



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

No. NSD 103 of 2023

**BRUCE LEHRMANN**

Applicant

**NETWORK TEN PTY LTD and another**

Respondents

### **FINAL OUTLINE OF FIRST RESPONDENT'S CLOSING SUBMISSIONS**

These submissions have been amended pursuant to orders made on 15 February 2024. All relevant amendments made pursuant to those orders are double-underlined. On 20 February 2024, the parties received an email from the Associate to Lee J requesting that they provide assistance to his Honour in relation to three matters set out in that email. Each of the matters, and Network Ten's submissions in response are set out in Part M: [1143A]-[1143U] and [1167A]-[1167V]. To assist, submissions in reply to the submissions filed and served by the Applicant on 28 February 2024 are double underlined and in bold at [146E]-[146U] and [1167W]-[1167AH]. Network Ten otherwise relies upon these written submissions and the submissions made during its oral closing address on 21 December 2023.

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### **FINAL OUTLINE OF FIRST RESPONDENT'S CLOSING SUBMISSIONS**

Pursuant to order 2 of the orders made on 29 December 2023, these submissions have been amended in reply to some of the matters raised in Mr Lehrmann's written closing submissions dated 25 December 2023 (ACS). All relevant amendments are underlined in accordance with the indication given by Lee J on 22 December 2023 (T2471.8-10). Network Ten otherwise relies upon these written submissions and the submissions made during its oral closing address on 21 December 2023.

#### **A GENERAL CREDIT OF WITNESSES**

##### **A.1 Summary**

1. The fact in issue in respect of the defence of justification is whether Mr Lehrmann raped Ms Higgins in Parliament House in 2019. The evidence of the two people in the room at the time of the alleged assault is irreconcilable. On Ms Higgins' account, Mr Lehrmann sexually assaulted her. On Mr Lehrmann's account, no sexual activity, consensual or otherwise, occurred whatsoever. The Court's assessment of the credibility and reliability of the evidence given by Mr Lehrmann and Ms Higgins is therefore central to the determination of the principal fact in issue.
2. Successful attacks were made in cross-examination on the credit of each of Mr Lehrmann and Ms Higgins. Those attacks were, however, qualitatively different.

3. In summary, Mr Lehrmann was revealed to be a fundamentally dishonest man, prepared to say or do anything he perceived to advance his interests and wholly unconcerned with giving the Court an honest account of the events of 22-23 March 2019. Incredibly, he is an applicant who seeks the aid of the Court to vindicate his reputation in respect of a report of an event, in circumstances where he has given false—we will submit knowingly false—evidence in respect of almost every significant integer concerning that event. The ultimate account he gave of his conduct on 22-23 March 2019 cannot be reconciled with his earlier accounts or the available objective evidence. In its final incarnation, the explanation he gave for what he did while at Parliament House was simply ludicrous.
4. Ms Higgins’ evidence of the sexual assault did not waver and was visibly raw, emotional and distressing. The attack on her credit fell broadly into two categories.
5. *First*, there were, plainly, inconsistencies in her account of events directly related to the alleged assault in the period from 22 March to 13 April 2019. For reasons we develop below, those inconsistencies are explicable by a combination of the effects of trauma and alcohol on memory, the passage of time, limited access to information and Ms Higgins’ attempts to reconcile her independent memories with information of which she has subsequently become aware. Overwhelmingly, however, her account of the events she described over that period finds support in contemporaneous records or the evidence of other witnesses, even in circumstances where other witnesses had different recollections of the same events.
6. *Secondly*, there was an attack on Ms Higgins’ credit that turned mostly on her subsequent interactions with Fiona Brown, Linda Reynolds, Michaelia Cash and the media. The attacks in this latter category are remote from the alleged sexual assault. The attempt to tie them to Mr Lehrmann’s ultimate submission that Ms Higgins should be found to have fabricated, and always to have fabricated, her allegation of sexual assault, lacks coherence and cannot be reconciled with the objective evidence.
- 6A. It appears from the ACS that, unsurprisingly, this second line of attack on Ms Higgins’ credit has been abandoned. The only relevant reference in the ACS appears to be an allegation that Ms Higgins made dishonest claims about the lack of forensic analysis of Mr Lehrmann’s phone in a speech after the mistrial: ACS, [28(h)], [300]-[301]. In relation to that allegation, Ms Higgins’ erroneous belief that Mr Lehrmann was not

required to provide his telephone for forensic analysis was not unreasonable in circumstances where no material from his phone was used in evidence in the criminal proceedings and Ms Higgins, as a witness in those proceedings, presumably did not have access to the DPP brief of evidence. It is not a matter that would have any effect on the Court's assessment of her credibility in this proceeding.

- 6B. Otherwise, Ms Higgins' interactions with Michaelia Cash are only referred to as part of Mr Lehrmann's submissions about the adequacy of the respondents' assessment of Ms Higgins' credibility in the context of the qualified privilege defence: ACS, [426], [427].
- 6C. Finally in this category, despite the emphasis that was sought to be given to it in the running of the trial, the suggestion that Ms Higgins attempted to derail the foreshadowed criminal retrial of Mr Lehrmann for the purpose of somehow orchestrating the bringing of defamation proceedings by him that would lead to the rape allegation being determined on the civil standard appears to have been abandoned. Nothing is said in support of that allegation in the ACS.
7. Having regard to the impaired credit of the two principal protagonists, in assessing the probability of the occurrence of the central fact in issue, the following objectively established touchstones, established via contemporaneous records and the evidence of other witnesses whose credit cannot fairly be impeached, are of particular importance:
- (a) Mr Lehrmann was physically attracted to Ms Higgins (a matter as to which Mr Lehrmann gave false evidence).
  - (b) Mr Lehrmann purchased at least two drinks for Ms Higgins at The Dock on 22 March 2019 (a matter as to which Mr Lehrmann gave false evidence).
  - (c) Mr Lehrmann spent a substantial amount of time with Ms Higgins at The Dock (a matter as to which Mr Lehrmann gave false evidence).
  - (d) Ms Higgins became intoxicated at The Dock, and was encouraged to drink and skoll alcohol by Mr Lehrmann (a matter as to which Mr Lehrmann gave false evidence).
  - (e) Ms Higgins continued to drink alcohol at 88mph.
  - (f) Ms Higgins fell over at 88mph (a matter as to which Mr Lehrmann gave false evidence).

- (g) Mr Lehrmann passionately kissed and touched Ms Higgins at 88mph (a matter as to which Mr Lehrmann gave false evidence).
- (h) Mr Lehrmann and Ms Higgins returned to Parliament House in the early hours of 23 March 2019.
- (i) Ms Higgins had no reason to go back to Parliament House (a matter as to which Mr Lehrmann gave false evidence).
- (j) Mr Lehrmann lied to security officers to gain entry into Parliament House.
- (k) Ms Higgins removed her shoes when passing through security and was unable to put them back on because of her level of intoxication.
- (l) Mr Lehrmann and Ms Higgins entered Senator Reynolds' Ministerial Suite.
- (m) Mr Lehrmann had alcohol in the Ministerial Suite (a matter as to which Mr Lehrmann gave false evidence).
- (n) Mr Lehrmann left Parliament House on his own and in a hurry, leaving Ms Higgins there.
- (o) Ms Higgins was found some hours later in a state of undress on a couch in Senator Reynolds' office in the Ministerial Suite.
- (p) Mr Lehrmann lied to Fiona Brown repeatedly about his reasons for being in Parliament House and his activities while there.
- (q) Mr Lehrmann lied to Senator Reynolds about the same matters.
- (r) Mr Lehrmann never gave his current account of his activities while at Parliament House until mid-2021, well over two years after the relevant events (being an account that, itself, is absurd).
- (s) Ms Higgins made contemporaneous, credible and consistent reports of having been sexually assaulted to Ms Brown, Mr Payne, Mr Dillaway, Major Irvine, Mr O'Connor, Federal Agents Cleaves and Thelning, Detective Senior Constable Harman and Ms Cripps; and has never wavered in respect of the essential parts of those reports since.
- (t) Ms Higgins made subsequent reports of having been sexually assaulted to Ms Humphreys, Kelly Higgins, Mr Higgins and Ms Jago.



## **A.2 Mr Lehrmann's Credit**

8. Mr Lehrmann was an actively dishonest witness. During the course of his evidence, he admitted to telling lies, conceded that his evidence was untruthful and was caught out on many occasions giving untruthful evidence.
9. As developed in Part B below, Network Ten relies upon those lies not only as being relevant to the assessment of Mr Lehrmann's credit and reliability, but also as evidence of a consciousness of guilt to the extent that the lies were told after 23 March 2019 and relate to the fact and circumstances of his attendance at Parliament House out of hours.
10. Contrary to the apparent suggestion at [2], [6] of the ACS, Network Ten does not contend that Mr Lehrmann is a compulsive liar in the sense that he is unable to tell the truth on any issue. Rather, Network Ten's contention is that Mr Lehrmann was a witness prepared to say or do anything that he perceived would assist his case or undermine Network Ten's case. That including making a scandalous attack on the credibility of Lauren Gain. In cross-examination, Mr Lehrmann was reminded of an assertion he had made on the *Spotlight* program in June 2023 that Ms Gain had made up her observation of him and Ms Higgins passionately kissing at 88mph, and that she had colluded with Ms Higgins to make up false evidence that was then given in his criminal trial (T297.20-24; Exhibit #R43 at 37:08-38:18). He was offered the opportunity to withdraw the accusation, but declined to do so and, instead, said that he stood by it (T297.28). He was prepared to say that Ms Gain had sought to pervert the course of justice in his criminal trial (T297.30-31). None of those allegations were even put to Ms Gain during her evidence in this proceeding (T1095-1119). The inference must be that Senior Counsel for Mr Lehrmann knew (as was the fact) that he could not responsibly put the allegations to her because they are baseless. Such serious and untrue allegations should never have been made and maintained by Mr Lehrmann.
- 10A. Mr Lehrmann's attempt to justify the attack he made on Ms Gain's credibility at [9], [10] of the ACS, misstates the nature of that attack. The attack he made on *Spotlight* and repeated in his evidence was not simply that Ms Gain's observation was false, but that she had made that false allegation in collusion with Ms Higgins for the purpose of perverting the course of justice. The ACS fail to grapple with that serious and baseless allegation. Further, the serious allegation made at [9] of the ACS that "*Ms Gain had been contacted by Ms Higgins in a deceptive and calculated manner ahead of the*

Project broadcast in a manner suggestive of an attempt to pollute Ms Gain's evidence and 'recruit' her" does not reflect and is otherwise unsupported by the content of the relevant Telegram message from Ms Higgins to Ms Gain (referred to at [835] below), was not put to either Ms Higgins or Ms Gain in cross-examination, and should not have been made.

- 10B. Further, the reasoning advanced at [11] of the ACS, which seeks to equate Ms Higgins' conduct with that of Mr Lehrmann, is plainly fallacious. Ms Higgins is not a party to these proceedings. Network Ten's criticism is of Mr Lehrmann audaciously bringing defamation proceedings in which he seeks damages to vindicate his reputation, in circumstances where he has given no remotely credible account of his conduct in respect of the events underlying the imputations he has sued upon, and has been prepared to launch a scandalous attack on an obviously honest and independent witness. This is conduct which, in Network Ten's submission, disqualifies him from any entitlement to damages, even if the defences were to fail; in those circumstances, the judgment of the Court would be a sufficient vindication.
11. In our submission, taken as a whole, Mr Lehrmann's dishonesty easily surpasses that of the plaintiffs in *Joseph v Spiller* [2012] EWHC 2958 (QB), who succeeded but were awarded 1p in damages and ordered to pay 75% of the defendants' costs. At the end of the day, Mr Lehrmann is an applicant who invokes the jurisdiction of this Court to vindicate his reputation in respect of a publication conveying imputations about an event, but has then been caught lying endemically and in multiple forums, including this Court, about that very event.
- 11A. Mr Lehrmann accepts that his evidence was unsatisfactory and that it is open to the Court to form an adverse view of his credit: ACS, [2]. His characterisation of his evidence as being false in respect of "relatively peripheral issues" (ACS, [8], [12], [21]) and otherwise consistent and unwavering (ACS, [6]) should, however, be rejected. Mr Lehrmann repeatedly gave untruthful evidence on matters of central importance in this proceeding, including in respect of the touchstones referred to in [7] above. Those matters are developed in detail below. None were peripheral matters; they were the directly relevant background to and immediate aftermath of what occurred in Senator Reynolds' office on 23 March 2019.

- 11B. Mr Lehrmann’s evidence in respect of what happened on his return to Parliament House on 23 March 2019 was certainly not “consistent and unwavering”. He lied about the reason for attending Parliament House (see paragraphs [35]-[37] below), and lied about his activities after entering the Ministerial Suite (see paragraphs [64]-[70] below). He lied and was evasive when asked by Fiona Brown about what had happened (see paragraphs [71]-[76] below). For the reasons set out at [77]-[81] below, Network Ten submits that Mr Lehrmann’s conduct after 26 March 2019 was indicative of someone who feared that Ms Higgins had disclosed the sexual assault. Further, Mr Lehrmann lied to Senator Reynolds in response to her show cause letter and failed to address the reason for attending Parliament House in his response (see [82]-[84] below). At [11] of the ACS, Mr Lehrmann cites as an example of his consistent and unwavering evidence that he maintained that upon entering the Ministerial Suite he turned left and did not see Ms Higgins again, yet Ms Brown’s notes record that he told her that he and Ms Higgins “chatted” before going to the “outer office” or “general area” (T2051.31-38) and that Ms Higgins was “fine” when he left (T2054.21-29) (see [523] below).
- 11C. Mr Lehrmann submits that if he knew he had had sex with Ms Higgins, it would have been counterintuitive and risky to have denied to police that any sexual activity occurred, particularly when he did not know what, if any, forensic evidence existed: ACS, [12]-[15]. But engaging in such speculation would not assist the Court in circumstances where it does not know what advice (if any) Mr Lehrmann received from Mr Korn or anyone else about what he should or should not say in his police interview.
- 11D. Mr Lehrmann well knew the nature and detail of the allegations made by Ms Higgins from having watched *The Project* prior to his police interview. He knew that the allegations were almost two years old at the time of the broadcast. Further, Mr Lehrmann was exposed at trial as someone who was prepared to lie to the police in circumstances where he knew those lies could be easily contradicted or must have appreciated that there was some risk of them being contradicted – for example telling the police in absolute terms that he had no alcohol in his office (see [38]ff below). He was also someone prepared to shift his position in response to the disclosure of information by police during the interview – for example initially telling police that he could not recall if he was intimate with Ms Higgins at 88mph, but then telling them that it was possible after Ms Gain’s observations about them pashing had been disclosed to him. Further, Mr Lehrmann denied to police having received any calls when he was in

the Ministerial Suite (Exhibit #31: CB1120, CB1121 pp 4935, 4944 (Q640, Q734)) and knowing his girlfriend's number (Exhibit #31: CB1120, CB1121 p4945 (Q739)) in circumstances where police had his phone records that showed the missed calls. Similarly, Mr Lehrmann denied that there was any alcohol in the office (Exhibit #31: CB1120, CB1121 pp 4946, 4047 (Q754, Q762)) in circumstances where police were aware that Ms Brown had said that the excuse he had given for coming back to the Ministerial Suite was to drink whisky.

- 11E. Mr Lehrmann's denial of any sexual activity having taken place to police is consistent with him having decided to adopt the approach most likely to deter the bringing of charges against him. If Mr Lehrmann had admitted sexual activity had occurred, but asserted it was consensual, it was all but inevitable that he would be charged, having regard to Ms Higgins' account and the amount of alcohol that had been consumed, irrespective of whether there was any forensic evidence in existence. As at April 2021, the only way Mr Lehrmann could potentially avoid charges being brought against him was to adopt the course he did, of denying that any sexual activity occurred, leaving the police with his word against that of Ms Higgins. Viewed in that light, it was hardly the "gamble of his life" (cf ACS, [14]). It was a rational approach for a liar to take in circumstances where he had resolved to participate in an interview with police in the hope that it would result in them not pursuing the matter further.
- 11F. As developed in these submissions, a feature of Mr Lehrmann's evidence was that he purported to have an absolute recollection of aspects of events he could not otherwise recall, and that he knew was unhelpful to his case (see, for example, [213], [242] below). His evidence in respect of those events was shown to be untruthful. Further, Mr Lehrmann was shown to have lied when he gave similarly absolute accounts at the relevant times to Ms Brown, Senator Reynolds, the police and in his *Spotlight* interview (as developed below). Mr Lehrmann cannot simply explain away these lies by suggesting that he "had no reason to retain minute details" of events on 22 or 23 March 2019 or the passage of time: cf ACS, [3], [4]. The relevant details were matters Mr Lehrmann purported to have distinct recollections about, but which were subsequently shown to be untruthful.
- 11G. The particular examples referred to at [3] of the ACS as to Mr Lehrmann's evidence about the number of drinks purchased at The Dock and where he was when he replied to Senator Reynolds' show cause letter are addressed at [16]-[23] and [83(c)] below.

The relevance of Mr Lehrmann's response to the show cause letter from Senator Reynolds was not confined to the lie he told the Senator about where he was physically located. The response, which Mr Lehrmann said was one of the most important letters that he needed to respond to in his entire professional life (see [943] below), contained lies about the circumstances of his entry to Parliament House and failed to address the question of what he did in the Ministerial Suite in the early hours of 23 March 2019.

