred to in the Broadcast beyond what was published is irrelevant to the assessment of reasonableness.

579. For example, it was not published that "*Linda Reynolds was lying through her teeth*" during question time on 15 February. Ms Wilkinson plainly thought that Senator Reynolds lied about knowing of the allegation of sexual assault having taken place in

her office prior to meeting with Ms Higgins there on 1 April. As dealt with in Part A above, she plainly had a basis to form that view given Ms Higgins had spoken to her about Ms Reynold's knowledge.

580. Ms Wilkinson was asked whether she thought that there was a systemic cover up – another allegation that is not actually made in the Broadcast. She thought that the attempts to keep the matter from the media was a cover up: T1777.19-24.

Responsive submissions

580A. The fundamental factual and legal problems with the applicant's submissions on reasonableness at ACS[399]-[456] are outlined in paragraph [1A] above at the start of these submissions. The content of the applicant's submissions is fundamentally misconceived and untenable, particularly as to the outrageous accusations levied against Ms Wilkinson and Network Ten:

a. The applicant's submissions about the bruise photograph are addressed at paragraphs [24F], [242]-[246] and [261L] above. The evidence shows both in the 27 January 2021 meeting and following that, Ms Wilkinson raised questions about the photograph and sought clarification. It cannot seriously be suggested that in light of that contemporaneous documentation as to her concerns that she did not get a response from her producers or other executives that satisfied her concerns. Her evidence about her memory of the explanation given to her is, contrary to the applicant's submission, consistent with the facts Ms Higgins outlined about the loss of data and Mr Llewellyn's "stuff-up" explanation in his message on 31 January 2021. Ms Wilkinson was not abdicating responsibility: see paragraphs [24G]-[24H] above. Ms Wilkinson was honestly and reliably explaining her role within a broad commercial television news production team. The established facts about the bruise photographs reinforce, not detract, from the reasonableness of Ms Wilkinson's conduct. Her conduct in this regard is entirely honourable.

b. There were no material inconsistencies or implausibilities in Ms Higgins' account. The applicant's submissions about the facts about Ms Brown and Senator Reynolds are addressed in reply at paragraphs [261B]-[261D], [261N]-[261V]. The applicant's submissions ignore the impact of culture on a young

female within the Australian Parliament, and Liberal Party in particular, that was starkly apparent to Ms Wilkinson – someone who had succeeded in male dominated business at an even more anachronistic time as to conduct and attitudes towards women: see Wilkinson 1 [27], [47]-[51]. Ms Wilkinson's questions and Ms Higgin's responses were about the pressure she *felt*. As Ms Wilkinson explained in her evidence there can be a difference between actual words and conduct and how a young women may feel in an unsuitable environment – it could not seriously be suggested that the Australian Parliament in 2019 had the support structures and appropriate culture for young women that existed, or should have existed, elsewhere. Neither Senator Reynolds nor Ms Brown were trained to deal with such a situation, they did not have the direct support of persons who were trained who attended with them when they met Ms Higgins. There is nothing implausible in those circumstances in politics and processes being put above people, and a young woman in that situation feeling the pressure she described. Ms Wilkinson was aware of roadblocks Ms Higgins faced and why Ms Higgins felt the way she did: see paragraphs [574]-[575]. As explained above, it is an untenable submission to describe a police investigation spanning twelve or even five days as *short* – when *The Dock* CCTV footage had already been obtained. In any event, the Broadcast responsibly and fairly included in a prominent introduction to a segment what the Government including Ms Brown and Senator Reynolds claimed to have done and how they viewed their conduct.

c. The matters addressed at ACS[421]-[425] do not affect or detract from the reasonableness of Ms Wilkinson's conduct. As to Ms Higgins motivations – Ms Wilkinson gave unchallenged evidence about her perception of the meeting on 27 January 2021 (Wilkinson 1 [74(f)-(h)]) that she perceived no malice or rancour in Ms Higgins. The evidence does not suggest that Ms Higgins, a long-term Young Liberal, who was a Liberal staffer who her employer was actively trying to keep, had any other motivation than the sexual assault and related matters.

d. The allegations about Senator Cash were addressed with a denial in line 139: see paragraph [261W(d)] above. Senator Cash was given detailed questions including whether she was "dismissive, indifferent or uncaring" towards Ms Higgins that

she chose not to address specifically. Ms Wilkinson did not hear the recording between Ms Higgins and Senator Cash. Ms Wilkinson had no means or capacity to affect the edit in relation to Senator Cash's response. Contrary to ACS[427], Ms Wilkinson did have evidence that Senator Cash, contrary to her denial, did know about the allegations earlier than she claimed: see Wilkinson 1 [80].

e. The submissions in ACS[428]-[429] are contrary to the evidence. Further, a rape counsellor confirming that a person, who claimed to be raped, was previously her client, corroborated the email of her following up with Ms Higgins months later, was extremely significant and had particular significance in Ms Wilkinson's mind, someone with significant experience with sexual assault survivors: see Wilkinson 1 [36]. The submissions ignore the decisions by Mr Campbell and Network Ten to keep the investigation confidential: see Wilkinson 1 [24]-[25], [47]. The decisions when and to whom to make broader inquiries were not Ms Wilkinson's to make.

f. As to ACS[430]-[446], the applicant apparently concedes in the last sentence to ACS[448] that it was Mr Llewellyn, not Ms Wilkinson, who was responsible for seeking responses. The factual issues with the applicant's submissions are addressed elsewhere above and in Network Ten's submissions. To the extent that the responses contradicted how Ms Higgins felt, those responses were included in the Broadcast. The responses however otherwise significantly corroborated Ms Higgins' account. She identified the persons with whom she interacted and worked. She had gone to the Police. The investigation had not proceeded. Differences between Ms Higgins' account and the responses were about characterisation, perception and belief.

As addressed above, as to ACS[441]-[442], the SACAT and APH police attempted to do their job immediately – Ms Higgins knew, and told the respondents, they obtained the The Dock CCTV footage but not the Parliament footage – there is nothing implausible about the timeline.

As to ACS[443], this summary was not misleading as the statement confirmed that the CCTV footage had not yet been provided to the AFP sexual assault investigators (see paragraph [349A(c)] above).

As to ACS[444]-[445], these submissions are inconsistent with the evidence. The problems with the criticisms of the edits are addressed above. The applicant's submissions otherwise confirm that the applicant's only complaints about the Broadcast are matters outside the role and control of Ms Wilkinson and matters unrelated to the applicant.

g. As to ACS[437]-[446], Ms Wilkinson is not addressed in the applicant's submissions. Nor reasonably could she be, given her various duties on 15 February 2021.

580B. Further as to the specific criticisms of Ms Wilkinson at ACS[447]-[452], the matters the applicant raises illustrate the weakness of his submissions to suggest that Ms Wilkinson did not act reasonably. The applicant places great weight on a message from Mr Bendall. That message is true. Ms Wilkinson originated/developed the story. Ms Wilkinson conducted the interview – on which the story was based. Ms Wilkinson delivered the story to the audience by presenting it on *The Project*. The documentary evidence outlined in detail above shows that Ms Wilkinson did not produce, edit or otherwise control the content or timing of the Broadcast. To know about and follow the decisions and conduct of others in their discrete and highly qualified roles is entirely reasonable. The applicant is incorrect when he submits that Ms Wilkinson was unreasonable because she knew and acquiesced in what others did.

580C. The evidence does not establish that Ms Wilkinson had a political motivation for the story. As submitted above, her unpublished belief or opinions about matters not published are not relevant to the evaluative assessment of whether her conduct was reasonable. Publishers, including journalists, absent actuating malice do not fail under s30 because they hold unpublished opinions or beliefs that are said to be unreasonable. The applicant's submissions proceed on assumptions not made good on the evidence that this is a story that should never have been published and everything that Ms Higgins said was absurd and unreliable and ultimately completely contradicted by the evidence. They ignore the fact that outside the curial environment and before the effects of publicity, Ms Higgins, as recorded on 27 January and 2 February 2021, was a genuine, compelling and highly credible young woman. Ms Wilkinson's motivation was to report on issues that were plainly of the highest public interest.