### **A.3 Mr Lehrmann lied about being physically attracted to Ms Higgins**

12. Mr Lehrmann lied when he denied having said that Ms Higgins was “*good looking*” during drinks at the Kingston Hotel on 2 March 2019 and denied having invited Ms Higgins to those drinks (see [205]-[215] below).
13. In cross-examination, it was put to Mr Lehrmann that, as at 22 March 2019, he found Ms Higgins attractive. Mr Lehrmann said no (T350.43-44). That evidence was inconsistent with what he had said on the *Spotlight* program. When asked if he found her attractive, Mr Lehrmann's answer was that he did find her attractive (Exhibit #R16 at 16:06-16:25). Mr Lehrmann sought to explain this inconsistency by making some kind of strange distinction that he found her attractive, but not in a way that he would advance any sort of relationship, and that the attraction he felt for her was no different to the attraction he might find in anyone in the court room irrespective of gender (T351.8-12). It was abundantly clear that Mr Lehrmann was scrambling to provide an explanation for this obvious inconsistency.

### **A.4 Mr Lehrmann lied about events at The Dock**

#### ***A.4.1 Mr Lehrmann lied about meeting up with Mr Wenke at the Kingston Hotel***

14. In cross-examination, Mr Lehrmann said that after finishing work at Parliament House on 22 March 2019, he and Mr Wenke walked down together to the Kingston Hotel to have a couple of beers and a bite to eat. It was put to him that his intention at that time was to have a meal with Mr Wenke and then go home (T240.26-41). Mr Lehrmann's initial response was to agree, but then he suggested that he and Mr Wenke were “*working on something*” and he could not recall if it was necessary to go home after the pub or return back to Parliament (T240.41-43). It was put to him that if he had been intending to go back to Parliament, he would have had his pass with him. He would not accept that because he had left his pass in the office, he was not intending to go back to Parliament. He suggested that he could have done so through the signing in process

(T241.15). He then accepted that if he was intending to go back to Parliament House the ordinary course would have been to have taken his pass with him but that “*sometimes you do forget*” (T243.23-25). He said given he did not have his pass or his keys that it would have been the case that he and Mr Wenke were returning to Parliament (T243.35).

15. Contrary to Mr Lehrmann’s evidence, Mr Wenke’s evidence was that they did not walk down to the Kingston together. Mr Wenke said that he arrived separately by walking from his place of residence (T1121.11-13). Mr Wenke also said that he had finished work for the week at the time he left to go to dinner at the Kingston Hotel (T1121.37-38). Contrary to Mr Lehrmann’s evidence, he and Mr Wenke were clearly not intending to return to Parliament House after their meal. Mr Lehrmann’s evidence on the fact and circumstances of meeting Mr Wenke at the Kingston Hotel was untruthful. Although relatively minor lies in the scheme of things, they were indicative of someone who was prepared to give untruthful evidence on the run, and in order to seek to explain inconsistencies in his account of events.

#### ***A.4.2 Mr Lehrmann lied about purchasing drinks at The Dock***

16. In his examination in chief, Mr Lehrmann was asked how much he had to drink at The Dock and his answer was “*only a couple of rounds with Austin. We – we were in – so I think it would have been one round for me, one round for him*” (T94.43-45). Mr Lehrmann confirmed, when the cross-examiner was closing gates, that his evidence was that he brought one drink for Mr Wenke and one for him at the same time, and then Mr Wenke returned the favour i.e. that they each had only two drinks of beer while at The Dock (T244.14-39). By reference to his bank statement recording expenditure of \$16 at The Dock on 22 March 2019 (Exhibit #15: CB36), Mr Lehrmann accepted that in 2019 two beers would have cost \$16 (T244.40-41). He said it was possible he had other drinks, but his best recollection was that he drank two beers on the night (T244.45-47).
17. In his examination in chief, Mr Lehrmann was also asked if he had purchased drinks for anyone else other than Mr Wenke, and Mr Lehrmann said that he did not (T95.1-2). Again, during the gate-closing phase of the cross-examination, Mr Lehrmann said that he did not recall buying drinks for anyone else, that the only money he spent at The Dock was \$16 and that that was the cost of two beers (T245.12-27; T249.1-6). He said

that was his position having reviewed his bank statement and the compilation CCTV (Exhibit #17A: CB35) (T245.27).

18. Mr Lehrmann said that he did not have any cash with him on the night (T249.8). He said that he had two bank accounts as at 22 March 2019 that he could access using a debit or credit card. He provided statements for both of those accounts (EFTPOS and a credit card) (Exhibit #15: CB36). Mr Lehrmann agreed that he had two sources of funds that he could have accessed on the night, each of which had separate cards (T249.17-47). His evidence was that he used one of those accounts to pay for drinks at The Dock and had no other source of funds to pay for drinks other than those two accounts (T250.9-19).
19. Mr Lehrmann said he had no recollection of buying two vodka drinks for Ms Higgins during the course of his time at The Dock on 22 March 2019 (T247.12-13). When Mr Lehrmann was challenged on the truthfulness of his evidence in chief about not buying drinks for anyone other than Mr Wenke, his mind went blank and an adjournment was necessitated (T247.28-39).
20. After a break, Mr Lehrmann said that he could recall buying Ms Higgins a drink at the bar. He said he couldn't remember the type of drink, but it was in a small glass (T259.14-34).
21. Mr Lehrmann ultimately had to admit that the answers he had given about not having bought drinks for anyone other than Ms Wenke had been false (T260.18). In answer to a question from the Court, he said that his state of recollection about purchasing drinks at that point in the cross-examination was not different to the state of his recollection when answering questions about the topic in examination in chief (T260.34-38). The only explanation Mr Lehrmann was able to provide for having given false evidence was that he "*must have been confused about where we were*" because he had reviewed the CCTV footage of The Dock in preparation for giving evidence (T261.16-27).
22. Mr Lehrmann also accepted that when asked by the police if he had bought Ms Higgins any drinks, his answer that he could not specifically recall was not correct having reviewed the CCTV footage (T261.37-262.5).
23. Mr Lehrmann was caught out in a lie. In his evidence-in-chief, he had attempted to mislead the Court by asserting that the only person he had purchased drinks for was Mr Wenke. When he realised that the CCTV footage was about to be played and would

reveal his lie, his mind blanked and he then volunteered that he had in fact purchased at least one drink for Ms Higgins. The true position was that he had purchased at least two drinks for Ms Higgins, and at least six drinks in total, and had no explanation for how he had paid for them. This was another example of Mr Lehrmann seeking to play down his interactions with Ms Higgins on 22 March 2019 in an attempt to mislead the Court as to the true extent of his interactions with her that evening.

**A.4.3 Mr Lehrmann lied about having “minimal” contact with Ms Higgins at The Dock**

24. In his evidence-in-chief, Mr Lehrmann was asked about his interactions with Ms Higgins at The Dock. He said that “*they were professional and cordial. I remember them being minimal to an extent*” (T94.38). In cross-examination, he was asked what he meant by “minimal to an extent” and said that they had “*some brief social interactions*” or “*incidental conversations*” and “*nothing of substance*” (T246.19-26).
25. Mr Lehrmann denied spending most of the evening with Ms Higgins. He denied going to Ms Higgins on numerous occasions to converse with her (T246.28-39). He disagreed that he chatted to Ms Higgins for a proportion of the night and that he kept an eye on her throughout the evening and monitored her to make sure she always had a drink in her hands or close by (T246.41-247.1).
26. The facts, matters and circumstances set out in [312]-[316] below, demonstrate that Mr Lehrmann’s evidence about having minimal or incidental conversations with Ms Higgins was utterly false and intended to mislead the Court. In fact, he spent the majority of the evening with Ms Higgins, including going to the bar with her to buy drinks, monitored her drinking to ensure that she had a drink at all times and encouraged her to drink, including by irresponsibly insisting at the end of the night that she “*skoll*” a spirit-based drink.

**A.5 Mr Lehrmann lied about events at 88mph**

27. Mr Lehrmann’s evidence was that he had a clear recollection that at 88mph he did not touch Ms Higgins on the legs or thigh, put his arm around her or kiss her (T296.45-297.8). Mr Lehrmann was unequivocal; he denied *any form of intimacy* occurred at all with Ms Higgins at 88mph (T298.19-20). Mr Lehrmann was exposed as having lied in giving that definitive answer in at least three ways.
28. *First*, Mr Lehrmann was reminded of the questions he was asked in his police interview about events at 88mph. He was asked by police (Exhibit #31: CB1120, CB1121,



(Q674)): “*At any time during the night of 22-23 of March 2019, did you engage in any intimate behaviour with Ms Higgins at all*” (T299.1, 11, 32). Mr Lehrmann’s answer to that question was “*Yeah, I can’t. I just can’t remember that. I know we were close, but I just can’t remember*” (T299.40). It was put to Mr Lehrmann that his answer to police was not the denial of engaging in intimate behaviour he had given in this proceeding, to which he sought to make a distinction between intimate touching generally (which he had outright denied) and specific examples of intimacy (touching, arms around her) (T299.45-47). Mr Lehrmann’s unequivocal denial was simply untruthful.

29. *Secondly*, Mr Lehrmann was asked if it was *possible* that he had engaged in intimate behaviour at 88mph on 23 March 2019. He said “*no*” (T301.16-17).
30. However, in his interview with police, Mr Lehrmann’s answer was again something far less equivocal: “*Yeah, yeah, it’s possible, but um, would I have – would I have acted beyond anything that was a bit flirtatious? Absolutely not, because I was in a relationship, so.*” (Exhibit #31: CB1120, CB1121 (Q675)).
31. *Thirdly*, Mr Lehrmann was asked about the police putting to him what Ms Gain had told them about witnessing Mr Lehrmann and Ms Higgins pashing. It was put to Mr Lehrmann that in light of his position now that a pash never occurred, his answer to police to the question of whether he had pashed Ms Higgins should have been an unequivocal no. He agreed with that proposition (T302.11-37). Mr Lehrmann was then played the question and his answer at Exhibit #31: CB1120 (18:09:15). He agreed that the substance of his answer to police was that he could not recall, because of the passage of time, whether he had been intimate with Ms Higgins and pashed her at 88mph (T303.26-28). He attributed the inconsistencies in his answers to police and in this proceeding to a combination of nerves and trying to piece the night together when speaking to police.
32. The true position is that Mr Lehrmann was caught out in a lie between the unequivocal denial of having had any intimate contact with Ms Higgins at 88mph and his earlier answers to police that it was possible he had had such contact. His evidence to the court on this topic was not frank. It is all the more remarkable that Mr Lehrmann would make and maintain such a serious allegation against Ms Gain of having colluded with Ms Higgins in making up having witnessed the kiss in circumstances where he had accepted that possibility when asked about the kiss by police.

33. Finally on this topic, Mr Lehrmann was also asked if he had engaged in any flirtatious behaviour with Ms Higgins. He said: “*very minimal*” but was unable to articulate what that meant beyond “*nothing beyond that would indicate an attraction or anything more than, you know*” (T300.1-7). When pressed in cross-examination, Mr Lehrmann said it was possible he had engaged in verbal flirtation with Ms Higgins (T301.45-46). He could not explain what that meant (T302.5-6). In Network Ten’s submission, it was apparent from his answers that Mr Lehrmann was simply making up his evidence on the topic of flirtation as he went along. The result was some kind of acceptance of having engaged in “*very minimal verbal flirtation*”, but without any kind of explanation as to what that meant, when the true position, established from the obviously truthful evidence given by Ms Gain, was that he had intimately touched and pushed Ms Higgins.
34. Mr Lehrmann also gave evidence that Ms Higgins did not trip over and he did not help her up while at 88mph (T296.18-23; 298.10-14; T304.16-18). In light of the evidence of Ms Higgins and Ms Gain (as to which, see [365] and [382] below) and the contemporaneous records of the police officers (as to which, see [677] below), the Court would reject Mr Lehrmann’s evidence on this topic and find that in fact Ms Higgins did trip while at 88mph and/or on the steps on the way out of the club and that Mr Lehrmann did in fact help her up. There can be no basis for Mr Lehrmann’s lie on a matter such as this other than a propensity for dishonesty and a determination not to assist the Court.

## **A.6 Mr Lehrmann lied about his purpose for entering Parliament House**

### ***A.6.1 Mr Lehrmann lied about the circumstances in which Ms Higgins came with him to Parliament House***

35. In Network Ten’s submission, the Court would not accept Mr Lehrmann’s explanation as to the fact and circumstances in which he and Ms Higgins caught an Uber to Parliament House. Those matters are addressed at [382]-[390] below. The evidence that Mr Lehrmann gave was, again, self-serving and untruthful. In particular, it is not only contrary to Ms Higgins’ evidence but also inherently unlikely that Ms Higgins (who had spent the night drinking and dancing, and was three weeks into a very junior role in Senator Reynolds’ office) just so happened to also need to go to Parliament House in the early hours of the morning, but did not give a reason to Mr Lehrmann.

#### ***A.6.2 Mr Lehrmann lied to security in order to access Parliament House***

36. As set out in paragraph [393] below, Mr Lehrmann admitted to having lied to security for the purpose of entering the security gate at Parliament House by telling them that he was with Senator Reynolds and had been requested to pick up some documents. This was no trivial lie. It was a lie that implicated Senator Reynolds, and a lie that Mr Lehrmann then lied about again when asked to explain his conduct to the Minister.
37. In his evidence in chief and in cross-examination, Mr Lehrmann had suggested that if he had given the real reason for his entry i.e. to collect his keys, security would “*have thought that was a minor thing*” and told him to “*bugger off and come back next week*” (T351.14-34). However, those answers were particularly nonsensical having regard to Mr Lehrmann’s evidence that it is not unusual to come back to Parliament House after hours and that he had occasionally done so in the past, including to drink alcohol (T352.11-20). In fact, the real reason Mr Lehrmann did not tell security that he was there to collect his keys is likely because, had he done so, they would have waited for him outside the Ministerial Suite in order to lock up afterwards and escorted him back to leave the building (T352.26-30). His intention was never just to collect his keys and leave immediately.
- 37A. For these reasons, the Court would reject Mr Lehrmann’s submissions that the lies he told security for the purpose of entering Parliament House were “*of no moment*” and that his explanation for having lied was “*entirely rational*”: ACS, [16].

#### **A.7 Mr Lehrmann lied about alcohol**

38. Mr Lehrmann lied to police when he told them in absolute terms that he had no alcohol in his office. He then maintained that lie by allowing his record of interview to go uncorrected when it was played during the criminal trial and the substance of his answers were presented to the jury.
39. Mr Lehrmann gave a false answer to police during his interview on 19 April 2021 when he said that to his knowledge there was no alcohol in the Ministerial Suite (Exhibit #31: CB1120, CB1121 (Q753)) (T196.28-38). The true position was that he had whisky and gin and possibly red wine in the old Senate office, which he moved to his new desk in the Ministerial Suite (T196.33-38).
40. During the same police interview, it was put to Mr Lehrmann that Fiona Brown had said that the reason he had provided to her as to why he attended the office was to:

*“drink whiskey”*. Mr Lehrmann gave a false answer to police when he told them without qualification: *“yeah, I didn’t have any alcohol in my office”* (Exhibit #31: CB1120, CB1121 (Q762)).

41. Mr Lehrmann gave a further false answer to police during his interview when it was put to him that Fiona Brown had told police: *“he just came in to have a drink - to drink his whisky”*. Mr Lehrmann’s response was definitive. He told police: *“...there’s no alcohol, I didn’t have any alcohol, so, to access”* (Exhibit #31: CB1120, CB1121 (Q764)).
42. In cross-examination, Mr Lehrmann agreed that the answers he had given to the police were false (T239.33-38).
43. Mr Lehrmann initially disagreed with the proposition that he had allowed his denial of having alcohol in his office to go uncorrected throughout his criminal trial, but subsequently retreated from that position when pressed by the Court (T199.1-12).
44. In cross-examination, Mr Lehrmann agreed that he had heard Ms Brown give evidence at the criminal trial to the effect that the explanation he had given for going back to Parliament House was to drink whisky (T199.28-30).
45. He agreed that he had allowed submissions to be advanced on his behalf at the criminal trial on the basis that the account he had given to police was truthful and accurate (T202.1-3).
46. Mr Lehrmann initially maintained the dishonest position he had advanced in his record of interview with police, and had allowed to be put before the jury in his criminal trial, in evidence before this Court.
47. It was put to Mr Lehrmann in cross-examination that there was alcohol in Senator Reynolds’ office after 2 March 2019 and before he departed on 26 March 2019. Mr Lehrmann’s initial evidence was that: *“I don’t recall there being alcohol in her office. No.”* (T186.29-33).
48. Mr Lehrmann was later forced to concede that he had bottles of whisky and possibly red wine in boxes in the office at his desk (T189.15-27; T190.2-3). He accepted the possibility that there was wine and beer kept in the fridge depicted in the photograph at page 5436 of Exhibit #18: CB1059 (T191.10).

49. Mr Lehrmann was shown a video of three bottles of whisky and a bottle of gin (Exhibit #29), which he identified as the alcohol that he had in the Senate office. He had to concede that it was moved to the Ministerial Suite as part of the internal move and that it was in the suite when he went back to Parliament House in the early hours of the morning on 23 March 2019 (T191.18-192.26).
50. Ms Hamer, a media advisor who worked for Senator Reynolds, gave evidence that Mr Lehrmann kept alcohol on his desk when he was based in the Senate office (Hamer, [6]: CB1083, p 5678; T1061.7-9). Mr Wotton's evidence was that Mr Lehrmann kept bottles of scotch on his desk (Wotton, [38]: CB1084, p 5686).
51. In cross-examination, Mr Lehrmann was also referred to Exhibit #30. That photograph showed bottles of alcohol on a shelf above his desk as at 12 March 2019 after he had moved to the Ministerial Suite (T192.42-193.33).
52. In response to a question from the Court, Mr Lehrmann said that prior to being shown the photographs of the whisky, gin and wine he had no recollection of there being alcohol in the office (T203.28-31).
53. He was unable to tell the Court when it was that he realised that he could not be absolute about there being no alcohol in the office (T203.33-38, 204.30-32).
54. Mr Lehrmann's evidence that at some unspecified time he realised that he could not be definitive about having no alcohol in the office and instead had no recollection one way or the other was totally implausible. It was untruthful evidence and should be rejected by the Court. Equally, his evidence to the effect that he had no recollection of there being alcohol in office until being shown photographs of the alcohol in the witness box was untruthful.
55. *First*, Mr Lehrmann's evidence was that he had whisky and gin in the Senate office and that he packed it up to be moved to the Ministerial Suite. He said that the whisky and gin was packed in a box in his office in the Ministerial Suite (T187.33-45). In re-examination, he identified the boxes by reference to Exhibit #33: CB22. It is utterly implausible that Mr Lehrmann would have any doubt about whether he kept whisky and other alcohol in the office.
56. *Secondly*, as set out in [529]-[532] below, Mr Lehrmann told Ms Brown in their second meeting on 26 March 2019 that he went back to drink whisky. In his evidence in chief, Mr Lehrmann said that he had told Ms Brown that he "*came back to drink some whiskey*

*or something like that*” (T153.45-47). He denied in fact coming back to drink whisky (T154.4). In cross-examination, Mr Lehrmann said that he had been mistaken in his evidence in chief, and what in fact he had said to Ms Brown was that he “*came back to have a drink*” (T228.19-24).

57. Mr Lehrmann agreed that he knew on 26 March 2019 that that was the explanation he had provided to Ms Brown that day (T228.26-32). Again, it is utterly implausible that Mr Lehrmann would have told Ms Brown that he came back to have a drink if he did not know at that time that there was alcohol in the office. It was a plausible explanation because he knew full well that he had whisky and other drinks in his office and so did others. Had he told Ms Brown that he had come back to drink whisky, but there was no alcohol in the office, his lie would have been at risk of being immediately exposed.
58. *Thirdly*, when Mr Lehrmann was played an extract from an interview he gave to the Seven Network in June 2023 on the *Spotlight* program (T228.42-229.48) (Exhibit #R16), he agreed that at that time (i.e. June 2023) his recollection was that the excuse he had given Ms Brown on 26 March 2019 was that he gone back to Parliament House to drink whisky (T230.1-20).
59. *Fourthly*, Mr Lehrmann’s evidence that he could not say if he was aware at the time Ms Brown gave evidence in his criminal trial that she had said that the excuse he had given to her was that he had gone back to drink whisky was ridiculous in circumstances where he was present during that trial and, despite his purported uncertainty, must have heard her give that evidence (T230.22-44).
60. *Fifthly*, Mr Lehrmann agreed that he had heard Ms Hamer give evidence at his criminal trial that he had a range of alcohol in his office (T231.27-29, 232.34-35, T235.25-40) and that was true, and the alcohol was transferred from the Senate office to the Ministerial Suite (T232.26-42, T235.33-42).
61. Mr Lehrmann allowed the lie he had told police about having no alcohol in the office and his false denial that he had told Fiona Brown that he had come back to drink (contrary to her evidence) to go before the jury in his criminal proceedings. Despite Mr Lehrmann’s apparent disregard for what was said by the prosecutor and concerns over the way in which the Chief Justice summarised the case (T236.3-4, T237.14-15), there can be no doubt that Mr Lehrmann’s lies were put before the jury (T236.1-237.30).

62. The true position is that Mr Lehrmann has always known that he had alcohol in the office and that he told Fiona Brown on 26 March 2019, when asked why he had gone to Parliament House on 23 March 2019, that he came back to drink whisky or have a drink. He agreed that that was what he said to:
- (a) Ms Brown on 26 March 2019;
  - (b) a reporter from the Seven Network in the *Spotlight* interview in June 2023;
  - (c) his Senior Counsel in his evidence-in-chief in this proceeding;
  - (d) Kings Counsel in his cross-examination; and
  - (e) in his answers to questions from the trial judge in this proceeding, (T237.37-46).
63. In the circumstances, the Court should reject Mr Lehrmann’s assertion that he did not knowingly lie to the police in his interview (T239.33-43). That is simply inconceivable given his evidence that at all other times he was aware that he had alcohol in the office and that is what he had told people. It was another lie designed to explain why he had brazenly lied to police. Mr Lehrmann’s lie to police exposes a consciousness of guilt in that he must have told that lie because he perceived it would be harmful to him as part of the police investigation if he told police that he went back to Parliament House to drink whisky with Ms Higgins.

#### **A.8 Mr Lehrmann lied about activities after entering the Ministerial Suite**

64. Mr Lehrmann’s evidence was that he worked on Question Time briefs while in the Ministerial Suite. He said that he was prompted to do so by information that he had received at The Dock.
65. In cross-examination, Mr Lehrmann was unable to identify any information he learnt at The Dock (or 88mph) that was relevant to the work he was doing for Senator Reynolds concerning Question Time folders (T387.30-33). He said that the only information that he could recall was about “the French submarine contract” (T387.36). He was unable to specify who had provided him with information about the contract (T387.39; T388.1). He could not recall any specific information that was so important that it needed to be noted for about 40 minutes between 1:48 and 2:30am on a Saturday morning while inebriated. The best he could offer was something about an interest that

Senator Reynolds had in moving the contract to Western Australia for political reasons (T388.25-27).

- 65A. In the circumstances, Mr Lehrmann’s suggestion at [98] of the ACS that Network Ten had an obligation to call one or more of the ADCs who attended The Dock to give evidence about their conversations (if any) with him should be rejected. So too should the submission that some kind of inference is available from not having called such people that his evidence cannot on this topic be considered implausible. There was no such obligation, but in any event the only ADC that Mr Lehrmann could name – Major Irvine – was called and gave evidence on this topic.
- 65B. Similarly, the submissions at [99]-[101] of the ACS to the effect that Network Ten ought to have retained Mr Reedy to analyse every conversation between Mr Lehrmann and others at The Dock for any mention of the word “submarine” is bizarre, and the Court would readily reject the submission that some kind of inference arises from having not done so. It is not part of Network Ten’s burden to disprove Mr Lehrmann’s assertion that he worked on Question Time folders while in the Ministerial Suite on 23 March 2019; he puts that hypothesis forward and invites the Court to accept it, in circumstances where there is not the slightest shred of evidentiary support for it.
66. At one point in his evidence, Mr Lehrmann said that he was having detailed discussions about politically sensitive matters at The Dock (T388.32 and T389.35).
67. That evidence was absurd and knowingly false for at least the following reasons:
- (a) Mr Lehrmann had been unable to name any of the aides-de-camp he had met at The Dock, other than Major Irvine (T389.9-11).
  - (b) Mr Lehrmann’s evidence was that aides-de-camp had low-level administrative roles and were not involved in the development of policy (T389.13-19).
  - (c) Mr Lehrmann’s evidence was that the job of an aide-de-camp involves: *“essentially travel with the Minister with various briefs and documents that may or may not be signed or the Minister might need to review, keeping the Minister to time, things like that”* (T389.21-28).
  - (d) Mr Lehrmann described aides-de-camps as *“handbag-carriers”* (T389.30-31).
  - (e) Mr Lehrmann gave evidence that he had no sensitive discussions at The Dock (T258.30).



- (f) Mr Lehrmann had already resigned as at 23 March 2019 and informed Ms Brown of that intention (T391.11-12).
  - (g) Mr Lehrmann was finishing up work the week after his attendance at The Dock and had essentially finished all his work (T391.14-16). He didn't have many outstanding tasks (T391.19).
  - (h) Mr Lehrmann agreed that the next Question Time was not until 2 April 2019, 10 days after his visit to The Dock. He also agreed that Question Time occurred after the date he was due to finish up (T391.24-28).
  - (i) The departmental liaison officer for the Department of Defence, Mr Payne, said that within the office there were a number of advisors working on different subject matters. Mr Lehrmann was not on his list of defence advisors. Mr Lehrmann was not involved in any work concerning the defence portfolio in respect of which he was responsible for distributing Question Time briefs (T1424.39-42). Mr Payne said that Douglas Ridd or Drew Burland would have had responsibility for Question Time briefs concerning matters such as submarines (T1425.1-16).
68. Mr Lehrmann's assertion of having had detailed discussions about politically sensitive matters to do with the French submarine contract with the aides-de-camp that attended The Dock on 22 March 2019 was ludicrous. The evidence of Major Irvine was that there would have been no discussion of sensitive matters, and that any discussion would have been about things that were generally available in the public domain. There was no need whatsoever for Mr Lehrmann, who had already resigned and essentially finished up with Senator Reynolds, to have been writing on Question Time folders at 2am on 23 March 2019 while inebriated.
69. Further, Mr Lehrmann accepted that he did not mention anything about working on Question Time folders when asked to account for his conduct to Fiona Brown or to show cause why he should not be terminated for serious misconduct by Senator Reynolds. He accepted that, on his version, he had been doing proper work for the Minister to assist her duties in the Senate and that he had learned vital information that needed to be captured, but yet he had not said anything about working on the folders when asked to explain his conduct (T399.12-400.10). Mr Lehrmann could not give any explanation for why he had not raised it in his response, other than that he was concerned about national security implications (T399.22) and he could not remember

the state of his mind then (T400.12-13). Mr Lehrmann also accepted that he did not give the Question Time folder explanation to Ms Brown and Mr Chamberlain when he spoke to them on 5 April 2019 (T401.43-46). Mr Lehrmann accepted that, on his version of events, he had elected not to tell the truth to Ms Brown whom he had been directed to have a phone call with by Minister Reynolds (T402.5-6).

70. His evidence about writing on Question Time folders was a desperate and transparent lie, and yet it remains the only explanation Mr Lehrmann has offered to this Court for his presence in the Ministerial Suite for 40 minutes on 23 March 2019. To put it crisply, Mr Lehrmann alleges that he has been defamed by Ms Higgins' consistent and repeated account of what happened during those 40 minutes. In answer, Mr Lehrmann has offered no plausible counter-narrative at all, but has instead offered a range of lies, from which he has backtracked, culminating in his Question Time explanation, which is itself clearly a lie.

70A. Contrary to Mr Lehrmann's submission at [105] of the ACS, the Court is entitled to conclude that Mr Lehrmann's evidence about writing on Question Time folders was inherently implausible. The passages extracted from *Smith v R* [2021] ACTCA 16 do not assist Mr Lehrmann in that regard. It is obvious that the ACT Court of Appeal was not suggesting that a trial judge could never reject evidence as implausible, rather the error in that particular case was that the primary judge's reasoning in reaching a conclusion that an account was positively implausible had "*presumed a universality of human experience in sexual relations that does not and cannot exist*".

#### **A.9 Mr Lehrmann lied to Fiona Brown**

71. Mr Lehrmann's evidence was that he lied to Ms Brown in their second meeting on 26 March 2019 (see paragraphs [72] below). He said that he was called into her room to discuss something serious with her (T332.10). He was told it was in relation to access to Parliament House in the early hours of Saturday morning. He was told that it involved him and another person. Mr Lehrmann's evidence was that he had a conversation with Ms Brown about the state of his intoxication that morning, in which he said that he did not agree he was intoxicated. In cross-examination, Mr Lehrmann admitted that he had been intoxicated (6 or 7 out of 10) but did not consider that his statement to Ms Brown was false because he took her to mean intoxicated to be a very high level (T332.12-41).

During the meeting, Mr Lehrmann told Ms Brown that the other person with him in the office was Ms Higgins (T322.45-47).

72. Ms Brown asked Mr Lehrmann why he had attended the office in the morning. His evidence was that he said it was to come back and drink alcohol. He said that was a lie and he knew it was a lie when he said it (T333.1-20).
73. Mr Lehrmann's evidence was that the true reason he came back was to collect his keys, and that he told Ms Brown the lie because of her tone and because Ms Brown had a "*strict adherence to the codes of conduct and things of that nature*" (T333.22-43).
74. That evidence failed to explain why telling Ms Brown that he had been drinking alcohol in the office was less serious and less likely to constitute a breach of the codes of conduct than telling her that the reason was to collect his house keys (which on Mr Lehrmann's evidence was the truth).
75. Mr Lehrmann's evidence in chief was that he did not tell Ms Brown about working on the Question Time briefs because he feared that she might have taken it to be an even greater security breach with flow-on effects (T154.6-9). However, in cross-examination, he suggested that he might have told Ms Brown about working on the Question Time briefs (359.7-361.23). This was desperate speculation by a witness under pressure in the witness box. There is no reference to working on Question Time briefs in Ms Brown's notes and was not mentioned in Ms Brown's evidence.
76. If Mr Lehrmann's explanation were true, then his failure to proffer it to Ms Brown, and subsequently to Senator Reynolds, and then to Ms Brown and Mr Chamberlain, would expose profound dishonesty on his part to a Minister of the Crown and her Chief of Staff, in a context where it was simply inexcusable to lie.

#### ***A.9.1 Events after 26 March 2019***

77. In cross-examination, Mr Lehrmann was asked about events following his second meeting with Ms Brown on 26 March 2019. He purported to have little memory of those events (T363-376). He was shown the text message exchange he had with Ms Brown, which is Exhibit #R33: CB65. He accepted that after the meeting he left the office and did not see Ms Brown before leaving (T363.4-9). He accepted that Ms Brown may have tried to call him at 1:09pm and 1:11pm on 26 March 2019 (T365.17-18).

78. At 1:14pm on 26 March 2019, Mr Lehrmann sent Ms Brown a text message: *“Hi Fiona I have left my pass at ministerial entrance with security”*. Ms Brown responded: *“Bruce I asked you to return it to me, I’m disappointed you’ve failed to follow a direct request”* (Exhibit #R33: CB 65, p 2310).
79. On 3 April 2019, Ms Brown called again and Mr Lehrmann did not answer (T368.30). Ms Brown sent Mr Lehrmann a further text message: *“Hi Bruce, I need to have a chat to you ASAP, have left you a message as well a few hours ago, can you please call me? Thanks Fiona”* (Exhibit #R33: CB 65, p 2310). Mr Lehrmann recollected receiving that message (T369.47). He did not call Ms Brown back, but instead asked her to email him. Ms Brown sent Mr Lehrmann a text: *“Can you please attend a meeting with me tomorrow, as we need to discuss your employment status, as you left without seeing me as we agreed at our meeting on Tuesday 26 March”* (Exhibit #R33: CB 65, p 2311). Mr Lehrmann did not respond to that message (T371.18-22), and Ms Brown sent him a further message on 4 April seeking confirmation of his attendance that day at 10am (Exhibit #R33: CB 65, p 2313): *“Hi Bruce can you please confirm your attendance this morning at 10am? Can you call me on your arrival so I can sign you in? The meeting will take place in suite M1 52, thanks Fiona”*.
80. Mr Lehrmann then sent a text message to Ms Brown: *“Hi Fiona. Unfortunately, I’m not in Canberra as I’m dealing with a sensitive family issue”* (Exhibit #R33: CB 65, p 2313). In cross-examination, Mr Lehrmann initially said that he was not *“within the bounds of Canberra”* at that time. In fact, it appears from the messages with his mother that Mr Lehrmann was in Canberra at this time, notwithstanding his suggestion that he might have been in the process of moving to Sydney (T394.31-399.10) (Exhibit #24: CB83). Mr Lehrmann said that he was not in Queensland on 4 or 5 April 2019 (T376.3-6; 383.17).
81. Although he denied it in cross-examination (T370.16-22), in Network Ten’s submission, it may be inferred from the fact that (a) Mr Lehrmann left the office without seeing Ms Brown (contrary to her request), (b) repeatedly failed to call Ms Brown when requested to do so and instead asked her to communicate by email the correspondence that passed, and (c) sought to avoid meeting with Ms Brown and Senator Reynolds by telling Ms Brown that he was not in Canberra, that he feared that Ms Brown had spoken to Ms Higgins about what had occurred in Parliament House and he feared that Ms Higgins had told her that she had been sexually assaulted.