580D. The matters the applicant identifies do not detract from the reasonableness of Ms Wilkinson's conduct:

a. As to ACS[250], Ms Wilkinson's awareness of such matters does not detract from the reasonableness on reporting on Ms Higgins' allegations or relying on her colleagues, see especially paragraph [300] above as to the her role in the comment process.

b. As to ACS[451], this was not an unreasonable conclusion from the fact that the applicant left the office and did not return, as told to Ms Wilkinson. It would be highly unusual that there was another explanation. Although not relevant to the evaluative process – it is an unusual argument to make that such a conclusion was unreasonable when in fact the events on 22-23 March 2019 (for which Ms Higgins and the applicant were on the applicant's view equally culpable) were part of the reasons for his termination for cause. Ms Brown was asked why the applicant was terminated from his employment and no response was given to that question.

c. As to ACS[452], there is no evidence before the Court to suggest that this was not the only way for persons to definitively identify the applicant. The applicant's case on identification is now based on people making inquiries of persons who did know about the allegations, such as Mr Dillaway. The applicant was a nobody – this was an entirely reasonable belief to have – particularly when based on Ms Higgins' evidence and the Timeline document there were many persons who knew Ms Higgins and the applicant who already knew about the allegations.

d. As to ACS[453]-[456], the applicant's submissions do not apply to Ms Wilkinson as explained at paragraphs [68]-[72] above. Ms Wilkinson gave unchallenged evidence that Network Ten had the most conservative lawyers of the three commercial networks she had worked: Wilkinson 1 [12]. Ms Wilkinson, as an employee in a commercial television news production, was entitled to rely upon the fact, without any direct knowledge by herself, that Network Ten received, and its in-house legal team provided, proper legal advice and that all of her actions and conduct were approved by that advice. Ms Wilkinson did not have the power to waive her employer's privilege. Notwithstanding her reliance on that advice in her evidence, the applicant has not sought production of documents over which

Network Ten claims privilege.

580E. Further to paragraph 580D(d) above about legal advice, the matters at Ms Wilkinson relies on outlined in paragraphs 551A-551H above establish the reasonableness of her conduct as an employee of a company who published the Broadcast after legal review and approval.

580F. The applicant's submissions at ASC [452A]-[452C], and in particular the two general points raised for emphasis, illustrate the fundamental weakness of the applicant's contentions about the reasonableness of Ms Wilkinson's conduct. The applicant's submissions ignore the orders of the Court, a position it encouraged, that the cross-claim evidence be admitted in the primary proceeding: see paragraphs 551A-551F above. The conflict between Ms Wilkinson and Network Ten, the subject of the cross-claims, included the legal advice that Ms Wilkinson sought to rely upon. It includes evidence that discloses the substance of that advice, as Ms Wilkinson understood it, to establish the extent of that conflict. That Network Ten belatedly conceded the conflict does not affect the relevance and probative value of the documentary evidence tendered.

580G. Contrary to the applicant's submission at ASC [452A], the evidence establishes that Ms Smithies and Mr Farley were involved from the early stages of the investigation and preparation of the Broadcast: see paragraphs 210, 227 and 239 above. Ms Smithies, in fact, attended the 2 February 2021 interview to assess Ms Higgins credibility, and the legal team was involved in formulating and approving the script for that interview: see paragraphs 246, 252 and 254 above. As opposed to the submission that legal review occurred at the late stage, the chronology outlined in these submissions illustrates that Ms Smithies and Mr Farley were copied into significantly more communications throughout the two weeks from the interview to the publication of the Broadcast than Ms Wilkinson, see Section F.2 above.

580H. The suggestion in ACS[452(a)] that the Broadcast was Ms Wilkinson's sole responsibility (based on complimentary descriptors) is contrary to the voluminous documentary evidence that establishes the significant team within Network Ten, including internal legal, and The *Project* that published the Broadcast. There is no issue that, like Ms Maiden, Ms Wilkinson was approached for the story. The story was of the utmost public interest, and it was entirely reasonable for Ms Wilkinson to bring the

story to her employer's attention, conduct an interview with Ms Higgins under her employer's direction and supervision, and then present the Broadcast once produced and approved by her employer and its executives, producers and lawyers. Ms Wilkinson's role in publication as the interviewer and presenter meant she was the person most publicly associated with the story, Network Ten's decision to have her accept the award and speak on its behalf reflected commercial imperatives, but nonetheless, unlike Ms Maiden, the award was given to Network Ten and The Project and Ms Wilkinson accepted the award on their behalf with Mr Llewellyn and Mr Bendall. The applicant's submissions lack substance, ignore the evidence, and have no relevance to the s30 assessment to be undertaken by the court in so far as Ms Wilkinson is concerned.

580I. The second point of emphasis in ACS[452(b)] is a nonsense and mischaracterisation of senior counsel's oral submission. Senior counsel was responding to an unmeritorious submission on behalf of the applicant that falsely claimed that Ms Wilkinson was placing blame on Network Ten. The suggestion that a publisher makes an admission about their own conduct by making supportive submissions about the conduct of another person is unprincipled and unsound. Ms Wilkinson and Network Ten (or Mr Llewellyn) do not stand and fall together, each respondent's conduct is to be judged in all the different relevant circumstances in which they published the Broadcast. That Ms Wilkinson may support the submissions Network Ten makes does not in any principled way affect the reasonableness of her conduct in publishing the Broadcast, which was reasonable in all relevant circumstances.

L OTHER DEFENCES

L.1 Justification at Common Law

581. The second respondent has not pleaded, and does not rely on the defence of justification at common law.

582. The second respondent is of the view that there is no difference between the common law defence the defence under s25 of the *Defamation Act*.

L.1.1 Relevant Principles and Why Pleaded and Pressed

L.1.2 Whether Defence Established

L.2 *Lange* Qualified Privilege

583. The second respondent does not plead a defence provided in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [1997] HCA 25 because:

(a) from its inception, that defence operated on the same reasonableness criterion as s22 of the *Defamation Act* 1974 (NSW);

(b) s30 of the DA introduced the previously NSW only s22 defence to every jurisdiction of Australia in 2006 rendering *Lange* no longer necessary;

(c) further, s30 has been interpreted to have the same effect as *Lange*: see *Palmer v McGowan (No 5)* (2022) 404 ALR 621; [2022] FCA 893 at [207], [221]-[224] (Lee J).

L.2.1 Relevant Principles and Why Pleaded and Pressed

L.2.2 Availability of Defence to Network Ten

L.3 COMMON LAW QUALIFIED PRIVILEGE

L.3.1 Relevant Principles and Why Pleaded and Pressed

General principles

584. The common law recognises a defence to the publication of defamatory matter when the defamatory matter is published in the course of providing information about a subject on which the publisher has a duty or interest in communicating information, and the people to whom the matter is published have a reciprocal duty or interest in receiving information: *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [9]-[10] per Gleeson CJ, Hayne and Heydon JJ, [53]-[54] per McHugh J; *Cush v Dillon* (2011) 243 CLR 298 at [11]-[13] per French CJ, Crennan and Kiefel JJ.