#### **A.10 Mr Lehrmann lied to Senator Reynolds**

82. On 4 April 2019, Ms Brown sent Mr Lehrmann a text message to say that she had communicated further with him via his (Hotmail) email address (Exhibit #R33: CB65, p 2313). The communication referred to by Ms Brown was a letter from Senator Reynolds to Mr Lehrmann dated 4 April 2019 (Exhibit #23: CB80). Mr Lehrmann was taken to the letter in cross-examination (T376-378).
83. Mr Lehrmann prepared a response to Senator Reynolds' letter overnight, and sent it to her at 9:28 on 5 April 2019 (Exhibit #24: CB83). Mr Lehrmann agreed that in part his response to Senator Reynolds contained false information. Other parts were exposed as false in the course of cross-examination. In particular:
- (a) Mr Lehrmann lied to the Minister when he denied that he informed security that he had attended Parliament House for official purposes. He accepted that that was a false account, because over the intercom he had informed security he was there for official purposes (T379.35-46). He had implicated Senator Reynolds in a lie.
  - (b) Mr Lehrmann lied to the Minister when he said that the insinuation was that he was acting under authority from her, and that this was "*no way the case*" and he "*certainly did not make that inference*". Mr Lehrmann accepted in cross-examination that that was another falsehood (T380.34-45).
  - (c) Mr Lehrmann lied to the Minister when he told her that he had retreated to Queensland to see his mother (T383.19; T394.31-399.10; Exhibit #24: CB83). The true position was that he was in Canberra on 4 and 5 April 2019.
84. Mr Lehrmann also agreed that, contrary to the direct request in Senator Reynolds' letter, he had not provided an account for what he had been doing in Parliament House on the morning of 23 March 2019 (T381.31-37). Mr Lehrmann's failure to only partially address matters raised in the letter was referred to in Senator Reynolds' letter dated 5 April 2019 (Exhibit #25: CB84) (T384.1-25). His next communication was the telephone call between Ms Brown and Mr Chamberlain referred to in paragraphs [714]-[718] below.

## **A.11 Other Lies**

### ***A.11.1 Classified Document Security Breach***

85. In his evidence in chief, when asked about his dealings with a departmental liaison officer (DLO), Chris Payne, Mr Lehrmann stated that “*there had been a very brief minor incident about a security – a document that I was seeking to return to its home agency, ASIO, and the DLO responsible for that agency was not at her desk, so I placed it on her desk while I popped round the corner to the kitchen to make a coffee and wait for her to return*” (T89.8-11). He denied being aware at the time whether anything further was done about the incident (T89.14).
86. In cross-examination, Mr Lehrmann disagreed that the security breach had been a sackable offence (T208.1-5). He admitted that he had left a top secret classification document unattended in an unsecured office (T208.31-37) and that he was spoken to about the matter by Mr Payne (T208.39-47). Mr Lehrmann was taken to a letter from Senator Reynolds dated 4 April 2019 (Exhibit #23: CB80) in which she had asked him to show cause why his employment should not be terminated for serious misconduct. The third paragraph of that letter referred to the security breach relating to Mr Lehrmann’s failure to properly handle classified documents. Mr Lehrmann agreed that from what he understood, Senator Reynolds considered the security breach to be a very serious matter and one of two matters which she considered warranted termination (T211.27-31).
87. Mr Lehrmann was asked about the response that he had prepared overnight to the Senator’s show cause letter. He said that he conducted “*many reviews*” of that draft response to make sure it was accurate (T212.30-35). Mr Lehrmann’s response was sent at about 9:28am on 5 April 2019 (Exhibit #24: CB83). In response to a question from the Court, Mr Lehrmann stated that he held the view that the security breach was not a serious matter at the time he communicated with Senator Reynolds (T212.16-18).
88. However, in cross-examination, Mr Lehrmann:
- (a) conceded that it was not a minor incident about security (T213.46, 214.17), contrary to his earlier evidence that it had been a “*very brief minor incident*” (T89.7);

- (b) could not recall whether he had gone around the corner to the kitchen to make a coffee, contrary to his earlier evidence to that effect (T213.15-16; T214.19-33); and
  - (c) conceded that something further was done about the security breach of very great significance in that he received the show cause letter from Senator Reynolds (and had previously spoken to Ms Brown about it), contrary to his earlier evidence that he was not aware of anything further being done about it (T219.1-36).
89. Mr Lehrmann's evidence in chief in respect of the classified document security breach was exposed as being untruthful. Those lies were clearly designed to downplay the significance of the breach, as were: (i) Mr Lehrmann's ridiculous assertions that the appropriate way of managing top secret documents was to place them face down in an unsecured office (T215.14-216.17), and (ii) his evidence that Mr Payne: "*had some words to me about leaving it on the desk in that way*" when the true position is that he had told Mr Lehrmann that it was completely unacceptable (see [185]-[190] below).
90. Having been caught out in a lie, Mr Lehrmann sought to explain his evidence in chief on this topic about nothing further having been done by suggesting that he had been "*mistaken about the context of that question*" (T219.11-12). He explained that the "*context*" was that it had not been raised again until Senator Reynolds' letter or treated by others as serious (T219.19-23). However, that explanation did not withstand the slightest scrutiny. It was inconsistent with the fact that both Mr Payne and Ms Brown had raised it before Senator Reynolds' letter, matters that Mr Lehrmann conceded constituted two further things having been done about the breach before the Senator's letter (T219.25-36).
91. In re-examination, Mr Lehrmann gave a further explanation as to why he did not consider the security breach to be serious. He said that the context of the breach was that the document had been left in a location (the DLO's office) that the public do not have access to. But Mr Lehrmann had already conceded in cross-examination that the incident had been serious, and the fact that members of the public could not freely access the Ministerial Suite was beside the point in circumstances where, according to Mr Payne and Ms Brown (Brown, [21]), not even all of the staff members in the office had clearance to access the document given its top secret status (see [186] below). Mr Lehrmann's evidence in re-examination that "*the only conversation I had was with Mr*

*Payne, nobody else. It wasn't raised in the aftermath there"* (T534.5-6) was untruthful, having regard to the fact that he had a conversation with Ms Brown and the breach was raised by Senator Reynolds.

#### ***A.11.2 Lies on Spotlight***

92. In the *Spotlight* interview, Mr Lehmann said that he had not told Ms Brown in his meeting with her on 26 March 2019 that one of the reasons for being at Parliament House was to work on Question Time folders because he thought she would consider that to be a serious security breach. Mr Lehmann said on *Spotlight* that he thought Ms Brown would consider it a security breach because he had already received a warning over a "*very minor breach*" from Ms Brown. He accepted that he was referring to the classified document security breach on 20 March 2019 (T387.1-6), and he accepted that the explanation he had given on *Spotlight* was yet another lie (T387.12-13).

#### ***A.11.3 Reprimand by Senator Reynolds***

93. As set out at [238]-[240] below, following the incident at the Kingston Hotel on 2 March 2019, Mr Wotton's evidence was that the following day he observed Mr Lehmann being summoned by Senator Reynolds into her office and emerging looking stunned and ashen faced. Mr Wotton was subsequently summoned and reprimanded by Senator Reynolds in respect of what had occurred at the Kingston Hotel. His evidence was that he and Mr Lehmann spoke later that day when he was at the airport heading to Perth and discussed, in substance, how terrible it had been to be reprimanded by the Senator.
94. When those matters were put to Mr Lehmann in cross-examination, his evidence was that he had no recollection of a conversation with Senator Reynolds or Mr Wotton about what had occurred at the Kingston Hotel (T225.14-16, 24-34), and although he could recall Mr Wotton being reprimanded (T225.3), he unequivocally denied being reprimanded himself by Senator Reynolds (T225.42).
95. In light of Mr Wotton's evidence and Ms Hamer's evidence, the Court would reject Mr Lehmann's evidence that he was not reprimanded for his conduct at the Kingston Hotel. It also beggars belief that a political staffer would not recall being reprimanded by a Minister of the Crown, or of discussing the reprimand with a colleague. This was a further example of Mr Lehmann claiming to have no memory of certain events that he perceived to be unhelpful to his case (or put another way, of assistance to the



respondents' case), but somehow purporting to have a clear memory of a particular matter within those events.

#### **A.12 Mr Lehrmann was evasive and non-responsive**

96. During aspects of his evidence, Mr Lehrmann purported to have no or an extremely limited recollection of events (in respect of which he knew other witnesses would be coming to give evidence), but was somehow conveniently able to recall and give false evidence about the parts of those events that were helpful to his case.
97. A good illustration is the evidence he gave about the gathering at the Kingston Hotel on 2 March 2019 (T171.44-179.18). Mr Lehrmann's evidence was that he could not recall any of the words exchanged between him, Mr Wotton, Ms Hamer or Ms Higgins (T175.30-177.46) or Ms Higgins taking out her phone to book an Uber (T178.15-16), but he purported to definitively recall that he did not take Ms Higgins' phone away from her to stop her ordering the Uber (T178.31-46).
98. Mr Lehrmann's selective recall was indicative of a witness who was not being candid or honest, but rather was prepared, when purporting to give affirmative evidence in respect of an event of which he otherwise professed to have no recall, to say whatever he thought would assist his case.
99. When challenged about the false information he had provided to police about having alcohol in his office and his failure to correct that information at the criminal trial, including after Fiona Brown had given evidence about the explanation he had provided for attending Parliament House, Mr Lehrmann became evasive and was suddenly unable to recall events: *"I'm really struggling to take myself back there"* (T199.40), *"it's a very hazy moment, that criminal trial"* (T200.2).
100. Mr Lehrmann's answers in cross-examination were often non-responsive and evasive. He often responded to propositions with words such as *"not necessarily"* (e.g. T172.20, T241.8).

#### **A.13 Mr Lehrmann's demeanour**

101. Mr Lehrmann's demeanour was combative and defensive, and at times his tone of voice exhibited an arrogant disregard towards propositions or questions put to him in cross-examination.

#### **A.14 Conclusions on Mr Lehrmann's credit**

102. For all of these reasons, the Court would approach the entirety of Ms Lehrmann's evidence with extreme suspicion, and should reject it in the absence of a cogent foundation, whether by reason of corroborating evidence or otherwise, which would have permitted the Court to regard Mr Lehrmann's account as likely to be reliable.

#### **A.15 Ms Higgins' Credit**

103. Ms Higgins' evidence was of a different character to that given by Mr Lehrmann. She made many appropriate concessions, and was frank about how the sequence or chronology of her independent memories had been affected by information she has subsequently learned. She was clear throughout that, contrary to the propositions put to her in cross-examination, she was not "reverse engineering" her recollections to fit around things she has subsequently learned or creating "new memories" from what she had subsequently learned (e.g. T754.26). The overall impression was that Ms Higgins had, in some of her previous accounts of events, strayed beyond her recollections and made assumptions about what had occurred based on matters she had learned, been told or suspected, without identifying that she had made those assumptions (e.g. T755.30-35, T797.13-16, T833.24-27, T962.37-39). In her evidence in this trial, she was clearly making a conscientious attempt to strip out those assumptions and confine herself to matters of which she had an independent recollection. Much was sought to be made of the differing accounts given by Ms Higgins on previous occasions, but it stood to her credit in these proceedings that she was prepared to acknowledge past errors and explain them. Critically, her evidence in respect of the central fact in issue—the alleged assault—has never wavered in any material respect, and her evidence here in respect of it was compelling, distressing and believable. Contrary to Mr Lehrmann's submissions, Ms Higgins' evidence was not that of a "fundamentally dishonest witness" or mendacious: ACS, [23].
104. Ms Higgins' life has, plainly, been immeasurably affected by the events with which this proceeding is concerned. During the course of her evidence she became highly distressed and overwhelmed by emotion, particularly when recounting the details of the sexual assault and immediate aftermath. It was impossible not to be moved by the deep upset and stress exhibited by Ms Higgins when recounting those events and being challenged on their truthfulness. There was a palpable rawness and vulnerability to her

testimony that was entirely consistent with an honest witness recounting terrible memories. It was the evidence of a young woman in trauma.

105. Despite her efforts to maintain control, on occasion Ms Higgins exhibited unhappiness and frustration at being directly challenged on the truthfulness of her evidence (T766.45-767.1; T780.40-781.4; T836.42-43). This resulted in emotional outbursts. However, those outbursts are consistent with an honest witness, angry and upset at being publicly challenged on her evidence and it did not affect her capacity to give her evidence candidly and honestly.
106. On the essential features of her account of the principal events, her evidence was consistent, cogent and withstood challenge. The hallmark of Ms Higgins' overall honesty was her willingness to accept that sequences of events may have been different from the sequences as she recalled them, and that others had made observations or recollections that varied to some degree to her own (for example, the observations made by Ms Anderson, as to which see paragraph [121] below).
107. In considering the credibility and reliability of Ms Higgins' evidence, the Court would have regard to the Agreed Facts (Exhibit #67) as to the impact of trauma and alcohol on memory.
108. Of the two categories of credit attack made against Ms Higgins referred to in paragraphs [4]-[6] above, there were three common themes:
  - (a) *First*, it was contended that there were inconsistencies in Ms Higgins' evidence relating to the events of 22-23 March 2023. For the reasons developed below, we submit the Court should find that any inconsistencies in Ms Higgins' evidence on this topic were immaterial and did not impugn her evidence on the key facts. While Ms Higgins was prepared to make appropriate concessions since becoming aware of further information, the core aspects of her evidence as to the events of 22-23 March 2023 were consistent and unshaken.
  - (b) *Secondly*, there was a bizarre suggestion that Ms Higgins had gone to the media because she wanted to try to affect the outcome of the upcoming election (T842.13-17). The Court would have no hesitation in rejecting that proposition. It was inconsistent with Ms Higgins' evidence and unsupported by any other objective evidence. But even if it were true, it could not remotely account for the allegation that she had, some two years earlier, fabricated a rape allegation. If, as

Mr Lehrmann’s case theory apparently has it, Ms Higgins fabricated the rape allegation in order to save her job, then her conduct, more than two years later, in quitting her job, publicising her false rape allegation and reinstating a police investigation would be utterly irrational. The job-saving rationale is itself hopeless. As Ms Brown acknowledged, Ms Higgins’ job was never at risk (T2157.17-35). This line of credit attack does not appear to be pressed in the ACS. In passing, Mr Lehrmann makes a curious submission at [368] of the ACS that Network Ten has “put motive to complain in issue by arguing that Mr Lehrmann’s case theory is that Ms Higgins fabricated the rape allegation to save her job”. As set out, it was Network Ten’s understanding that this was Mr Lehrmann’s case theory, but Ms Higgins’ motive is not something it has put in issue by responding to that case theory. Ultimately, it is not clear whether Mr Lehrmann has a case theory at all for his contention that Ms Higgins fabricated the rape allegation. At another point, there is an allusion along the lines that Ms Higgins may have constructed a narrative to rehabilitate her reputation after being found passed out in the office (see, [369] of the ACS and [525A] below). In any event, neither case theory could be accepted for the myriad reasons developed elsewhere in these submissions. The assertion that Ms Higgins fabricated a rape allegation is an extraordinarily serious one, whatever the supposed rationale for having done so.

- (c) *Thirdly*, there was a credit attack made on the basis that:
- (i) after the mistrial of Mr Lehrmann’s criminal proceedings on 27 October 2022 and when a new trial date had been set that day (for 20 February 2023), Ms Higgins made a speech to the gathered media outside court;
  - (ii) medical evidence was provided to the ACT DPP which related to a risk to Ms Higgins’ health and led to the discontinuance of the criminal proceedings;
  - (iii) there were media reports on or about 7 December 2022 that Mr Lehrmann was intending to file the present proceeding, and on that day Ms Higgins posted to Instagram indicating a willingness to appear as a witness in the prospective proceedings. Further in February 2022, Ms Higgins reposted her 7 December 2022 post with the comment “a timely reminder” and in

response to a comment that she had had her chance, posted a message to the effect that she would have another one in a slightly more favourable court.

- (d) It appears that the ultimate proposition the applicant intends to make is that the above matters constituted a course of conduct by Ms Higgins designed to manipulate the court processes to avoid an eventuality that would undermine her financial interests of Mr Lehrmann being found not guilty in criminal proceedings where there was a higher standard of proof and a preference to go ahead, as was indicated before the complaint even came, to proceed in civil proceedings where there was a lower standard of proof (T882.33-38). There are a number of fundamental problems with this strained and Machiavellian theory, not least how (assuming each relevant proposition were to be accepted by the Court) those propositions are rationally connected to the determination of the central fact in issue in respect of the justification defence – namely whether Mr Lehrmann raped Ms Higgins on 23 March 2019 (or, to put it another way, whether Ms Higgins fabricated an allegation of rape shortly after that date).

108A. As set out above, this line of credit attack does not appear to be pressed in the ACS.

109. Other more specific credit attacks are addressed within the body of Parts C and D below.

110. As to the three main lines of attack upon Ms Higgins' credit:

### **Alleged inconsistencies relating to the events of 22/23 March 2023**

111. As set out above, the inconsistencies in Ms Higgins' evidence, as they related to events on 22-23 March 2019 were explicable due to the impact of trauma, consumption of alcohol, the passage of time, limited access to information and reconciling independent memories with information that she subsequently learned.
112. In this respect, in cross-examination, Ms Higgins agreed that the *sequence* or *chronology* of her memories – but not the actual memories themselves – had improved over time, including because she had been able to refer to contemporaneous messages (T711.24-30). In effect, Ms Higgins' evidence was that she had used information subsequently provided to her to anchor the sequence of her independent memories.
113. In cross-examination, Ms Higgins was asked about the evidence she gave at the criminal trial (T709). She said that she had done her best to give truthful evidence during those proceedings, but fairly conceded that she was not always correct and speculated to some

extent (T709.41). She reiterated that at the time of giving evidence she did her best and thought she was telling the truth, but accepted that she was not always correct (T709.44). She said that she was prepared to make appropriate concessions where she was wrong about something for the purpose of giving the most honest answers (T713.4-7).