585. The High Court in *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534; [2012] FCA 53 at [12] explained:

> *The defence of qualified privilege at common law has been held to require that both the maker and the recipient of a defamatory statement have an interest in what is conveyed. This is often referred to as a reciprocity of interest, although "community of interest" has been considered a more accurate term because it does not suggest as necessary a perfect correspondence of interest. The interest spoken of may also be founded in a duty to speak and to listen to what is conveyed.* [underline added]

586. The correct approach to determining whether defamatory matter was published on an occasion of qualified privilege at common law was explained by Earl Loreburn in *Baird v Wallace-James* (1916) 85 LJ PC 193 at 198, in a passage quoted with approval in *Bashford* at [64] by McHugh J:

> *In considering the question whether the occasion was an occasion of privilege, the Court will regard the alleged libel, and will examine by whom it was published, to whom it was published, when, why and it what circumstances it was published, and will see whether these things establish a relation between the parties which gives a social or moral right or duty.*

587. The circumstances in which an occasion of qualified privilege arises were described by Parke B in *Toogood v Spyring* (1834) 149 ER 1044 at 1050, (approved by the majority in *Bashford* at [9], and in *Cush v Dillon* (2011) 243 CLR 298, at [11]):

> *"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society… in the discharge of some public or private duty, whether legal or moral, or in the conduct of the publisher's own affairs in matters where his interest is concerned."*

588. Qualified privilege is the most important defence the common law has developed to ensure members of the public absent malice have the freedom of expression to communicate defamatory matter irrespective of truth or falsity or reasonableness without liability for defamation within their communities (taken in the legal sense but also common meaning).

589. The 1971 Report, described above, recognised that an occasion of privilege based on reasonableness was intended to supplement not constrain the development of qualified privilege at common law. Unfortunately, however, s22 (and s30) have probably had, until recent years, a chilling effect on the use of common law qualified privilege to defend the publication of defamatory matter to what might be thought to be broader communities of interest. For example:

a. In *KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden*

(2020) 101 NSWLR 729; [2020] NSWCA 28, the NSW Court of Appeal, reversing the decision at first instance, held that defamatory matter about a former employee sent to thirty-five parents was published on an occasion of qualified privilege.

b. In *Bill Karageozis as trustee for the bankrupt estate of Siobhan Lamb v Sherman* [2023] QCA 258 the Queensland Court of Appeal, reversing the decision at first instance, held that a defamatory police report by a person to the Police of allegations that did not amount to a crime was published on an occasion of qualified privilege.

590. These two recent cases illustrated that community of interest and the relevance of defamatory matters to members of relevant "communities" in determining a defence of common law qualified privilege is not to be taken narrowly.

591. Where in the course of making a publication on an occasion of privilege, a communication is made incidentally to persons without an actual interest (or duty), such communication will be protected if made reasonably and no more widely than is required for the effective making of the communication: see, generally, Gatley (11th ed, [14.66], [14.73]). See also Simpson J in *Haddon v Forsyth* [2011] NSWSC 123 at [314]. The general test is whether the publication goes beyond the exigency of the occasion: see Gatley, at [14.73].

<u>Why CL QP is pleaded here – not a mass media case</u>

592. The defence is pleaded and pressed because defamatory matter about the applicant was only published to a limited and select number of persons who already possessed special knowledge about the applicant and therefore reasonably identified him as the subject matter of the publication. The Broadcast was not defamatory matter about the applicant when published to persons without that special knowledge.

593. Common law qualified privilege is, as explained above, a defence of confession and avoidance. It only needs to answer the actionable publication – in other words that class of persons who reasonably identified the applicant as the person referred to by Ms Higgins.

594. This case does therefore not qualify as a "*mass media*" case. There is no actionable claim in relation to hundreds of thousands of viewers.

595. In any event, successful reliance on common law qualified privilege by the mass media may be the exception, rather than the rule, but it is certainly possible depending on the circumstances.

596. In *Wraydeh v Fairfax Media Publications Pty Ltd* [2021] NSWCA 153; (2021) 105 NSWLR 254, the New South Wales Court of Appeal (Simpson AJA, with whom Bell P and Gleeson JA agreed) found such a defence in circumstances where the media had published articles based on police media releases seeking public assistance in locating a particular individual.

597. Simpson AJA noted at [48] the *general* proposition that the requirement of reciprocity (or "community of interest": see at [41]) precluded application of the defence to mass media publications, although in terms noting the possibility of exceptional cases. Her Honour noted the trial judge's reasoning in finding an occasion of privilege at [49], to which there was ultimately no challenge ([51]) – in short, there was a public interest in the police communicating with the public at large, by means of the news reports in question, and the public had a reciprocal interest in having the information from the police. In relation to the issue whether what was published was sufficiently related to the occasion, the media were at liberty to publish information which was "germane" to the occasion, extending beyond the police media releases: at [75]-[76].

598. On 15 February 2021, the applicant was not a public figure – he was a person, like most ordinary persons, whose existence was only known to a limited number of persons. Therefore the interaction between the findings by the Court on identification and this defence is determinative. The second respondent's position is that there is a comparatively small subset of the persons who viewed the matters who reasonably identified the applicant in accordance with the pleaded case or at all.

599. It was the natural and probable consequence of News Article that any person who reasonably identified the applicant in the matters already knew, or would have in the ordinary course have known, the allegation that the applicant raped Brittany Higgins in Parliament House in 2019.

600. The second respondent contends that each of the people that could reasonably identify the applicant had such specialised knowledge about him (or proximate relationship to him) that the second respondent, having conducted a recorded interview with a person accusing him of rape, had an interest in communicating that interview to those persons through the Broadcast and those persons had an interest in receiving the Broadcast such the each publication to those persons was on a privileged occasion.

600A. As to ACS[478]-[480], the key factual distinction in *Daily Examiner Pty Ltd v Mundine* [2012] NSWCA 195 is the finding that there was an indeterminate number of persons who had the knowledge that allowed them to identify the plaintiff. Particularly there was a finding at [74],[78] that given her public role, there was a significant number of members of the community beyond a confined group such as her fellow workers, family and friends, who may have had an interest such that would have known the pleaded facts and identified Ms Mundine. The evidence does not establish that this is such a case. The applicant's broader case is that persons identified the applicant by already knowing or independently finding out the sting of the defamatory imputations – this is not the type of identification case addressed in *Mundine*.

On the applicant's pleaded case, those viewers of the Broadcast who had knowledge of the pleaded facts sufficient to identify the applicant were necessarily part of a confined group and such identification occurred on a privilege occasion.

L.3.2 Ms Wilkinson's Interest in Publishing

601. Ms Higgins chose Ms Wilkinson to assist her to make her allegations public so that she could:

a. effect change at APH;

b. ensure that what happened to her, did not happen again to another woman;

c. make her allegations public so that her police complaint could not be easily hindered.

602. Higgins had an interest in communicating the defamatory matter about the applicant to particular classes of that audience, namely to people who worked, or have worked at APH and/or had the power to effect change such the AFP, politicians, political advisors

and public servants etc.

603. Given the breadth of this class and Ms Higgins inability to know the identity of (and thus directly communicate with) each person in the class, a public announcement was necessary. A television interview was also necessary in communicating the information, so that Ms Higgins' credibility could be assessed by members of that class – in the same was as if she had personally told them.

604. Ms Wilkinson thus had the requisite interest to aide Ms Higgins in making that communication because Ms Higgins had chosen her as her agent.

604A. As to ACS[481]-[483], Ms Higgins' decision to give Ms Wilkinson an exclusive television interview, (c.f. a premier making statements and answering questions to a random pool of journalists that were broadcast to the public), gave Ms Wilkinson a different interest to other journalists or members of the public.

L.3.3 Viewers' Interest in Viewing Publications

605. The class of persons who are said to have identified the applicant as the person referred to by Ms Higgins in the Broadcast are those who already knew of the allegations.

606. They must be limited to people who worked, or have worked at APH and/or have the power to effect change such the AFP, politicians, political advisors and public servants etc.

607. To the extent any person outside of that class viewed the Broadcast and identified the applicant, such publication was incidental and therefore still protected by the privilege. It is difficult to comprehend who such a person might be given the applicant has not thus far articulated who in fact these viewers are who reasonably identified the applicant.