114. The following are examples from Ms Higgins' cross-examination where she explained apparent inconsistencies by reference to the fact that over time she had obtained further information that caused her to accept that things may have happened in a different sequence to the way in which she had remembered them or that others remembered things differently. Far from being harmful to her credit, they were indicative of a witness doing her best to give truthful evidence.

### **Bruise Photograph**

115. It was put to Ms Higgins that there was an inconsistency in her evidence about the cause of the bruise in the photograph, and what she had said in her statutory declaration in February 2021. In her evidence in this proceeding, Ms Higgins said that she thought the bruise could have been caused by either the assault or tripping up the stairs. She explained that she believed at the time she made her statutory declaration that the bruise was caused by the assault, but she had accepted, including as a result of having been challenged in cross-examination in the criminal case by counsel for the applicant, that it was possible that it had come from another source (T712.11-19). She was adamant that the bruise was caused on the night of the assault, but she fairly accepted that she could not definitively say that it was from the assault and that it may have happened from the fall up the stairs (T712.43-713.2; see also T769.24-27). Ms Higgins' responses to this line of cross-examination were consistent, even when it was repeatedly put to her (see for example T861.42-863.44).

- 115A. Ms Higgins' willingness in the criminal case and in this proceeding to accept that the bruise might have been caused by a source other than the assault is hardly evidence of her seeking to manipulate the Court as Mr Lehrmann appears to contend at [31], [32] of the ACS. It is, rather, consistent with a witness prepared to make appropriate concessions. Otherwise, the alleged "*unsatisfactory morass of evidence*" said to support a conclusion that the photograph was not a contemporaneous record is unclear from Mr Lehrmann's submissions (ACS, [30]). Although Ms Higgins was asked about the

evidence she had given in the criminal proceedings about the location of Mr Lehrmann's knee on her thigh and the leg depicted in the photograph (T962.32-963.6), it was never put to Ms Higgins in this proceeding that there was any inconsistency in the location of the bruise in the photograph and her evidence in the criminal case about the leg that Mr Lehrmann crushed during the assault (ACS, [29]).

### **Panic Attack**

116. Ms Higgins squarely raised that she had been "bamboozled" in the criminal proceedings into thinking that she was wrong about having had a panic attack on the day of Minister Ciobo's valedictory. That had always been her memory, and she made it clear in her evidence in chief that she had wrongly accepted during the criminal proceedings that she had not had a panic attack that day (T713.16-22). Ms Higgins was adamant that she had suffered a panic attack on that day, and that it had caused her to miss out on an opportunity to sit on the floor. When it was put to her that she had given a particular sequence of events that day that could not have occurred, she said that she was not giving a chronological order of events (T714.15-20, 38-44). She had a clear memory of (a) having drinks, (b) having lunch, (c) meeting with the other members of Minister Ciobo's team and (d) having a panic attack, but could not be definite about the sequence in which those things happened (T725.5-16; T729.20-26). Having regard to the Agreed Facts in relation to the effect of trauma and alcohol on memory, we submit that to the extent that this evidence disclosed inconsistencies or confusion it is explicable and neutral on the question of credit.

### **Roses Chocolates**

117. It was put to Ms Higgins that her evidence about finding and eating a box of Roses chocolates was an example of her evidence evolving as she found out different information (T731.1-2). Her answer about going into the kitchen, finding a box of Roses and sitting in the DLO's office to eat them (T632.34-36) was not inconsistent with having found the chocolates in either the kitchen or the DLO's office. In any event, Ms Higgins made clear that she had been looking for food, went into the kitchen, found some Roses chocolates either in the kitchen or the DLO's office and ate them in the DLO's office (T730.41-46, T731.7-10). There was nothing about her evidence that was

inconsistent or indicative of Ms Higgins' evidence having evolved in response to new or different information.

### **Draft Manuscript**

118. Ms Higgins was asked about her book publishing contract (Exhibit #35: CB946). She fairly accepted that the marketability of the future book was in some part related to the truth of her allegations that Mr Lehrmann sexually assaulted her. When it was put to her that she had a financial interest in the outcome of the criminal proceedings, she declared on oath that if she finished the book and it was published she would donate the relevant monies to charity (T737.1-3). She was asked about the rough draft of her book (T738ff) (Exhibit #49: CB953). Ms Higgins said the draft was the start of the process of writing and she was just trying to get words/feelings on the page. She said that she was not making things up when she wrote the draft, but that it had been prepared in April 2021, and that she now knows much more than she did then. Ms Higgins made clear that the draft was not intended to have the same accuracy as her evidence in a courtroom and that accepted that it contained things that were incorrect (T740.1-12).
119. As with her evidence about the panic attack, when Ms Higgins referred to incorrect features of the draft manuscript, she was referring to the sequence of events, or conveying them with literary flourishes, rather than the fact of them having occurred: see for example T740.14-19; T740.42-44; T744.1-8. In particular, she agreed that she did not know whether she was in the office or on the leather couch when security called out, contrary to what she had written about being on the couch when she heard the call (T743.13; see also T756.16 in relation to her account in the interview for The Project). Again, Ms Higgins said that the reason she agreed it was incorrect, was because she now has a better idea of the sequencing of events (T740.14-19).
120. Ms Higgins readily accepted that the reference in the draft manuscript to her having cut her knee was incorrect (T769.1), but explained that it was akin to a rough form of journal that did not have the same status as what she had told the police or her testimony in this proceeding (T770.4-14). When Ms Higgins was asked by the Court if the reason her evidence differed from what she had put in the draft manuscript was because she had since had access to further information, she replied that that was true "in part" (T772.1-7). In Network Ten's submission that answer was consistent with all the other answers that Ms Higgins had given to this group of questions, namely that she had firm



memories that had remained consistent but she accepted that with the benefit of further information the sequence of events might have been different and that others may have had different recollections.

## **Dress**

121. Ms Higgins was cross-examined about her recollection of whether she was wearing her dress when she woke up. She said that her recollection had been that her dress was on her person when she woke because she did not have a memory of putting it back on (T745.36-39). She fairly conceded in light of what Ms Anderson has said since about finding her naked, that it was possible that she was naked. Contrary to Mr Lehrmann's submission at [361] of the ACS, Ms Higgins did not accept that it was possible that she had removed her dress herself. The effect of her evidence was that she had no recollection of doing so and that it was just not something that would ever happen (T958.28-35). She said that Ms Anderson's recollection was not necessarily inconsistent with her recollection as she was aware and felt a level of nakedness at the time she awoke (T746.27-42). Ms Higgins said that she believed at the time she wrote her draft manuscript and first spoke to *The Project* that she woke up with her dress around her midsection (T747.30-38). Her evidence was similar in relation to her recollection of the dress being around her waist that she had recounted in her interview for *The Project* (see T755.23-46).
122. Ms Higgins' evidence in respect of this topic, as with the preceding topics, was not or not substantially inconsistent with earlier representations she had made, and was, in any event, indicative of a truthful witness trying her best to reconcile her independent memories with information she later became aware of. She was not changing her evidence, but rather accepting the possibility that things may have occurred in a different sequence or that others had recollected things differently (see also, T762-764, T766.23).
123. Ms Higgins accepted that what she had told Ms Wilkinson at their initial meeting about Mr Lehrmann removing her underwear was untrue and said as part of a casual conversation in which she was too embarrassed to admit that she wasn't wearing underwear on the night (T749.45-750.1). However, as Ms Higgins pointed out, it was true that she was not wearing underwear and she told the truth about her underwear to

police and in the criminal proceedings (T751.43-752.2). This is not a matter bearing on Ms Higgins' general credit.

### **The Timeline Document**

124. In cross-examination, Ms Higgins accepted that there were some errors in the timeline document she had initially prepared for police and that was subsequently sent to *The Project* team, in particular (a) she had inadvertently referred to the incident happening on Saturday night when in fact it had happened on Friday night/Saturday morning (T832.27) and (b) that she had re-signed the ministerial code at the second meeting with Ms Brown not the first (although it had been mentioned in the first) (T833.1-27). These were very minor inaccuracies, explicable and not inconsistent with the essential elements of Ms Higgins' recollections. As with the matters referred to above, having access to further information, Ms Higgins fairly conceded that these errors had been made in the timeline document.

### **Alleged motive for going to the media**

125. In cross-examination, it was suggested to Ms Higgins that she did not comply with the urgings of police not to go to the media because she wanted to try and affect the outcome of the upcoming election. At T842.15ff, Ms Higgins said: "*No – I was a Liberal through and through since I was born. I had no intention of impacting the election, but I did want to change the culture in Parliament House.*" She denied any intention of affecting the outcome of the election and said:

*"When I came forward, I was angry at the way that my rape had been handled, but I didn't think that anything I said would be consequential enough to impact the election. I didn't have that big of an ego to think that I could change the course of an election, and I still don't. Yes. But I was angry at the culture of Parliament House, and I was hurt by the Liberal Party, but I was still a Liberal."*

126. Ms Higgins was played a section of the recording that is Exhibit #36: CB242(a), (b) and (c); CB 1114. Ms Higgins agreed that the planned timeline for the story was for it to be broadcast before a sitting week (T846.35-38). She said that the motivation for the story was not about the Liberal Party, but about women in politics and her reference to people "*all stuck in Parliament with it*" was to the people directly involved in her assault (T847.13).

127. There was simply no basis to support this attack on Ms Higgins' motivation for going to the media. Her evidence was that she wished to effect a change of culture in Parliament House. In cross-examination she said that the *Four Corners* broadcast (Inside the Canberra Bubble) in 2020 was a moment when she felt fed up about the women in politics issue and felt like she had a duty to speak about it (T859.38-41). She denied that the note of a thesis idea on her phone was the acorn from which her plan to go to the media grew (T860.13-14). She said that, if anything, the acorn was probably the Dhanya Mani and Chelsey Potter scandals in 2019 that she had heard of and considered similar to her own experience (T860.13-17).

**Alleged attempt to derail the criminal trial for the purpose of sustaining the allegation of rape on the civil standard**

- 127A. As set out above, this line of credit attack does not appear to be pressed in the ACS.
128. This particular attack on Ms Higgins' credibility appears to be founded on the notion that she had a financial motive (in the form of a book deal and others matters) to have the allegation of rape proved true and that in order to do so Ms Higgins embarked on a complex and implicitly uncertain and Machiavellian plan that involved ensuring that no further criminal trial would occur after the aborted trial (by giving a speech on the steps of the court and somehow manipulating or influencing the content of the medical evidence provided to the DPP) and then relying on Mr Lehrmann to commence defamation proceedings (which she had no guarantee he would do) in order to litigate the rape controversy in a civil law setting with a lower standard of proof, on the assumption that the respondent would plead a justification defence and subpoena her in aid of that defence (all matters over which she had no control). The absurdity of that case theory is immediately apparent, and there are a number of reasons why the Court would reject it.
129. *First*, the fundamental problem with this case theory is that no coherent basis has ever been articulated as to how an alleged financial motive on the part of Ms Higgins to have the controversy determined in civil proceedings is rationally connected to the determination of the central fact in issue, being whether Mr Lehrmann raped Ms Higgins (or whether Ms Higgins fabricated a rape allegation in March 2019). There simply is no such connection.

130. Indeed, as Network Ten contended in its submissions objecting to the related line of cross-examination (as to which see *Lehrmann v Network Ten Pty Ltd (Cross-Examination) (No 2)* [2023] FCA 1520), even assuming the worst, the more rational explanation is that Ms Higgins sought to avoid reliving the trauma of the criminal trial, with the continued risk that a result would not be reached again. In fact, Ms Higgins' evidence in this proceeding was that she had no intention of blowing up a retrial. When that proposition was put to her in cross-examination, her reaction was: "*Wow. No. Not at all*" (T1021.15-16). When it was put to Ms Higgins that she had said things outside court with the intention of trying to avoid a retrial, or because she was wanting to avoid the risk of a (new) jury finding Mr Lehrmann not guilty, her reply was: "*I had just gone through a criminal trial. I wasn't hiding from anyone*" (T1021.25-29).
131. *Secondly*, Ms Higgins candidly accepted that the effect of what she had said to Ms Wilkinson and Mr Llewellyn was that she had her doubts about the justice system and that she thought the allegations would be more likely be found to be true in a civil case on the balance of probabilities, she was still prepared to go ahead with a criminal prosecution (T1015.19-24). When it was put to her that she had a lot to lose if Mr Lehrmann had been found not guilty, she freely accepted that she considered that statistically that was the probable outcome but she was nevertheless prepared to prosecute her allegations against him and "*would go through it again tomorrow now that I'm obviously not jumping off buildings*" (T1016.2-4). It is neither surprising, nor sinister, that a rape victim, in respect of an assault with no witnesses, might be less fearful of the outcome of a civil proceeding than a criminal trial.
132. Again, even on the worst case scenario, Ms Higgins' comments on social media about telling the truth "*no matter how uncomfortable or unflattering*" to the Court in the criminal proceedings, the "*asymmetrical criminal justice system*" and the general imbalance of her having to be cross-examined at length while Mr Lehrmann stayed silent and detached (Exhibit #52: CB1048) are consistent with a hypothesis that she was seeking to avoid having to go through the same experience again, rather than the significantly farfetched conclusion that she did so because she has fabricated that she was raped. As Network Ten previously submitted to this Court, the desire to avoid a repeat of the unsatisfactorily concluded criminal trial is a rational and understandable motive, which does not impugn Ms Higgins' credit at all. It is a logically consistent hypothesis and more probable than that advanced by Mr Lehrmann: *Bradshaw v*

*McEwans Pty Ltd* (1951) 217 ALR 1, 5 (cited in *Peck v Australian Automotive Group Pty Ltd* [2023] FCA 1413, [202] (per Cheeseman J)).

133. *Thirdly*, if the ultimate proposition is that Ms Higgins did certain things (and banked on Mr Lehrmann bringing this proceeding, the putative respondent pleading a justification defence, and then being subpoenaed in aid of that defence - all entirely uncertain and beyond Ms Higgins' control) so that the controversy would be determined in a civil law setting with a lower standard of proof, that conclusion necessarily involves a willingness on the part of Ms Higgins to participate in a further juridical enquiry as to whether the rape occurred. It is indicative of Ms Higgins' continued preparedness to maintain her allegation on oath in further proceedings. One only has to ask the question to see how untenable the proposition is – if Ms Higgins had fabricated the rape allegation, why would she be volunteering publicly to give evidence, on oath, that the rape had occurred, and subject herself to less restricted cross-examination in a civil context, in order to assist a media organisation in a defamation dispute to which she is not a party?
134. *Fourthly*, Ms Higgins' evidence was that she was not in a headspace where she was thinking about the potential consequences of the speech she gave outside court after the mistrial (Exhibit #51: CB1046), having been hospitalised the week before after an attempted suicide (T1016.6-35). This was not the action of some mastermind with a plan to blow up any future criminal trial in the hope that Mr Lehrmann would bring a civil claim where the controversy would be tested on a lower standard.
135. *Fifthly*, to the extent that Mr Lehrmann's case theory depends on the proposition that Ms Higgins influenced the authors of the medical reports provided to the DPP (as part of the supposed scheme to blow up the criminal retrial), there does not appear to have been any proper basis to advance that proposition and Ms Higgins' evidence was that she had no contact with the DPP at the relevant time (T1017.37-46) and (as was obviously the case) "*the decision to go ahead wasn't mine to make; it was the doctors and the DPPs, and I wasn't in well health, and so I had to accept their decision*" (T1024.24-40).
136. *Sixthly*, as referred to above, Mr Lehrmann's case theory depends on Ms Higgins banking on him commencing defamation proceedings against a media organisation – of which there was no certainty – and furthermore, on the relevant media organisation

pleading a substantive defence of justification and subpoenaing Ms Higgins in support of that defence – again, matters in respect of which there was no certainty. It is simply fanciful to suppose that Ms Higgins fabricated a rape and then was financially motivated to blow up a criminal proceeding (which she apprehended would unlikely succeed given the statistics associated with successful prosecutions of such claims) and then depended on a series of complex and uncertain events occurring in order to execute a plan to have the allegation determined in a civil defamation claim. The more rational explanation is the one that Ms Higgins provided in cross-examination: *“I was willing to go through with a criminal case again. It was only advised by doctors and lawyers that I couldn’t. So I had no issue. I put myself through the criminal court once. I was going to keep going. And then it looked like he wanted to make money off being a rapist, I of course put my hand up and said “Please put me back in” and here I am”* (T1028.26-31).

137. *Seventhly*, Mr Lehrmann appears to rely on a payment received by Ms Higgins in relation to the resolution of a complaint and prospective claim she made against the Commonwealth in support of a contention that she had a financial motivation in having the rape allegation determined in civil proceedings. That appears to be the way in which the complaint and payment of settlement monies is relied upon, but is an incoherent proposition when regard is had to the matters referred to above, as well as the fact that:
  - (a) Ms Higgins had already made the allegation of rape years before the complaint and settlement and so the complaint against the Commonwealth of itself did not provide a motivation for the allegation to be determined in a civil context; and
  - (b) The complaint against the Commonwealth was not about the rape, but concerned the way in which the incident had been handled. In effect, it was a case about whether there had been a breach of a duty of care owed to Ms Higgins. The truth or falsity of the rape allegation itself was therefore not an issue that was required to be determined as part of that complaint.
138. To the extent that Ms Higgins made representations in the witness box about the terms of settlement with the Commonwealth that were inconsistent with the terms as recorded in the deed of settlement and release (Exhibit #59), they could not impugn her credibility (and certainly not in a way that has any connection to the central fact in issue) when it was clear from her evidence that she was giving an account of the basis

on which she believed the Commonwealth had settled her complaint (i.e. that the Commonwealth had made an admission of liability in respect of breaching its duty of care). Ms Higgins was quite clear that she was only providing her understanding and that it could be necessary to “*double-check with them*” (T1028.44). As a layperson, she was entitled to believe mistakenly that the Commonwealth had admitted the alleged breach given the terms of settlement that were subsequently disclosed in Exhibit #59.

139. To the extent that there might be matters in the deed with the Commonwealth that are objectively wrong or inconsistent with factual findings that are made in this proceeding, those are not matters bearing on the central fact that Court must decide—strikingly, the allegation of rape in the deed is entirely consistent with all other accounts that Ms Higgins has given of that event.

### ***Phone records***

140. Finally, Ms Higgins was asked a series of questions about deleted contacts and messages from her phones (T908.39-926.31). Ms Higgins explained that prior to handing her phone over to police in May 2021, she deleted one photograph that she was ashamed of that had nothing to do with the subject of this proceeding (T909.9-37). It was put to Ms Higgins that when police downloaded her phone there were no messages between her and Ms Humphreys, Ms Hamer, Major Irvine and Ms Gain. Ms Higgins denied deliberately deleting them (T910.10-12, 18-19). She could not explain why those messages were not downloaded, but stressed that she had not intentionally deleted them and explained that she had lost things when transferring data between phones over the years (T910.20).
141. It would not have made sense for Ms Higgins to have deleted such messages. As she said herself, they would have helped her (T910.15-16). It was also put to Ms Higgins that she had deleted messages between Alex Woods, a security guard at Parliament House who Ms Higgins had arranged to go on a date with, and her Bumble date Nick. She explained that after the incident at Parliament House, she had no intention of texting Mr Woods again (T911.47) and so would have archived him as a contact. Similarly, Ms Higgins thought that she may have deleted contacts for Nick as she had no intention of seeing him again but also thought they could have been messaging on the Bumble app itself (T913.27-31). There was nothing nefarious in the deletion of these two contacts. Ms Higgins initially thought that she had not heard Nick’s name before. She was

reminded that she had referred to him by name in her draft book (T949.28-33). Ms Higgins could not recall that and had no reason to remember his name after only meeting him fleetingly five years ago (T912.29-31).

142. In relation to Chris Payne, Ms Higgins thought that she had mainly communicated with him by Signal or WhatsApp (T914.40-44).
143. Ms Higgins said she had deliberately deleted communications with Senator Reynolds and Senator Cash (T915.5-14), and otherwise did not think she had ever messaged Jesse Wotton (T915.16-20). She speculated that her messages with Ms Abbott may have been lost when she moved between devices (T915.22-24).
144. When asked by the Court if she recalled changing phones between January 2021 and 21 May 2021 when she provided her phone to police, Ms Higgins said that she recalled having a phone upgrade during that period. That evidence is consistent with Ms Higgins' message to Mr Llewellyn at 6.58am on 12 February 2021 letting him know that she had a new number (Exhibit #R650: CB697).
145. Otherwise, Ms Higgins denied selectively deleting messages from her phone (T914.14-20). As with her missing messages with Ms Humphreys and others, Ms Higgins was glad that the missing messages with Mr Dillaway existed. There was no reason for her to delete it. In fact they corroborated her account of having to make a choice and determining that she was not interested in pursuing a police complaint (T919.10-920.17; Exhibit #45: CB92). There was no reason to suspect that she had made up a self-serving chain of emails with Ms Gain, and the message referred to at T925.31 was a draft that had not been sent (T925.39-45; Exhibit #47: CB246).
146. Many of the messages and message chains that had been deleted by Ms Higgins or been lost from Ms Higgins' devices were able to be retrieved from other sources. None of the retrieved messages appeared to be of any material significance.

#### **Messages with Mr Dillaway**

- 146A. At [24]-[27] of the ACS, Mr Lehmann submits that little reliance can be placed on the text messages between Ms Higgins and Mr Dillaway in the days following 23 March 2019 in which she began to disclose the sexual assault to him. That submission appears to be predicated on a finding that Ms Higgins was a "totally unreliable witness" and a "person prone to say untruthful or deliberately manipulative things" (see [27] of the



ACS). In Network Ten’s submission, the Court would reject that characterisation of Ms Higgins as a witness for the reasons set out above.

- 146B. Otherwise, Ms Higgins’ messages with Mr Dillaway and the evidence she gave about those messages is considered in Part E.3.7 below. In substance, those messages show Ms Higgins processing in real time what had happened to her. Ms Higgins’ message to Mr Dillaway to the effect that she had spoken to her father about the incident was not a “disingenuous” lie, as asserted by Mr Lehrmann at [26] of the ACS, but rather an attempt to protect someone she cared for from feeling overly burdened by the disclosure she had made to him (see [569] below).
- 146C. Finally on this topic, it should be recorded that the most the evidence established about Ms Higgins “[reaching] out to a security guard by text message” prior to sending her message to Mr Dillaway on 26 March 2019 was that there was a record of an exchange of text messages between Ms Higgins and Mr Alex Woods on 23 March 2019 that most likely related to Ms Higgins cancelling a date that had been planned for that weekend. Ms Higgins’ evidence was that she cancelled the date after having been sexually assaulted by Mr Lehrmann (T911.3-912.27). It is not clear from the ACS how the message is said to be relevant to any analysis of the messages exchanged between Ms Higgins and Mr Dillaway or any other issue.

### **Other Matters**

- 146D. The matters summarised at [28] of the ACS, some of which do not appear to have been put to Ms Higgins in cross-examination, are, where appropriate, addressed elsewhere in these submissions. Contrary to Mr Lehrmann’s submission, they are not demonstrative of serious and widespread dishonesty by Ms Higgins.

### **Ms Higgins' out of court representations**

- 146E. **Mr Lehrmann contends that representations made by Ms Higgins: (1) within a Deed of Settlement and Release between Ms Higgins and the Commonwealth of Australia (Deed) (Exhibit #59) and (2) during her evidence in the criminal proceedings, evidence a preparedness to tell lies on solemn occasions.**
- 146F. **For the reasons developed elsewhere in this outline of submissions, Network Ten submits that the Court should find that Ms Higgins endeavoured at all times to give frank and truthful evidence in this proceeding. She made appropriate concessions where the accounts of others or the sequencing of events was different**

from her own recollection. Ms Higgins' stated understanding of the content of the Deed, her acceptance that her understanding might be inaccurate and that it could be necessary to "double-check" her understanding (in circumstances where she did not have a copy of the Deed in front of her when giving evidence), was consistent with the way in which she gave her evidence more generally: see [138], [139] above.

- 146G. Ms Higgins' evidence was indicative of someone who understood and respected the solemnity of this proceeding. She sought to give accurate and reliable assistance to the Court. There is a grim irony in Mr Lehrmann's submission: it was he who exhibited a disregard towards the court process and administration of justice by repeatedly lying in his evidence to this Court in respect of key features relevant to the central fact in issue (as to which see [8]-[102] above).

*Representations in the Deed*

- 146H. Mr Lehrmann submits that Ms Higgins' evidence and other evidence adduced in this proceeding establishes that representations made by Ms Higgins in 11 clauses in a document entitled "Attachment 2 – Events Complained About" attached to the Deed (Representations) were lies.
- 146I. It does not appear that the document entitled "Attachment 2 – Events Complained About" is part of the Deed. It is not one of the documents constituting the "Potential Legal Claims" (as defined in clause H of the Recitals to the Deed). It appears to be a draft prepared for the purposes of the mediation that occurred on 13 December 2022, possibly as part of a position paper. However, Network Ten accepts that the Representations are also contained in the "draft Particulars of Liability" document, which does fall within the definition of "Potential Legal Claims" and is therefore part of the Deed and subject to the warranties given by Ms Higgins.
- 146J. Mr Lehrmann appears to contend that Ms Higgins' conduct in making false representations constituted a breach of the warranties given by her in clause 7.1 of the Deed, and that they were made for the purposes of securing a life changing payment. Those extremely serious allegations – in substance that Ms Higgins has committed a fraud on the Commonwealth of Australia – ought not to be adjudicated upon in this proceeding, for four reasons.

- 146K. First, neither party to the Deed was a party to this proceeding. The Court has not had the benefit of any submissions from them in respect of the circumstances in which the Deed was negotiated and executed.
- 146L. Critically, it is no part of the responsibility of Network Ten to act in Ms Higgins' interests in respect of the allegations now advanced against her in respect of the Deed. The Court should not make very serious findings of the kind alleged against an unrepresented witness who has not been heard in respect of them.
- 146M. Secondly, the central fact in issue in this proceeding is whether Mr Lehrmann raped Ms Higgins. The allegations concerning the alleged sexual assault, as recorded in the Deed, are entirely consistent with all other accounts that Ms Higgins has given of the event. Mr Lehrmann does not appear to contend otherwise.
- 146N. In particular, the following clauses from the draft Particulars of Liability are consistent with the evidence given by Ms Higgins:
- (i) Inside Minister Reynolds's office, Mr Lehrmann looked for something. The claimant sat on window ledge overlooking the Prime Minister's courtyard, feeling very 'out of it' (cl 2.10): see [442]-[445] below.
  - (ii) The claimant was then either taken over to the couch by Mr Lehrmann or went there herself and lost consciousness (cl. 2.11): see [447] below.
  - (iii) The claimant later awoke by the feeling of pain from her leg being crushed. She realised she was on the couch and that Mr Lehrmann was on top of her having sexual intercourse with her and pinning her leg down with his knee (cl. 2.12): see [447], [451] below.
  - (iv) The claimant had not consented to sexual intercourse with Mr Lehrmann (cl 2.13): see [450] below.
  - (v) The claimant began crying and told Mr Lehrmann to stop at least half a dozen times but he did not stop. The claimant could not move from under him due to his knee pinning down her leg (cl 2.14): see [450], [452] below.

- (vi) Mr Lehrmann then finished a few minutes later. He got up without speaking to the claimant and then left Minister Reynolds' office (cl 2.15): see [450], [453]-[454] below.
- (vii) The claimant was unable to get up and passed out again (cl 2.16): see [455] below.

146O. These parts of the Deed are prior consistent statements that support, rather than undermine, Ms Higgins' credibility.

146P. Thirdly, many other matters set out in the draft Particulars of Liability (and replicated in the "Attachment 2 – Events Complained About" document) are consistent with the evidence given by Ms Higgins in this proceeding.

146Q. They include: (i) her evidence regarding the attendance of a security guard and her departure from Parliament House (cl 2.17-2.19), (ii) her evidence about the handling of the sexual assault allegation by Senator Reynolds' office (cl 3.1-3.28 – as to the impugned clauses in this section, see Network Ten's response below) and (iii) the handling of the sexual assault allegation by Minister Cash's office (cl 4.1-4.15).

146R. Finally, as developed below, upon a proper analysis, there are in any event no or no substantial inconsistencies between the relevant representations in the Deed and Ms Higgins' evidence to the Court. To a significant extent, Mr Lehrmann's submissions are addressed to alleged inconsistencies between representations in the Deed and the facts they urge the Court to find based upon evidence of others (particularly Ms Brown), in circumstances where Ms Higgins' evidence was consistent or substantially consistent with the representations in the Deed.

- (a) Clause 3.4 (cl 2.4 of the draft Particulars of Liability)

The alleged inconsistency between clause 3.4 and Ms Higgins' evidence appears to be that the clause states that Mr Lehrmann got into the taxi without Ms Higgins' invitation or agreement, whereas her evidence was to the contrary. In fact, Ms Higgins' evidence was consistent with the clause. Her evidence was that she was told by someone (she was not sure who) that she and Mr Lehrmann lived in the same direction and were to travel

together (T621.26-28). She simply acquiesced with that suggestion (T621.35-37).

The phrase “without invitation or agreement with the claimant” is used in clauses 3.4, 3.5 and 3.6 of the Deed. In Network Ten’s submission, it seems clear, from the context in which the phrase is used, that it was intended to convey no more than that the decision to share a cab and stop at Parliament House was not prearranged or something that Ms Higgins suggested. That is consistent with Ms Higgins’ evidence.

(b) Clause 3.5 (cl 2.5 of the draft Particulars of Liability)

The alleged inconsistency between clause 3.5 and Ms Higgins’ evidence appears to be that the clause states that Mr Lehrmann directed the taxi to stop at Parliament House, alleging that he wanted to retrieve something from his office, without invitation or agreement with Ms Higgins, whereas her evidence was to the contrary.

Again, Ms Higgins’ evidence was entirely consistent with the clause. Her evidence was that: (i) it was Mr Lehrmann who said that he had to pick something up from work (T621.45-46), and (ii) she simply went along with what Mr Lehrmann told her was happening (T621.46-622.3).

(c) Clause 3.6 (cl 2.6 of the draft Particulars of Liability)

The alleged inconsistency between clause 3.6 and Ms Higgins’ evidence appears to be that the clause states Mr Lehrmann directed Ms Higgins to get out of the taxi and go with him into Parliament House, whereas her evidence was to the contrary.

While Ms Higgins’ evidence was not that Mr Lehrmann expressly “directed” her to get out of the taxi and go with him, the substance of her

evidence was that she had to get out because he had got out (T622.12, 17-22). To the extent there is any inconsistency between the two accounts, it is minimal and immaterial to Ms Higgins' credit.

(d) Clause 3.9 (cl 2.9 of the draft Particulars of Liability)

The alleged inconsistency between clause 3.9 and the CCTV footage (Exhibit #17: CB47) appears to be that the clause states that Mr Lehrmann led Ms Higgins to the Ministerial Suite whereas the footage shows Ms Higgins walking in front of Mr Lehrmann.

There is no inconsistency. Ms Higgins' evidence was that it was Mr Lehrmann who told her they were going back to Parliament House because he had to pick something up (T621.45-46) and that it was Mr Lehrmann who spoke to the first security guard on the intercom (T622.41-623.2). It was Mr Lehrmann who led them to the Suite including by telling security via the intercom that they were there to pick up some documents for Minister Reynolds (see [393] below; Exhibit #16: CB 37, 38). The CCTV footage shows Mr Lehrmann leading the way by going through the metal detector first and waiting for Ms Higgins to come through. He is waiting by the lift with the security guard when Ms Higgins skips barefoot after them. The fact that the footage shows Ms Higgins walking slightly in front of Mr Lehrmann in the ministerial corridor outside the Suite is hardly contrary to the proposition that he led her there having regard to the evidence given by Ms Higgins, the intercom recording and the CCTV footage from the Point 8 security entrance.

(e) Clause 4.1 (cl 3.1 of the draft Particulars of Liability)

The alleged inconsistency between clause 4.1 and Ms Higgins' evidence appears to be that the clause states that Ms Higgins and Mr Lehrmann did

not communicate on 25 March 2019, when in fact her evidence and Exhibit #21 was to the contrary.

Mr Lehrmann’s submission that the evidence establishes they had coffee and exchanged words and exchanged emails on 25 March 2019 mischaracterises or overstates the evidence. In fact, Ms Higgins’ evidence was that Mr Lehrmann placed a coffee on her desk, said it was for her (“this is for you”, to which she thought she replied “thank you”) and then he kept walking: T637.34-638.6. Apart from that interaction, she did not speak to Mr Lehrmann that day (T638.5-6).

The extent of their exchange of emails that day was that Mr Lehrmann forwarded a news summary because he could not send it to Ms Higgins’ private email address and said that he would arrange for her email address to be added to the mailing list. Ms Higgins replied that it would be best if he could (Exhibit #21: CB59). Ms Higgins gave evidence about her reaction to reading this and an email that Mr Lehrmann had sent her on the Saturday but that she had not read until the following Monday (Exhibit #20: CB53): T638.8-640.25.

The substance of the representation in clause 4.1 is not untrue. Ms Higgins and Mr Lehrmann did not communicate in any meaningful way. They did not go out together for coffee and a chat. They did not exchange more than one email. The interactions were short and terse. Ms Higgins said that the email Mr Lehrmann had sent her on Saturday, which she read on the Monday, gave her the “*heebies*” and “*really freaked [her] out and still does*”: T638.43-44.

(f) Clause 4.4 (cl 3.4 of the draft Particulars of Liability)

The alleged inconsistency is between clause 4.4 and the evidence given by Ms Brown about whether Ms Higgins recounted to Ms Brown the events of

22-23 March 2019, including that Mr Lehrmann had sexually assaulted her, at their meeting on 26 March 2019.

Whatever is made of Ms Brown's evidence, Ms Higgins' evidence was entirely consistent with the representation in clause 4.4: see [533]-[549] below. Mr Lehrmann does not appear to contend otherwise.

In any event, despite Ms Brown's evidence, at the very least she knew or strongly suspected by the end of the meeting on 26 March 2019 that something untoward of a sexual nature had occurred, and she knew about various events on 22-23 March 2019, including that Mr Lehrmann and Ms Higgins had been in the Suite without authority, that they were inebriated, and that Ms Higgins was later found naked and passed out: see [548] below.