607A. As to ACS[484]-[485], the applicant apparently accepts, as he must, that certain viewers had an interest in hearing from Ms Higgins. The applicant relies upon there being an indeterminate number of people who had a proximate relationship with the applicant that enabled them to identify him. To the extent that the applicant can establish identification beyond a confined group through word-of-mouth or subsequent internet publication:

a. Word or mouth or gossip means that the persons are persons who fall within the class of persons mentioned in paragraph [606] above or media persons such that they also have the interest or have such a connection with such persons that they fall within the community of interest. To find out this way, the person must have had a sufficient and proximate relationship with someone who already knew, that is someone who already had an interest in the subject matter – that is they shared the community of interest.

b. As to persons discovering the identity through Internet searches – the timing of those disclosures, days and weeks after publication, and the active steps those persons took to discover the identity and relative obscurity of the references within the vast confines of Twitter and the Internet are relevant to the assessment whether identification by persons outside the confined group was incidental.

Publication of the Broadcast to the public not naming the applicant in these circumstances was otherwise reasonable and no wider than was required for the effective making of the communication given the importance of Ms Higgins' message and her inability to reach the people who worked, or have worked at APH and/or had the power to effect change such as the AFP, politicians, political advisors and public servants etc.

L.3.4 Occasion of Privilege

608. The occasion arises by the community of interest described above. The allegations about the applicant were plainly relevant to that occasion.

609. No malice is alleged in the proceedings against Ms Wilkinson.

M DAMAGES AND OTHER RELIEF

M.1 General Damages

Causation

610. If the trier of fact finds that the respondent has published defamatory matter about the applicant and that no defence has been established, the judicial officer is to determine the amount of damages (if any): s22(3) DA. This may result in the applicant being

awarded no damages: *Palmer v McGowan (No 5)* [2022] FCA 893; (2022) 404 ALR 621 at [507]; *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 at [75]. The Court is required by s34 "*to ensure there is an appropriate and rational relationship*" between the harm sustained and the amount of damages awarded.

610A. The Court has enquired of the parties as to the correctness of *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295. This Court, earlier, in *Palmer v McGowan (No 5)* at [503]-[508] summarised the historical position as to the award of nominal and derisory damages, including by reference to *Dank.*

610B. *Dank* was a case that was tried before a jury with mixed results: see *Dank* [3]-[4]. Section 22 was therefore directly enlivened. Section 22 does not, however, by its terms change the common law: c.f. DA s6. Nor does it do so by necessary implication. It would be an anomalous construction of the DA that it changed the general law such that damages were awarded on one basis by a judge after a jury trial and on a different basis in a judge alone trial.

610C. To the extent there was a change to the general law in the assessment of damages in defamation matters, it was ss 34-39 that caused that change. DA s34 mandates, as a matter of substantive law, that there is an appropriate and rational relationship between the harm sustained and the amount of damages the Court awards. This section is arguably inconsistent with the award of any damages, even nominal, to a plaintiff who has suffered no harm at all. If nominal damages are properly awarded, they ought not be damages of any real compensable value: see *Palmer v McGowan (No 5)* at [503] citing *The Mediana* [1900] AC 113 at 116.

610D. In the alternative, to the extent, contrary to Ms Wilkinson's submission, that *Dank* is considered to be correct, then DA s22(3) merely reflects the general law as amended by DA ss 34-39 (s34 in particular) and did not (of itself) effect a change to the general law. So even though DA s22 does not apply in the Federal Court, the DA, read as a whole, has thus changed the general law to allow for no damages to be awarded even where a defamatory publication has been proved and is undefended.

610E. To the extent that an abuse of process is established, that would provide a basis (if otherwise appropriate in the circumstances) to strike out the applicant's claim: *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004 at [65]; see also *FCR*

Rule 16.21(1)(f). In such a case, there would be no judgment for the applicant nor any award of damages: c.f. DA 22(3). Partial justification, on its own, although a strong basis to reduce a damages award, is not enough to warrant a finding that the entire proceeding is an abuse of process. One would expect some other additional factor about the proceedings that elevate it to that category. Other than in a case with such an additional factor, where defamation is otherwise established, derisory or nominal damages must be awarded, and to that extent *Dank* was wrongly decided: but c.f. *Massoud* at [282]-[285] per Leeming JA (obiter). If the Court is satisfied that sexual activity has been proved, this question need not trouble the Court because the applicant **has conceded** the proceedings would be an abuse of process in such circumstances: see paragraph 640B below.

610F. The applicant's submissions in ACS [545]-[547] are plainly wrong. *Massoud* was an appeal from a judge alone trial (see [2021] NSWDC 336) heard by Gibson DCJ and s22 only applies to jury trials: DA s22(1). If *Massoud* approves the principle in *Dank* then that principle applies in this Court as a matter of the general law of damages or DA ss34-39. Section 79 of the *Judiciary Act* 1903 picks-up the general law of damages or DA ss34-39 and therefore any such principle in this Court. Nonetheless, for the reasons above the second respondent submits that *Dank* is wrong.

611. In general, the three purposes of the award of general damages for defamation are consolation for hurt feelings, recompense for damage to reputation, and vindication of the plaintiff's reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-61 per Mason CJ, Deane, Dawson, and Gaudron JJ; *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at [60] per Hayne J (Gleeson CJ and Gummow J agreeing).

612. The extent of the actionable publication is a relevant consideration in assessing damages: *Bauer Media Pty Ltd & Anor v Wilson (No 2)* (2018) 56 VR 674 at [165] per Wilson JA. It is, however, only publication to those very few who reasonably identified the applicant that is actionable and therefore relevant to the assessment of damage: see *Morgan v Odhams Press Ltd* [1971] 1 WLR 120 at 1247 (Lord Reid), at 1262 [Lord Guest), at 1271 (Lord Pearson); see also *Cummings v Fairfax Digital Australia & New Zealand Pty Ltd; Cummings v Fairfax Media Publications Pty Ltd* (2018) 99 NSWLR 173, [2018] NSWCA 325 at [168] (McColl JA, Beazley P and Simpson AJA agreeing).

613. Although the applicant does not have to prove damage to establish an action for defamation and there is a presumption that once the element of the torts are establish that some damage to reputation was suffered (*Bristow v Adams* [2012] NSWCA 166) the applicant has the onus to establish the quantum of damage he is entitled to address the three purposes. The Court should not award any damages unless satisfied that in all the relevant circumstances the applicant has suffered harm and it is otherwise appropriate to do so. The applicant must persuade the Court as to the quantum to be awarded: *Palmer v McGowan (No 5)* at [462]. The respondent must persuade the Court that no damages should be awarded.

614. The applicant must establish the extent of harm, if any, the Broadcast caused him: see *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361 at [165]-[166].

614A. As to ASC [530A]-[530B], other publications and events preceding or following the Broadcast, see paragraph 359 to 402 above, are relevant to causation of damage, not just mitigation. The applicant bares the onus of proving that in the circumstances of publication he suffered compensable harm that was caused by the Broadcast. The applicant has, having settled against Ms Maiden and News Life Media, sought to portray the Broadcast as the primary or sole cause of the harm he claims to have suffered. That claim by him (that is inconsistent with his position in March 2023 during the limitation argument) put this squarely in issue and he has not put on any specific evidence to discharge his onus. Further, irrespective of the common law position in cases such as *Dingle v Association Newspapers* [1964] AC 371, DA s38(1)(d) means that proceedings the applicant has commenced in respect of other publications, irrespective of and further to any compensation received, may properly be taken into account in the reduction of damages awarded.

615. Mr Lehrmann, as explained above, gave entirely unsatisfactory and dishonest evidence.

616. His evidence about damages should be rejected unless it is contrary to his interests. Unlike nearly every other defamation proceeding in this jurisdiction, the applicant, although he called witnesses and apparently has many supporters, has not called any evidence from family members, friends or other persons about his hurt to feelings, whether contemporaneous, as to aggravation or any ongoing hurt: c.f. *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 at [484]-[488].

617. The evidence establishes that by 2pm on 15 February 2021 the applicant was stood down from his job due to accusations made against him in the News Article published at 8am that morning. Mr Sharaz and Ms Higgins had disclosed his name to many members of the Canberra media including *The Australian* journalist Ms Rosie Lewis. Ms Lewis contacted BAT resulting Mr Lehrmann being stood down and ultimately sacked from his position. On and from 1:55pm, numerous members of Parliament named Ms Higgins and discussed her serious allegations. This was already the story of the day, if not the year; Ms Maiden won the Gold Walkley.

618. Ms Lewis continued her investigation and published damaging articles accusing Mr Lehrmann of a further sexual assaults on 20 and 21 February 2021. On 22 February 2021, Louise Milligan published an article accusing the applicant of unwanted sexual touching to a fourth women. The articles made no reference to *The Project*. About this time, the applicant suggests he was excluded from chat groups. There is no evidence those purported actions were caused by the Broadcast. Even if that evidence is accepted as relevant to the Broadcast (of which there is no evidence) – the one document that is dated Ex 11 with the eject button occurred on 22 February 2023. The most likely cause where the three further serious allegations against the applicant that had no connection to the Broadcast.

619. By 22 March 2021, the 4 Corners on the ABC published the "Don't ask, Don't tell" episode that interviewed Ms Maiden and the security guard who gave the sensational evidence that Ms Higgins was found naked. The episode explicitly presented that the unnamed applicant raped Ms Higgins.

620. It is telling that the applicant admitted to his employer in June 2021 that (at a time where mainstream media had not named him) but more serious allegations had been made about by *The Australian* and the ABC that he believed that his ability to do his job was not affected in that precise class of person he now contends identified him from The Project. In that circumstance the applicant has not established that he has suffered any significant harm from The Project, bearing in mind the media and political storm that existed before the Broadcast.

621. Further, after he was named and charged Mr Lehrmann admitted, by giving concerns notices, that he considers he suffered serious harm by further publications about him on

9 February 2022 (National Press Club broadcast) and 20 June 2022 (Jonesy and Amanda broadcast) even though at that time he had been publicly named as a person facing a rape charge – indicative that there was limited impact, consistent with what he told BAT, on his reputation by the Broadcast before charge.

622. The applicant cannot establish that there was anyone who identified him that did not already know about the allegations either directly or as a result of the News Article, the actions of Ms Higgins and Mr Sharaz earlier that day or the media and political storm that occurred before 5:00pm on 15 February 2021. Publication to such persons could not cause significant or any harm to the applicant under any head of damage.

623. For these reasons, including those explained in Part I Identification above, the Court would not be satisfied, irrespective of the treatment of the applicant's evidence, that he has suffered harm that would give rise a significant award of damages. The appropriate and rationale award of damages, presuming a full acceptance of the applicant's evidence, would result in award similar to that awarded in *Palmer v McGowan (No 5)* and *Dutton v Bazzi* [2021] FCA 1474 (both which involved serious defamatory allegations, although admittedly less serious than in this case) and limited publication cases in inferior Courts.

Mitigation

624. "*Mitigation*" is used in defamation, including the *Defamation Act*, to describe, facts, matters and circumstances the Court may take into account, amongst others, that reduce the damages that might otherwise be awarded: see *Kumova v Davison (No 2)* [2023] FCA 1 at [98] (Lee J).

625. Section 38(c) DA recognises that the Court may take into account proceedings commenced in relation to similar any other publication of matter having the same meaning or effect as the defamatory matter. Both the News Article and National Press Club broadcast had the same defamatory meaning or effect as the Broadcast. To the extent that the harm is overlapping the applicant has settled those proceedings on significant financial terms acceptable to him – the applicant ought not recover damage for any harm that overlaps with any harm alleged in those proceedings.

626. As true mitigation, the applicant has taken self-help throughout the mainstream media to vindicate his reputation. This has involved him making television broadcast attacks on Ms Wilkinson and the Broadcast on 4 June and 13 August 2022 on the Spotlight program. He has given other television interviews on Seven Network and Sky News. He received significant compensation of over $100,000 in accommodation. He told Sunrise that he considered his public interviews had helped vindicated his reputation and change the public narrative about him. Any award of damages should be reduced to take into account these acts of self-help that admits have assisted his reputation and the financial compensation he directly received to ensure that any award is only compensatory.

Reduction of damages

627. Relevantly for these proceedings, the Court may also take into account the following in assessing damages, see *Schiff v Nine Network Australia Pty Ltd* [2023] FCA 688 (Jackman J) at [8]:

a. evidence properly before the Court on the defence of justification: *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 at 120 (Neill LJ);

b. evidence of specific conduct by the applicant, if it is "*directly relevant background context*" to the publication of the defamatory matter: *Burstein v Times Newspapers Ltd* [2000] EWCA Civ 338; [2001] 1 WLR 579 at [42] (May LJ, with whom Sir Christopher Slade and Aldous LJ agreed): as explained in *Schiff* at [5]-[18].

628. These matters are taken into account to assess the applicant's true reputation (see *Kumova* at [318],[345]), but may also affect the assessment of the degree of injury to the applicant's feelings that may well depend on the degree of vulnerability of the individual claimant to such hurt: see *Schiff* at [18].

629. In this case, Ms Wilkinson submits that the Court may take into account the following matters to significant further reduce any damages that may awarded:

c. To the extent that the Court finds that the applicant raped Ms Higgins but a defence of justification is not proved – no damages would be awarded.

d. The serious misconduct including the security breach and other matters for which Minister Reynolds sacked him for serious misconduct on 5 April 2019.

e. To the extent it is found that Mr Lehrmann had sexual intercourse with Ms Higgins in that:

i. He cheated on his girlfriend despite using his apparently monogamous relationship with her as a reason to deny Ms Higgins' allegations.

ii. That he perverted the course of justice in lying to the police.

iii. That he instructed his counsel to cross-examine Ms Higgins both at the criminal trial and in this trial on a false basis and presented her as a fantasist to the Courts and in his public statements, and

that such conduct is so serious and connect to the serious allegations that no damages ought be awarded.

f. His acts of dishonesty as established in lying to Ms Brown, Senator Reynolds, Security, friends and family and to the Court.

630. Courts in the United Kingdom have recognised circumstances akin to an abuse of process when an applicant may by their conduct in proceedings be completely disentitled to damages.

631. The English Court of Appeal in the recent decision in *Wright v McCormack* [2023] EWCA Civ 892. Warby LJ (with whom Andrews and Singh LJJ agreed) considered the legal principles at [42]-[64], emphasising how earlier cases had proceeded by reference to conduct which was in the same sector of reputation as the allegations sued on: see at [62(1)] and [62(2)] in particular, but also at [60] where the need for "relevance" or "matters which are directly relevant to the subject matter of the libel" was noted, by reference to decisions such as *Pamplin* and *Turner*.

632. The analysis is further confirmed by Warby LJ's discussion at [70]-[71] of the decision in *Campbell v News Group* [2002] EWCA Civ 1143, and the difficulty that Warby LJ said that he had in analysing the decision in Joseph v Spiller (see at [63]).

633. It was also confirmed by his Lordship's explanation of Summers (see below) (and its lack of applicability) at [74] and especially at [76]:

> *The judge in this case did not engage in the prohibited process of ascertaining the damages to which the claimant was entitled and then reducing that figure to reflect the claimant's "litigation misconduct". The judge took account of the claimant's lies and his attempt to deceive the court as part of the process of ascertaining the claimant's entitlement, namely a sum in damages that would be proportionate to the aims of compensating and appropriately vindicating the relevant aspect of the claimant's reputation. In this case, where the libel was an accusation of dishonesty, the dishonest conduct of the litigation was relevant for that purpose. This follows from the particular nature of the interest protected by the law of defamation.*

634. On the facts before him, Warby LJ found that it had been open to the trial judge to have regard to the applicant's conduct specifically because of the relevance of that conduct to the allegations sued on: see at [27] and [68]. As his Lordship said at [68], "[t]he sting of the libel was one of dishonesty" and on that basis the trial judge was right to consider it relevant to assessment of damages that the claimant had maintained a deliberately false case on serious harm, including by the service of witness statements which were subsequently withdrawn.