(g) Clause 4.5 (cl 3.5 of the draft Particulars of Liability)

The alleged inconsistency between clause 4.5 and Ms Higgins' evidence appears to be that the clause states that during the first meeting between Ms Higgins and Ms Brown, Ms Brown told Ms Higgins that Mr Lehrmann had said that he had not been drinking "that evening" (i.e. the evening of 22 March 2019), when Ms Higgins' evidence was that Ms Brown had told her that Mr Lehrmann had said that he had come back to the office for whisky.

The two propositions are not mutually exclusive, and it is perfectly possible (indeed likely) that Ms Brown told Ms Higgins that Mr Lehrmann had told her that he had not been drinking that evening (i.e. prior to attending Parliament House) and that the reason he had come back was to drink whisky.

In any event, the clause is addressing what Ms Brown told Ms Higgins about their state upon entry to Parliament House (Ms Higgins was captured on CCTV as being visibly drunk, Mr Lehrmann said he had not been drinking). Ms Higgins gave evidence about the reason Mr Lehrmann



had given to Ms Brown about attending the office. She does not appear to have been asked about whether or not Ms Brown told her that Mr Lehrmann had said he had not been drinking that evening.

Ms Brown's evidence was that Mr Lehrmann told her that he came back to drink whisky and had two glasses (Brown, [42]). Ms Brown's note records that Mr Lehrmann told her that *he did not agree that he was intoxicated when he came back to the office in the early hours of the morning* (Exhibit #R87: CB64, p2302). That is consistent with Ms Brown having told Ms Higgins that Mr Lehrmann has said he had not been drinking that evening. Mr Lehrmann's evidence was that he told Ms Brown that he came back to have a drink (but that that was a lie: T332.3-18).

(h) Clause 4.12 (cl 3.12 of the draft Particulars of Liability)

The alleged inconsistency between clause 4.12 and the evidence appears to be that the clause states that Ms Higgins asked Ms Brown several times if she could view the CCTV, but Ms Brown rebuffed her, whereas Ms Brown's evidence was that she never discussed access to CCTV footage with Ms Higgins (Brown, [157]).

Again, whatever is to be made of Ms Brown's evidence, Ms Higgins' evidence was entirely consistent with the representation in clause 4.4: see [626] below. Mr Lehrmann does not appear to contend otherwise.

In Network Ten's submission, the Court would prefer Ms Higgins' evidence for the reasons set out in these submissions. She had made a point about counting the number of cameras and asked to have access to the CCTV at her second meeting with Ms Brown. Ms Higgins' evidence was that Ms Brown rebuffed her request (T669.34-36). Mr Payne's evidence was that Ms Brown had told him that she was going to attempt to access the CCTV footage: see [554]-[555]. Major Irvine's evidence was that during her conversation with Ms Higgins on 27 March 2019, Ms Higgins

had spoken about CCTV footage, including possibly that she wanted to see it: see [597] below.

(i) Clause 4.22 (cl 3.22 of the draft Particulars of Liability)

The alleged inconsistency between clause 4.22 and the evidence appears to be that the clause states that when Ms Higgins raised with Ms Brown the issue of sick leave for her mental health and time off work to assist the AFP, Ms Brown demonstrated an unwillingness to discuss the issue and said it was Ms Higgins' problem, whereas Ms Brown's evidence was Ms Higgins did not raise the issue with her and by 11 April 2019 she was no longer an active COS.

This alleged inconsistency does not appear to have been put to Ms Higgins. The evidence shows that, by around 8 April 2019, Ms Higgins was exploring the possibility of proceeding with a police complaint, including by attending the 'meet and greet' with Ms Cripps and Detective Harman on that day: see [721]ff below. Her evidence was that on 11 April 2019 she decided not to pursue the complaint, and that one of the factors in making that decision was because she considered that Ms Brown was getting annoyed that she had not made a choice about what she wanted to do for the election: see [741] below. She said that the decision as to whether to proceed with a formal complaint "kept [getting put] back to me through Fiona Brown" (T678.40-41).

That evidence is substantially consistent with the representations in clause 4.22.

(i) Clause 4.24 (cl 3.24 of the draft Particulars of Liability)

The alleged inconsistency between clause 4.24 and the evidence appears to be that the clause states that Ms Brown made it clear by her words and demeanour that Ms Higgins was to put aside the events of 22-23 March

2019 and remain silent about the sexual assault in order to keep her job, whereas Ms Brown's evidence was that she did not do so (Brown, [192]). This is therefore another example of a submission addressed to an inconsistency between Ms Brown's evidence and the Deed, rather than between Ms Higgins' evidence and the Deed.

The First Respondent has addressed this issue in the section on roadblocks at [1120]-[1124B] below. There was no material inconsistency between Ms Higgins' evidence about her interactions with Ms Brown in respect of this issue and the representation in this clause.

(k) Clause 4.28 (cl 3.28 of the draft Particulars of Liability)

Mr Lehrmann submits that the representation in clause 4.28 that Senator Reynolds did not engage with Ms Higgins during the election campaign and avoided her and made clear that she did not want Ms Higgins attending events with her, is false.

Ms Higgins' evidence was that she did not see much of Senator Reynolds while she was in Western Australia, and that Senator Reynolds would actively avoid her and did not even like being in a room with her (T682.18-20). Ms Higgins said that Senator Reynolds just would not talk to her (T682.22-24). In cross-examination, Ms Higgins repeated her evidence about Senator Reynolds avoiding her and not supporting her (T835.19-26) and excluding her from events (T993.46-994.3; T998.19-21).

There is accordingly no material inconsistency between the representation in the Deed and Ms Higgins' evidence.

*Representations in the criminal proceedings*

146S. Mr Lehrmann has submitted that Ms Higgins' evidence and other evidence was inconsistent with the evidence she gave in the criminal trial in respect of three topics: (i) her evidence about how the bruise on her leg was sustained, (ii) her

evidence about when she took the photograph of the bruise, and (iii) her evidence about the length of time she kept the dress under her bed. Each of these matters has already been addressed in these submissions: see [115]-[115A] above and [690]-[692], [784]-[789] below.

146T. In summary:

(a) Ms Higgins accepted that she thought at the time she made her statutory declaration that the bruise had been caused by the assault, but fairly accepted in cross-examination in the criminal case that it was possible that it had come from falling up the stairs at 88mph (T712.11-713.2, 769.24-27). She was adamant that the bruise was caused on the night of the assault. Ms Higgins' responses to this line of cross-examination in this proceeding were consistent, even when she was repeatedly challenged on it (T861.42-863.44). As Network Ten has submitted at [115A] above, Ms Higgins' willingness to concede that the bruise may have been caused by another source was indicative of an honest witness doing her best to recollect events at a deeply traumatic time in her life. Her evidence in this proceeding was that the photograph showed a bruise on the right side of her leg (T963.1-2), which is the evidence she gave to the court in the criminal trial when asked to point to the location of the bruise in the photograph (Exhibit #71, T129.14-38).

(b) Ms Higgins gave evidence in the criminal trial that she took the bruise photograph during the week of the budget and around a week after the assault (Exhibit #71, T128.45-129.10). Her evidence in this proceeding was consistent with that evidence: see [690] below. Ms Higgins said that she took it the day after the budget (on 3 April 2019) and “after things started going wrong with the office” (T670.27-34).

The fact that Ms Higgins had said in the criminal proceedings that she believed the photograph was taken the day before the budget and estimated it was around five days from the assault (instead of ten or eleven days) is hardly evidence of an inconsistency of the magnitude alleged. Rather it shows that Ms Higgins was giving her best estimate of when the photograph was taken, anchored to a memory of it having occurred around the time of the budget, a week or week and a half after the assault. Mr Lehrmann's

submission that there was no proof the photograph existed at all before January 2021 is misleading in light of Ms Higgin’s evidence, and the evidence/agreed facts as to the unavailability of metadata for the photograph: see [857]-[873] below.

- (c) Finally, Ms Higgins’ evidence in chief in the criminal proceedings was that she kept the dress she wore on the night of the assault under her bed for “a good six months” before wearing it to Senator Reynolds’ birthday dinner (Exhibit #71, T130.44-131.7). When she was shown a photograph of the dinner on 15 May 2018 at the Pan Pacific Hotel in Perth, she fairly accepted that the amount of time that had passed before wearing the dress to the dinner was “shorter than I originally remembered” (Exhibit #71, T174.33-175.4). She gave consistent evidence in the criminal proceedings and this proceeding that the dinner was the one and only occasion after the assault she wore the dress.

In this proceeding, Ms Higgins fairly accepted that she had been wrong about the six month period. She said: “Yes, so I put it in a bag under my bed for a period of time. I was wrong about that period of time in the criminal case. I thought it was longer than what it was actually was. It was under my bed for about six weeks before I wore it one more time. And then never wore it again” (T686.40-44). Once again, Ms Higgins’ evidence demonstrates that she was prepared to accept when she was wrong about the precise chronology or sequence of events, but the substance of her evidence was consistent and unshaken in cross-examination, including in relation to the fact that she only wore the dress on one occasion after the assault, the nature of that occasion and the reason for wearing the dress on that occasion (T816.5-14).

- 146U. In all the circumstances, in Network Ten’s submission, the Court ought to reject Mr Lehrmann’s submission that the relevant representations demonstrate a “preparedness to tell lies, including elaborate lies, on the most solemn of occasions”. The Applicant’s submission that Ms Higgins lied in the Deed to secure a payment and under oath during the criminal trial because she was obsessed with securing a guilty verdict is extraordinary and without foundation.

#### **A.16 Conclusions on Ms Higgins' Credit**

147. In all the circumstances, the Court should reject the ~~three~~ attacks on Ms Higgins' credibility referred to above. Notwithstanding the inconsistencies in her evidence that she frankly acknowledged, she was overall a candid and honest witness. Her evidence in respect of the sexual assault was raw and compelling, and it was consistent with the objective evidence, where available, and the objective touchstones referred to above.
148. There was, at the end of the day, a stark contrast between the evidence given by Ms Higgins and Mr Lehrmann. As noted above, Mr Lehrmann was fundamentally dishonest about almost every significant integer of the event in respect of which he has brought this proceeding. He did not make appropriate concessions of the kind made by Ms Higgins. His ultimate position is, having lied endemically, to ask the Court to accept his as telling the truth when he says he did not sexually assault Ms Higgins, while at the same time declining to give the Court any coherent account of what he says in fact occurred in the Ministerial Suite in the early hours of 23 March 2019.

#### **A.17 Mr Llewellyn's Credit**

- 148A. Mr Lehrmann makes various criticisms of Ms Llewellyn's credit at [34]-[39] of the ACS. In Network Ten's submission, those criticisms are unfair and unfounded. Mr Llewellyn's evidence cannot be assessed through the narrow prism of the answers he gave to the limited lines of questioning on discrete and non-consecutive aspects of the investigation that he undertook that were pursued in cross-examination. Regard should be had to the entirety of his extensive affidavit evidence – the majority of which he was not challenged on, and which revealed him to be a highly professional producer who approached the tasks with which he was entrusted with honesty, integrity and diligence.
- 148B. The affidavit evidence discloses, in a sequential and exhaustive way, the very substantial body of work undertaken by Mr Llewellyn in researching and preparing the broadcast and in fact did so.
- 148C. Contrary to Mr Lehrmann's submissions, and as elaborated below, Mr Llewellyn did not simply accept everything he was told by Ms Higgins, but rather sought to test that information with her, including through questioning and observing her during the two interview sessions and by obtaining documents that could objectively verify what he had been told to the extent possible, bearing in mind the inherent limitations on the investigative powers of journalists.

- 148D. As is apparent from the ACS, the credit attacks that were sought to be made against him were confined to a very small number of matters having regard to the totality of the work that he did, as exposed in his affidavit. Critically, none of the credit attacks went to Ms Higgins’ allegation of rape – it was never even put to Mr Llewellyn that he should have doubted the veracity of the rape allegation.
- 148E. The following criticisms levelled at Mr Llewellyn at [35]-[38] are particularly unfair and should be rejected by the Court:
- (a) First, the criticism that he was unable to offer any sensible explanation for why the request for comment from Mr Lehrmann went out so late is unfair, not least because Mr Llewellyn did not accept that it had in fact gone out late (T1620.33-35, T1621.7, 10-11). Mr Llewellyn’s evidence was that had he received a response from Mr Lehrmann he would have included it in the broadcast, and depending on the nature of that response he would have offered him an opportunity to participate in an interview. Mr Llewellyn’s evidence went as far as stating that, even if Mr Lehrmann had responded in the middle of the broadcast, he would have ensured that it was included by adding it to the back announcement in the studio. In cross-examination, he rejected the suggestion that this would not have been possible. He said: “No, that’s not right. We’re a daily news show. We do stuff all the time very quickly. We do a combination of long-form and short-form, so we are super agile” (T1651.21-25).
- (b) Secondly, the suggestion that Mr Llewellyn gave dishonest evidence when asked about comments made by Mr Sharaz during the 27 January 2021 meeting about assisting the then-opposition in pursuing the issue raised by the story in Parliament should be rejected. It is clear that Mr Llewellyn was trying to give honest evidence in response to questions about his supposed knowledge about someone else’s intentions. He quite fairly accepted that it was possible that Mr Sharaz intended to assist the opposition to pursue the issue (T1629.39) based on what Mr Sharaz had said during the interview, but he did not know what Mr Sharaz was definitely going to do. It was also clear from Mr Llewellyn’s evidence that Mr Sharaz’s asserted intentions were not something he paid particular regard to – “it’s not Mr Sharaz’s story” he said in cross-examination (T1630.19). Further, his answer that he didn’t think Mr Sharaz had a political agenda was fair having regard to the explanation he gave when challenged about that answer – “it wasn’t a political agenda thing. It

was about raising an issue in Parliament” (T1630.31-32). In the circumstances, the Court would reject the allegation made by Mr Lehrmann at [36] of the ACS that Mr Llewellyn was either dissembling about his awareness of supposed political motivations or that his state of mind was so unreasonable that reliance cannot be placed on his evidence. That is, with respect, an untenable submission when proper regard is had to the evidence that Mr Llewellyn gave on this topic.

- (c) Thirdly, Mr Llewellyn’s evidence about LinkedIn was, again, not dishonest, as Mr Lehrmann asserts at [37], [38] of the ACS. In response to questions about a message from Mr Sharaz about finding out Mr Lehrmann’s current employer, Mr Llewellyn suggested that the reference in Mr Sharaz’s message to “they” could have been to him contacting LinkedIn or Mr Lehrmann’s first employer. That was not an unreasonable interpretation of Mr Sharaz’s message (even if others might have understood “they” to refer to his previous employer rather than LinkedIn) and in any event it was certainly not indicative of dishonesty. Similarly, no criticism can be made in respect of Mr Llewellyn’s evidence about advising people not to click on the LinkedIn account in circumstances where he believed the account to be inactive. Mr Llewellyn said that he did not know if Mr Lehrmann might still get a notification even if the account was inactive (1624.17-25).
- (d) Finally, it is unfair to describe Mr Llewellyn’s evidence as to whether the broadcast conveyed that Ms Higgins would not be supported if she went to police as “evasive”. It is clear from the passage of transcript referred to by Mr Lehrmann (T1574.1-46) that, rather than being evasive, Mr Llewellyn was seeking to respond to questions about his impression of what was conveyed by saying that there were no clear indications of whether Mr Higgins would be supported – because, in effect, Mr Higgins was being told “keep pursuing it or, you know, keep her job” (T1574.17-20). In short, Mr Llewellyn appeared to be seeking to explain that in relation to any impression conveyed by the broadcast as to whether anyone had indicated that they would support Ms Higgins if she went to the police, he thought the issue was nuanced because of the fact that she perceived that pursuing the complaint meant losing her job. This was not evidence from an evasive witness, but rather from someone trying his best to give a truthful explanation.



## **B FACT-FINDING PRINCIPLES**

149. The following issues are relevant to the fact-finding exercise in this proceeding:

- (a) The Onus of Proof.
- (b) The Standard of Proof.
- (c) Lies as Implied Admissions.
- (d) Lies as Evidence of a Consciousness of Guilt.

### **B.1 The Onus of Proof**

150. Mr Lehrmann bears the onus of proving that he was reasonably identified by the Publications. For the reasons developed in Part I of these submissions, the Court should not be satisfied that Mr Lehrmann has discharged that onus, and accordingly should dismiss the claim on that basis alone.
151. Assuming against that outcome, Network Ten carries the onus of proof with respect to the substantive defences of (a) justification under s 25 of the Defamation Act and at common law, (b) qualified privilege under s 30 of the Defamation Act, and (c) *Lange* qualified privilege. For the reasons set out in Parts J, K and L, the Court should be satisfied on the balance of probabilities that Network Ten has discharged its onus in respect of these defences.