635. The conduct of the claimant in *Wright* was, like submitted in this case, evidently extensive, pre-meditated and directly connected to a central part of the claimant's case (the need to counter the respondent's justification defence), and directly relevant and central to a case based on an allegation of sexual assault.

636. There is a line of English authority, most authoritatively summarised in *Summers v Fairclough Homes Ltd* [2012] UKSC 26; [2012] 1 WLR 2004, that a plaintiff's genuine claim may be struck out on the ground of collateral dishonesty.

637. The power is to be exercised in only in exceptional circumstances and in a rare case like the present when faced with dishonest conduct like the applicant's: *Summers* at [33], [36], [61]. As the Supreme Court said in Summers at [43]:

> "*The Court of Appeal said that [striking out a claim at the end of a trial] is a largely theoretical possibility … We agree and would add that the same is true where, as in this*

case, the court is able to assess both the liability of the defendant and the amount of that liability."

638. The principle in *Summers* was noted in *Turley v Unite the Union* [2019] EWHC 3547, by Nicklin J at [159], who emphasised at [159](iii) the "*very exceptional*" nature of a case which would warrant strike out. Nicklin J at [159](i) stated that "*the only limit on that jurisdiction is that the Court must determine cases justly*".

639. *Summers* is itself an illustration of how those principles would apply to the applicant's dishonesty in these proceedings. The claimant had first claimed a loss of £838,616 for personal injury. The trial judge found that a large part of the claim was fraudulently made, as was shown by surveillance footage of the claimant which was inconsistent with his claimed injuries. General damages and loss of earnings of £88,716.76 were awarded based on the proved extent of injury. The Supreme Court concluded that there was a balance to be struck and the approach that the courts had taken was to assess liability and quantum by giving judgment in the ordinary way, so long as those assessment could be carried out fairly: at [50].

640. The conduct in *Joseph v Spiller* [2012] EWHC 2958 (QB) was also similar to the conduct by the applicant in the present case. The central relevant finding by the court in that case was that at [166] and was that the plaintiff had propounded a fraudulent economic loss claim. That is, the conduct in question was not merely in relation to credit but involved the advancing of a deliberately false claim for compensation - see also at [177]. Mr Lehrmann's case, advanced publicly, is that he has been destroyed by a manipulative fantasist – he is true victim of a vendetta and political mechanisations. The applicant's denial of sexual relations with Ms Higgins would be a hideous lie that undermines the very foundation of bringing this action.

Responsive submissions

640A. The submissions in ACS[507]-[510] wholly ignore the chronological and factual reality, outlined above, that well before the Broadcast on 15 February 2021, Ms Higgins' allegation had become the political story of the day. The significance of Ms Maiden's story was recognised by the decision to award her the Gold Walkley. The applicant's submissions are also removed from the reality of his suspension before the Broadcast and the commenced of the active investigation by *The Australian*, that

resulted in multiple articles portraying the applicant as a serial offender to any persons also found to have identified him in the Broadcast. The Court can take judicial notice that a television program having a national audience of only about 726,728 people, even in 2021, was not a comparatively significant event: c.f. the 7.13 million average (11.15 million peak) audience who watched the Matildas in the World Cup semi-final in 2023.

640B. As to ACS[520]-[522], the more senior senior counsel for the applicant, Mr Richardson SC, properly conceded at T2444.37-38 that if the Court were satisfied sexual activity occurred, then the applicant's conduct of these proceedings would amount to an abuse of process. As King's Counsel for Network Ten submitted in reply "Our learned friend Mr Richardson [SC], fairly, made a concession about the consequences of your Honour finding an extreme abuse of process. In those circumstances, our submission would be that the judgment would serve as vindication of reputation and that no award of damages would further be necessary for that purpose."

Further, it would scandalise the Court to award damages for any part of a claim that was affected by an abuse of the process. In this case, if the Court finds that the applicant had sexual intercourse with Ms Higgins and lied about it to the police, the public, the Chief Justice and the jury, and this Court, that is an abuse of process that goes to the heart of the defamatory imputations for which the applicant seeks damages and to the entirety of his claim. Additionally, the perversion of the criminal process (both during investigation and before the Chief Justice) by this lie is so serious and so connected to the defamation, that irrespective of the seriousness of the imputations, the applicant would have no or minimal reputation in the same sector of his reputation to vindicate.

640C. As to ACS[523]-[530], the settlements of both those proceedings, irrespective of the amount or described form, means that the applicant has been compensated for an amount he has agreed was appropriate compensation for the subject matter of those proceedings. It would be contrary to s38 DA for him to receive any compensation for any loss or damage that was jointly caused with those publications that he has settled on terms acceptable to him – particularly where those matters were to be heard before this Court.

M.2 Aggravated Damages

Principles

641. Aggravated damages are only awarded where the respondent's conduct towards the applicant was improper, unjustifiable or lacking in *bona fides* and does in truth aggravate damages: see *Triggell v Pheeney* (1951) 82 CLR 497*; Hubba Bubba Childcare on Haig v Bowden* [2020] NSWCA 28; (2020) 101 NSWLR 729 at [153]; *Palmer v McGowan (No 5)* at [490]. The second respondent denies that the applicant has pleaded or particularised any proper basis for aggravated damages.

641A. It is unnecessary for the Court to assess compensatory aggravated damages separately from compensatory general damages in the circumstances of this case. The assessment of damages is inherently instinctive and "*aggravated damages, awarded to reflect conduct by the [publisher] which aggravates the injury and increases the harm done to the [applicant], are compensatory in nature"*: see *Carson v John Fairfax & Sons Ltd* at 50 per Mason CJ and Dean, Dawson and Gaudron JJ. Punitive damages are not available by reason of DA s37. Thus an award including aggravated damages must be confined to what is truly compensatory: see *Carson v John Fairfax & Sons Ltd* at 66.

641B. It goes without saying that if the applicant has not established that he has suffered hurt by the publication then aggravating conduct cannot aggravate any injury or increase any such (non-existent) hurt. To separately award aggravated damages in those circumstances would have a punitive element contrary to DA s37.

642. Four bases for aggravated damages are now put.

Recklessness/efforts to contact

643. The first allegation that Ms Wilkinson was reckless indifference to the truth or falsity of the defamatory imputation (of rape). This allegation was never put to Ms Wilkinson. In any event, there is no basis for this allegation:

(a) Ms Wilkinson relied upon the fact checking of Mr Llewellyn and the facts of the other highly experienced producers who had primary responsibility for the production.

(b) She interrogated and raised questions about the bruise photographs and relied upon others that the issue was resolved.

(c) She was aware that the applicant was given the opportunity to respond to the

allegations before Broadcast.

643A. Further, the evidence on the cross-claim establishes that Ms Wilkinson relied on the legal advice of Network Ten in-house lawyers as to all aspects of publication: see paragraphs 551A-551H above. It was plainly justifiable conduct that could hardly be described as reckless or improper.

644. The second allegation does not relate to the conduct of Ms Wilkinson.

645. The third allegation made against Ms Wilkinson (also raised on the first allegation) that she did not make reasonable efforts to contact him. This allegation was not put to Ms Wilkinson. Mr Llewellyn made reasonable efforts to contact the applicant but in any event it was reasonable for Ms Wilkinson to rely upon Mr Llewellyn. This particular is not made out.

Logies speech

646. The fourth allegation is about the Logies speech.

647. The Court can take Ms Wilkinson's unchallenged evidence in Wilkinson 2 that the speech was sent to Network Ten for review and was also provided to Ms Smithies for review at that time. Ms Wilkinson gave evidence under cross-examination that she had sought advice before getting up on that stage.

648. Section 91 of the *Evidence Act* 1995 (Cth) means that the Court cannot rely upon the judgment of McCallum CJ to prove that the speech was improper, unjustifiable or lacking in bona fides. That judgment was, in any event, also based on additional online commentary and publications by other persons such as Jonsey and Amanda. Further, the judgment was irregular by reason of the Chief Justice accepting (what was incorrect evidence) from the DPP and by denying Ms Wilkinson natural justice.

649. The examples of sub-judice contempt given in the NSW Judicial Bench Book (*Attorney General for NSW v Radio 2UE Sydney Pty Ltd* (unrep, 11/03/98, NSWCA), *Hinch v Attorney General (Vic)* (1987) 164 CLR 15, *R v The Age Co Ltd* [2006] VSC 479) each involve someone naming the criminal defendant and either disclosure of prejudicial information that would otherwise not be before the jury or direct statements about the guilt of the accused, often during the trial.

a. Ms Wilkinson did not name Mr Lehrmann or directly refer to Ms Higgins' allegations or the allegations of sexual assault – the focus of the speech was describing her as a political problem;

b. the long-standing test for sub-judice contempt is that the publication was either intended or had the tendency to interfere with the administration of justice in a particular proceeding. The test of tendency is sometimes expressed in terms of being objectively likely: see D Rolph, *Contempt*, 2023 p186 and the authorities cited therein;

c. given a. that tendency primarily depended on potential jurors knowing who Brittany Higgins was, knowing what her allegations were and that the applicant was the person charged for the speech to be understood as a public statement of belief in the truth of her allegations;

d. any potential juror that would have recognised the subject matter would also have remembered the Broadcast and Ms Wilkinson's associated public support for Ms Higgins and therefore a further public show of support by her was unlikely in such indirect terms to affect the potential juror pool;

e. the uncontested evidence at Wilkinson 2 [22]-[27];

f. to the extent potential jurors were not aware of the subject matter the tendency would depend on the unlikely possibility that a juror would put two and two together having remember the content of the speech over a week or more later; and

g. nonetheless, an implicit support or belief from a public figure in the guilt of an accused more than one week before trial would not clearly have the tendency to affect the juror pool who would be given strict directions in light of existing extreme publicity and notoriety and the numerous articles still online (News Article, The Australian and ABC articles accusing the applicant of offences against three other women, Four Corners program, Scott Morrison apology speech article and much more).

650. For the same reasons it was not improper, unjustifiable or lacking in bona fides for someone in Ms Wilkinson's position to give the speech.

651. The applicant has not effectively challenged, if at all, Ms Wilkinson's evidence in Wilkinson 2.

652. Ms Wilkinson's unchallenged evidence is she did not request to give the speech and in those circumstances it cannot be inferred she deliberately wanted to interfere with Mr Lehrmann's trial: Wilkinson 2[3], see also her unchallenged evidence at [25].

653. Ms Wilkinson read out the parts of her speech concerning Ms Higgins before the ACT DPP and Network Ten Senior Litigation Counsel Ms Smithies on 15 June 2021: Wilkinson 2 [22]-[24]. Her unchallenged evidence (Wilkinson 2 [25]) is that she would not have given the speech had she been warned not to give the speech.

654. The clear inference from the unchallenged evidence in Wilkinson 2[25] about what Ms Wilkinson would have done had she received such advice is that Ms Smithies advised Ms Wilkinson she could give the speech.

655. Ms Smithies again reviewed the speech on 19 June 2022 after Ms McGarvey asked for a copy to check for red flags: Wilkinson 2 [26]-[27]. Ms Thornton and Ms Cat Donavan also reviewed the speech. Ms Wilkinson understood from her communications that she had been given full approval to give the speech. Ms Wilkinson confirmed under cross-examination that she gave the speech on advice, and it may be inferred by necessary inference that Ms Smithies approved the speech – especially given the "*Beautiful Speech*" text from Ms McGarvey.

655A. The evidence on the cross-claim, outlined and referenced in paragraphs 24K and following and 381A to 382C above details not only the legal advice that Ms Wilkinson received but the care with which Ms Wilkinson took to ensure she followed legal processes. Ms Smithies in her evidence admitted that Ms Wilkinson, as a Network Ten employee was relying on her to advise her in relation to the speech: T2546.5-46. Whatever may be said about Ms Smithies' evidence and reasoning, it is clear that she strongly held the view, as reflected in her advice to Ms Wilkinson, that Ms Wilkinson should give the speech in the terms she spoke: see T2615.35-2617.25; Smithies [37].

655B. Ms Wilkinson's unchallenged evidence (Wilkinson 3 [4]) on the cross-claim is that she was asked by her employer through Ms Thornton to give the speech in early June. Ms Wilkinson was placed in an invidious position of balancing her concerns (raised first in her email on 3 June 2022) with her obligations to comply as an employee with directions from her employer – she was dependant in this regard on the advice given to her by her employer's lawyers and the judgment of those to whom she reported.

655C. Ms Wilkinson, as detailed above, addressed her concerns about making public statements in relation to the Logies by ensuring the draft speech was involved in several stages of checks including by Mr Farley, Mr Drumgold, Ms Smithies and Ms Thornton and ultimately Ms Smithies again, Ms McGarvey and Ms Donovan. From Ms Wilkinson's perspective, detailed consideration and approval had been given to the speech by Network Ten producers, executives and lawyers. Irrespective of her knowledge of the law, she could reasonably expect that Network Ten's specialist media lawyers and senior executives had an even greater knowledge. That is particularly so given the confidence with which the advice was given and the number of experienced persons who were involved in the approval process.

655D. Network Ten and The Project, not Ms Wilkinson as an individual, were nominated for the Logie award. Ms Wilkinson did not have a role in that nomination process: see Wilkinson 2 [12]. TV Week made the decisions as to who was nominated and who received the award at the ceremony on 19 June 2022. In these circumstances, Ms Wilkinson was requested by Network Ten to attend the Logies and give the speech if they won the award. She responsibly relied upon the significant expertise of Network Ten's lawyers, producers and executives to guide her as to what was appropriate and lawful.

655E. Ms Wilkinson gave unchallenged evidence as to her then belief in the experience and competence of Ms Smithies and the conservative approach of the in-house Network Ten lawyers: see Wilkinson 1 [12], [89]. Although the Court may see the lack of wisdom of giving the speech as obvious, Network Ten's senior lawyer, producers and executives communicated to Ms Wilkinson a completely different view as to what was permissible: c.f. also Smithies [37].

655F. Ms Wilkinson, as an employee, was not in position to challenge and was entitled to rely

upon and follow advice from someone like Ms Smithies, who was believed by her to be highly skilled and competent. Ms Smithies was also a person who was duty bound, by her duty to the Court and duty to act in the interests of Ms Wilkinson and Network Ten, to give advice that would avoid the risk of prejudicing the administration of justice. As illustrated in her evidence to this Court (see T2615.35-2617.25) Ms Smithies held and still holds strong views as to the appropriateness of her advice. Whatever may be said now about the correctness of the advice, Ms Wilkinson's reliance on it to give the speech is not capable of constituting conduct that is improper, unjustified or lacking in bona fides in a *Triggell v Pheeney* sense.

655G. On 22 February 2024, the applicant served updated particulars of his claim for aggravated damages. The updated particulars make no new allegation about the conduct of Ms Wilkinson, but particular (d) recognises that Ms Wilkinson gave the speech in her role as an employee, and implicitly at the direction of her employer and with the advice of its in-house lawyers. These additional particulars illustrate how nothing Ms Wilkinson did as an individual was improper, unjustified or lacking in bona fides such as to warrant an award of aggravated damages.

655H. The applicant in deleting ACS [537]-[538], see also first sentence of ACS [544], properly acknowledges that the cross-claim evidence has fundamentally undermined his aggravated damages claim against Ms Wilkinson. The submissions at ACS [297A]-[297C] are inconsistent and contradictory to the substance of the ultimate submissions. The factual submissions at ACS [297A]-[297C] are otherwise factually and legally flawed.

655I. The correct approach for the Court is to assess Ms Wilkinson's conduct on and before 19 June 2022, not with the benefit of hindsight or based on findings or subsequent events. ASC [297A]-[297B] rely upon factual findings of McCallum CJ, contrary to s91(2) *Evidence Act* 1995, based on the evidence before her not currently before this Court, as proof of the existence of those facts for this proceeding. The applicant's submissions if followed would lead this Court into error. A further danger of the applicant's submissions is that the quoted observations of the Chief Justice were based on the mix of events that resulted from mainstream and social media reporting and commentary on the speech – the observations were in the context of determining an ex

post facto application as to whether the trial should be stayed on all the evidence before that court. It is of no assistance to the evaluation this Court must make.

655J. ACS [297C] completely ignores the full circumstances in which Ms Wilkinson gave the speech. When Ms Wilkinson was first asked to make public statements, she identified the issues and sought legal advice and approval for any statements she would make. Notwithstanding the impending trial, in and from May 2022, Network Ten having at some time put forward the Broadcast for Logie consideration: TV Week selected the program as a finalist for an award; TV Week sought public statements from Ms Wilkinson and Network Ten about the Broadcast and nomination; Network Ten arranged and approved for Ms Wilkinson to give public statements; Network Ten asked Ms Wilkinson to attend the Logie's on its behalf and prepare an acceptance speech; and Network Ten executives, producers and senior lawyers legalled and approved the speech. Ms Wilkinson's conduct in giving the speech in these circumstances falls well short of the demanding *Triggell v Pheeney* standard to justify aggravated damages.

655K. In response to ACS [544], as explained in paragraphs 24Mff above, Ms Wilkinson was only asked questions about her state of mind about the speech on and before 19 June 2021. The applicant's submissions completely misrepresent Ms Wilkinson's evidence. Ms Wilkinson was in effect denying that she knew she should not give the speech as she was giving the speech on 19 June 2022. Ms Wilkinson was never asked about her beliefs about the speech in 2023, with the benefit of hindsight and reflection. Given the evidence adduced on the cross-claims about the fall-out from the speech on the criminal trial and her career it is unsurprising that Ms Wilkinson was not asked, by either Network Ten or the applicant, about what she thought about Ms Smithies and the advice she had received from Ms Smithies, and others within Network Ten, to give the speech. Also, and in any event, Ms Wilkinson's state of mind in 2023 and 2024 is entirely irrelevant to any fact in issue in these proceedings. The applicant's submissions on this issue are untenable.

656. The applicant has failed to prove that any conduct of Ms Wilkinson was improper, unjustified or lacking in bona fides.

657. Given the public statements by Mr Whybrow SC about the speech and the public statement the applicant has made against Mr Drumgold the Court would otherwise not be satisfied that applicant has suffered real hurt as a result of Ms Wilkinson's speech.

658. Consistent with the approach in Russell, the Court would also otherwise not be satisfied of any aggravation to the applicant's hurt because of the credit issues and dishonesty before this Court outlined above.

659. The claim for aggravated damages fails.

The correct approach to assessing damages

659A. Notwithstanding the order of the submissions above, the Court must assess all questions of harm, including harm due to aggravation, in light of all the facts proved relevant to damages. In short, the proper way to proceed is to assess damages, including factors going to mitigation, reduction of damages and aggravation of damages in a single step.

659B. It is important to note that the High Court has authoritatively explained the three purposes of a single award of damages in defamation, as set out above: see *Carson* at 60. Despite that, a finding that a plaintiff has suffered no harm to reputation (because for example, their conduct means they have no reputation to protect) does not mean that they have not relevantly experienced hurt to feelings by reason of the defamatory publication for which they should be compensated (which could also include an award of aggravation, discussed above). Similarly, a plaintiff who has not suffered any hurt, may have still suffered harm to reputation that ought to be compensated, including by an award that vindicates his or her reputation. For the avoidance of doubt, as submitted above, Ms Wilkinson says that the applicant has not suffered any damage to reputation or relevant hurt, including by any aggravating conduct by her, for which he should be compensated.

659C. The assessment of harm to reputation (and any amount required to vindicate the applicant) and hurt to feelings involves the consideration and weighing together of all relevant established circumstances, including extent of publication, identification, seriousness of the allegation, causation (having regard to the criminal charge and other mass media publications naming him) and the evidence before the court relevant to the

allegations against the applicant (including as to credit), in determining what harm has been suffered.

659D. Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1986) 117 CLR 118 at 150 (applied and approved in *Carson* at 60) said:

> "*Compensation is here solatium rather than a monetary recompense for harm measurable in money. The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of inextricable considerations. One of these is the conduct of and the intentions of the defendant, in particular whether he was actuated by express malice.*"

659E. Because of these "*mixture of inextricable considerations*", factors that would result in the reduction of damages that would warrant nominal or derisory amounts should be taken into account as part of the assessment of compensatory damage. Otherwise, the notional figure arrived at by the Court before any reduction is considered would occur on a false premise – such as a figure to vindicate a person who has no reputation to protect (by reason of the mitigating factors).

659F. Dividing the task into separate stages would involve the Court engaging in a fiction of the type described by the English Court of Appeal in *Burstein* with "*blinkers*": at [41]. Juries tasked with determining damages sums are not required to divide their assessment thus – and nor should a judge: c.f. the staged approached in *Newsgroup Newspapers Ltd & Anor v Campbell* [2002] EWCA Civ 1143 at [117]-[119].

659G. There are a number of fundamental issues with the submissions the applicant makes at ACS [549]-[566]:

a. First, where the plaintiff is found to have no reputation to defend the circumstance described in ASC [576] is the norm and the circumstances described in ACS [558]-[559] would be the exception. Damages cases turn on their own evidence and established circumstances and it would be unhelpful for this Court to use first instances cases as reflective of principles as the applicant does at ACS [559]-[560].

b. As to ACS [560] specifically, there are a further number of issues using *Griess* to support the applicant:

i. That case does not address a situation where the applicant's dishonesty amounted to an abuse of process or disentitling conduct, as opposed to mitigation relevant only to reputation;

ii. The Court accepted in that case that there was no challenge the applicant's hurt to feelings evidence – that applicant called corroborative evidence from friends or family as to his hurt to feelings – Mr Lehrmann's hurt to feelings evidence in terms of his dishonesty and causation given other publications and events is challenged and no independent evidence was adduced. The Court must be satisfied pursuant to s140 an applicant has suffered real hurt. Should the Court find sexual intercourse the applicant's conduct in giving public performances on television during the course of the current proceedings repeating and revelling in that dishonesty is also inconsistent with genuine or, at least compensable, hurt;

c. In response to ACS [561]-[562], there must be compensable harm to be aggravated. As explained above the proper approach for the Court is to take into account any dishonesty or abusive conduct of the applicant in assessing how much to reduce damages that would otherwise be awarded. Irrespective of hurt or aggravation found the egregious dishonesty of the applicant in relation to the key issues in the case is such that, if the defences fail, nominal damages awarded;

d. As to ACS [563]-[566], for the reasons given above the staged approach in *Campbell* is not the correct approach, may lead this Court into error and is contrary to the applicant's own submissions made at ACS [550]-[552]. Further, the specific facts of *Campbell*, or any other case, tend to distract the Court from doing justice to the facts of this case.

M.3 Other Relief

660. There is no factual basis to award an injunction. The matters were removed on 7 August 2021 and have not been published since. The second respondent has never made a public statement naming Mr Lehrmann.

661. The second respondent reserves the right to make submissions on costs after judgment is published.

Sue Chrysanthou 11 March 2024

Barry Dean

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Counsel for Lisa Wilkinson, the second respondent