### **B.2 The Standard of Proof**

152. In determining whether the defence of justification has been established on the balance of probabilities, the Court is to take into account the factors listed in s 140(2) of the *Evidence Act 1995* (Cth) (**Evidence Act**), being (a) the nature of the cause of action or defence, (b) the nature of the subject-matter of the proceeding, and (c) the gravity of the matters alleged.
153. The matters set out in s 140(2)(a)-(c) are mandatory considerations reflecting a legislative intention that a court must be mindful of the forensic context informing an opinion as to its satisfaction about matters in evidence: *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 41)* [2023] FCA 555 (**Roberts-Smith**), [96] (citing *CEPU v ACCC* [2007] FCAFC 132; (2007) 162 FCR 466 at [30]).
154. Although the uniform evidence legislation made changes to the common law, s 140 of the Evidence Act is not to be approached as involving a codification of any

corresponding common law principle: *Papakosmas v The Queen* (1999) 196 CLR 297; 73 ALJR 1274; [1999] HCA 37 at [10]. Nevertheless, s 140(2) of the Evidence Act has been treated as reflecting the common law as stated in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34 (**Briginshaw**); *Morley v Australian Securities and Investments Commission* [2010] NSWCA 331, [737]; *Roberts-Smith*, [99].

155. In the well-known passage from *Briginshaw*, Dixon J said, 361-2:

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality...it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

156. Dixon J went on to say that where there is an issue in a civil proceeding as to whether a crime has been committed, the standard of proof is the same as upon other civil issues, but weight is to be given to the presumptions of innocence and exactness of proof is required (at 363; see also McTiernan J at 372); *Roberts-Smith*, [105]. To similar effect, at 350, Rich J said:

In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion.

157. As to the gravity of the facts to be proved, in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; 110 ALR 449; [1992] HCA 66, the plurality of the High Court (Mason CJ, Brennan, Deane and Gaudron JJ) said at 170-171:

The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud. On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear or cogent or strict proof is necessary "where so serious a matter as fraud is to be found". Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.

158. Although those observations related to the common law, they have been applied in considering the operation of s 140 of the Evidence Act: see e.g. *New South Wales v Hathaway* [2010] NSWCA 184, [263], [272]. In *Qantas Airways Ltd v Gama* (2008) 167 FCR 537; 247 ALR 273; [2008] FCAFC 69, Branson J (with whom French and Jacobson JJ agreed at [110]) observed at [139] that the correct approach to the standard of proof in a civil proceeding under s 140 is “*adopting the language of the High Court in Neat Holdings*”, one that recognises that “*the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary according to the nature of what is sought to be proved*”.
159. Network Ten accepts that the gravity of the conduct alleged against Mr Lehrmann is very serious and that a high degree of moral opprobrium attaches to conduct of the kind alleged: *Vergara v Ewin* [2014] FCAFC 100; 223 FCR 151, [28].
160. Network Ten respectfully agrees, however, with the observation made by Lee J in the course of the trial at T29.29-36 that the “*focus is not at a level of abstraction on the allegation itself*” but is rather “*on the asserted improbability of the conduct*”: see also *Transport Workers’ Union of Australia v Qantas Airways Limited* [2021] FCA 873; (2021) 308 IR 244, [284]-[288]. Perhaps, at a level of abstraction, it might be thought that an allegation of rape in a ministerial suite in Australian Parliament House is improbable. But, as Network Ten submitted in its opening address, the asserted conduct is not improbable when assessed in its context.
- 160A. At [52]-[57] of the ACS, Mr Lehrmann refers to the observation made by Lee J referred to in the preceding paragraph and appears to submit that his Honour was suggesting that the principles from *Briginshaw* should be confined in some way or that the asserted improbability of the relevant conduct somehow “subsumes” considerations of the seriousness and consequences of the allegations. That is not how Network Ten understood his Honour’s observation. Network Ten understood that his Honour was saying no more than that in determining whether the Court is satisfied that a case has been proved on the balance of probabilities under s 140 of the Evidence Act, it should have regard to the particular circumstances of the relevant allegation rather than the allegation in the abstract or divorced from its context. As submitted above, understood in that way, the asserted conduct in this proceeding is not improbable.

161. Contrary to the submission of Mr Lehrmann, this is not a case turning on inexact proofs, indefinite testimony or indirect inferences. The Court has the benefit of the clear, cogent and compelling direct evidence of Ms Higgins of having been raped by Mr Lehrmann, unshaken in any material respect in cross-examination. That direct evidence is supported by a raft of indirect, corroborative evidence from lay and expert witnesses, in relation to: (a) the antecedent relationship between Mr Lehrmann and Ms Higgins, (b) the events immediately preceding the alleged assault at The Dock, 88mph and upon arrival at Parliament House, (c) the events immediately after the alleged assault, (d) Ms Higgins' multiple, contemporaneous reports of the assault in the succeeding days, and (e) the evidence of changes in Ms Higgins' demeanour after the alleged assault. Weighing against the impressive body of evidence, the Court has only the incoherent and inherently implausible denial of Mr Lehrmann, a witness whose credit is so poor that his evidence ought to be rejected in its entirety save where it is uncontroversial or independently corroborated.

### **B.3 Lies as Implied Admissions**

162. There is a separate principle, explained in *Jones v Dunkel*, by which an adverse inference or implied admission can arise from the conduct of a party in the course of litigation. The plurality (Heydon, Crennan and Bell JJ) in *Kuhl v Zurich Financial Services Australia Ltd* (2010) 243 CLR 362, [64] expressed the principle as follows (our emphasis):

Depending on the circumstances, when a party lies, or destroys or conceals evidence, or attempts to destroy or conceal evidence, or suborns witnesses, or calls testimony known to be false, or fails to comply with court orders for the production of evidence (like subpoenas or orders to answer interrogatories), or misleads persons in authority about who the party is, or flees, the conduct can be variously described as an **implied admission or circumstantial evidence permitting an adverse inference**.

163. The relevant category in these proceedings is, principally, the giving of testimony by Mr Lehrmann that was known to be false: *Kim v Wang* [2023] 411 ALR 402 at [150], [259]. To that might also be added Mr Lehrmann's attack on Ms Gain, baselessly suggesting that she had concocted evidence in order to pervert the course of justice, which was an attempt to deceive the Court.
164. The relevant lies set out below are relied on by Network Ten in support of the proposition that they evince a consciousness of guilt on the part of Mr Lehrmann, as

well as conduct constituting an implied admission or circumstantial evidence permitting an adverse inference.

#### **B.4 Lies as Evidence of a Consciousness of Guilt**

165. Lies are clearly relevant to credit, but in some circumstances may also be evidence of a consciousness of guilt: *Roberts-Smith*, [196].

166. The principles that apply to the circumstances in which lies may give rise to a finding of a consciousness of guilt in a civil case are similar to those applied in a criminal case: *FTZK v Minister for Immigration and Border Protection* [2014] HCA 26; (2014) 310 ALR 1. At [92], Crennan and Bell JJ said:

In *Edwards v The Queen* (1993) 178 CLR 193, this Court considered the instructions which need to be given to a jury by a trial judge if lies by an accused are relied upon as corroboration of other evidence. In a key passage in the majority opinion it was recognised that “[a] lie can constitute an admission against interest only if it is concerned with some circumstances or event connected with the offence”. It was then said that in any case where a lie is relied upon to prove guilt (here, the commission of an offence) “the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. Furthermore, Brennan J identified the inherent difficulties in treating false denials of guilt as admissions constituting independent proof of guilt”.

167. As Besanko J observed in *Roberts-Smith* at [198], the circumstances in which a lie may be capable of providing corroboration or independent proof of guilt were considered in *Reg v Lucas (Ruth)* [1981] QB 720 at 724 per Lord Lane CJ and *Edwards v The Queen* [1993] HCA 63; (1993) 178 CLR 193. The matters that must be satisfied before a lie can be considered to constitute corroboration in accordance with *Reg v Lucas (Ruth)* are that the lie must:

- (a) be deliberate;
- (b) relate to a material issue;
- (c) spring from “a realisation of guilt and a fear of the truth”; and
- (d) be clearly shown to be lies by evidence other than that to be corroborated.

168. In *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, the Court of Appeal of New South Wales considered the use of lies as evidence of a consciousness of guilt in civil cases. At [87]-[88], the Court (Beazley, Giles, Santow JJA) said (our emphasis):

87. The authorities to which we have just referred are criminal ones. In *R v Liddy*, Mullighan J said at para 242-243:

“It is unnecessary to set out the circumstances in which a deliberate lie told by an accused person may amount to positive evidence of guilt as opposed to adversely reflecting upon the accused’s credibility. The telling of relevant lies is a piece of circumstantial evidence from which an adverse inference of guilt may be drawn if the lie is told out of a consciousness of guilt and no other rational inference may be drawn.”

88. The concept that “no other rational inference may be drawn” is a concept of the criminal law, necessitated by the standard of proof beyond reasonable doubt. **In a civil case, it is sufficient in our view for a lie to be accepted as an admission of guilt, if that is the more probable inference to be drawn.** In this regard we adopt the like approach taken by the trial judge to the adoption of the knowledge test in *Pereira v Director of Public Prosecutions* (1988) 63 ALJR 1 (to which we come later in these reasons) to the civil sphere. That adoption is not only appropriate but necessary to accommodate the differing standard of proof.

169. The relevant lies are not to be considered alone, on a “piecemeal” basis, but as part of the totality of circumstances established by the evidence upon the relevant issue: *R v Boscaino* [2020] QCA 275 at [29]-[33]. In that case, Sofronoff P (with whom Morrison JA and Brown J agreed) said at [30]:

Evidence that a person accused of a crime told a lie about a material fact concerning the crime is a piece of circumstantial evidence. Circumstantial evidence is evidence which proves a fact from which another fact may be inferred. The prosecution leads evidence about the accused’s telling of a lie because that fact raises an inference that the accused is guilty of the charged crime. The reason why one might infer guilt is that, people being largely rational, there must have been a reason why the accused told the lie. As was said in *Crossfield*, “if there be no other reason assigned for the conduct of the party” one might conclude that the circumstantial fact raises an inference of the accused’s guilt. This is because a jury can infer that the accused’s reason for telling the lie was to hide something that pointed to the accused’s guilt and wanting to hide something that points to one’s guilt of an offence is the motivation of a guilty person. In that sense, the lie constitutes evidence of “consciousness of guilt” because the lie proves a motivation based on guilt. It can also be regarded as an implied admission of guilt in the sense that it is voluntary conduct by an accused that evinces guilt.

#### **B.4.1 Mr Lehrmann’s Lies as Evidence of a Consciousness of Guilt and Implied Admissions**

170. Network Ten relies upon the following lies told by Mr Lehrmann:

- (a) Mr Lehrmann’s lies to this Court about having said that Ms Higgins was good looking during drinks at the Kingston Hotel on 2 March 2019, and denying having invited her to those drinks: [12] above;
- (b) Mr Lehrmann’s lies to this Court about events at The Dock, including his lie about meeting up with Mr Wenke at the Kingston Hotel, his lies about the purchase of drinks and his lie about only having minimal contact with Ms Higgins: [14]-[26] above;

- (c) Mr Lehrmann's lies to this Court above events at 88mph, particularly when compared to the answers he gave on this topic to police. He lied about having any form of intimacy with Ms Higgins, about engaging in flirtatious behaviour with Ms Higgins and about her having tripped over and being helped up: [27]-[34].
- (d) Mr Lehrmann's baseless attack on Ms Gain: [10].
- (e) Mr Lehrmann's lies about his purpose for entering Parliament House, including his lie to this Court about the circumstances in which Ms Higgins came with him to Parliament House: [35]-[37]. Network Ten does not rely upon his lie to security at the time of entering Parliament House as evidencing a consciousness of guilt given its temporal connexion to the sexual assault.
- (f) Mr Lehrmann's lies to police about having no alcohol in his office, and the maintenance of that lie and his allowing it to go uncorrected in his criminal trial: [38]-[46].
- (g) Mr Lehrmann's lies to this Court about having no alcohol in his office. He later conceded that he did in fact have alcohol in his office, and then lied again to this Court about the timing of when he recollected that he had such alcohol: [47]-[63].
- (h) Mr Lehrmann's absurd lies to this Court about his activities after entering the Ministerial Suite, in particular his lie about having worked on Question Time briefs: [64]-[70].
- (i) Mr Lehrmann's lies to Ms Brown at their second meeting on 26 March 2019 about his reasons for entering Parliament House: [71]-[76]. Network Ten also relies on Mr Lehrmann's conduct after having told that lie to Ms Brown, in particular his sudden departure from the office and his lies about not being in Canberra to attend a meeting: [77]-[81].
- (j) Mr Lehrmann's lies to Senator Reynolds in his email of 5 April 2019: [82]-[84].
- (k) Mr Lehrmann's lies in the *Spotlight* interview: [92].
- (l) Mr Lehrmann's lies about being reprimanded by Senator Reynolds after the Kingston Hotel incident on 2 March 2019: 3 [93]-[95].

171. In Network Ten's submission, the Court would be satisfied that Mr Lehrmann told a deliberate untruth in respect of each of the lies referred to above.

172. They are each concerned with some circumstance or event connected with the alleged sexual assault.
173. The Court would be satisfied that each of the lies was told because Mr Lehrmann knew that the true position would implicate him in the commission of the sexual assault. They exposed a realisation of guilt.
174. There was no other rational reason for telling the lies, other than to hide something that pointed to Mr Lehrmann having sexually assaulted Ms Higgins and wanting to hide something that pointed to his guilt of having done so.



## C PRE-22 MARCH 2019 EVENTS

### C.1 Brittany Higgins

175. Brittany Higgins grew up on the Gold Coast, where she attended Gold Coast Christian College and subsequently A.B. Paterson College. After graduating from High School, she attended Griffith University. She graduated with dual degrees in Business and Communications towards the end of 2022 (T574.13-46). During her university studies, Ms Higgins worked in hospitality, retail, real estate and as a news presenter for a radio station.
176. In or around mid-2017, Ms Higgins came to work for Sam O'Connor, a state Liberal National Party MP for the electorate of Bonney in Queensland. Ms Higgins was referred to Mr O'Connor by members of the Liberal Party with whom she came into contact as a result of her campaigning work on the university campus (T575.8-38). Ms Higgins' work with Mr O'Connor as an assistant electorate officer was the spark for her interest in working in the political area. In her evidence-in-chief, she said: *"I think as soon as I kind of started working in the state MP office, I was really into Rotary at the same time, and the community outreach that I experienced in that office really inspired me...it was very wholesome and I loved it. I was really excited by it"* (T575.41-45). Ms Higgins worked for Mr O'Connor for about a year.
177. In or around September 2018, Ms Higgins moved from the Gold Coast to Canberra to commence employment as a *"front of house"* administrator in the Parliamentary office of Steven Ciobo, who at the time was the Minister for Defence Industry. Ms Higgins described how she was on the front desk, handling administrative tasks and that she wanted to work her way up through the ranks to become a media advisor (T576.15-35). She received training with a view to becoming an assistant media advisor, which included assisting the senior media advisor by drafting media releases, organising events and preparing media drops (T576.37-43; T583.8-26).
178. Ms Higgins identified the location of her home in Woden, Canberra by reference to Exhibit #R15 (T582.44-46).
179. Ms Higgins learned about the imminent retirement of Minister Ciobo in around February or early March 2019 from an article in the *Australian Financial Review* (T583.28-37). She learned that Minister Ciobo had been dropped from the ministry

through an announcement from the then Prime Minister and a phone call from Minister Ciobo to the office (T584.4-5).

180. A consequence of Minister Ciobo's resignation was that all staff employed in his office, including Ms Higgins, had to apply for new jobs. Ms Higgins described it as a six-week period of musical chairs where all of the Minister's staff lost their jobs and were looking to find new positions (T584.6-25). Ms Higgins immediately started canvassing who the next Defence Industry Minister would be. She read articles and talked to colleagues and so became aware that Senator Reynolds was a frontrunner for the position (T584.31-34, 45-47). She described working for Minister Ciobo's replacement in Defence Industry as her "*only natural home before the election*" (T584.36-39).
181. Ms Higgins identified Nicky Hamer as Senator Reynolds' primary media advisor and realised that they were mutual acquaintances on Instagram (T585.1-19). Ms Higgins sent direct messages (DMs) to Ms Hamer on Instagram and put herself forward as a potential assistant media advisor to Senator Reynolds (T586.31-35).

## **C.2 Bruce Lehrmann**

### ***C.2.1 Agreed Facts***

182. The following matters are agreed facts for the purpose of the proceeding (CB1108, pp 6012-6013, [23]-[26]):
- (a) For at least 12 months prior to 23 March 2019, Mr Lehrmann was employed as a policy advisor in the parliamentary office of the Hon. Linda Reynolds MP in Canberra, first when Senator Reynolds was the Assistant Minister for Home Affairs and, later, when she was the Minister for Defence Industry.
  - (b) Prior to his employment with Senator Reynolds, Mr Lehrmann had been employed in the office of Bridget McKenzie MP.
  - (c) In early March 2019, the Hon. Steve Ciobo MP announced that he would not contest the next federal election and stood down as the Minister for Defence Industry. Senator Reynolds was subsequently announced to replace Mr Ciobo as Minister for Defence Industry.
  - (d) As at March 2019, Mr Lehrmann had worked for Senator Reynolds for at least one year.

183. Despite his attempts to suggest that Ms Higgins was not the most junior staff member in Senator Reynolds office (including by referring to a secondee receptionist who would come in on busy days: T181.43-46), Mr Lehrmann agreed that Ms Higgins was the most junior person in terms of the people who were in the office every day (T182.1-3).

### **C.3 Classified Document Security Breach**

184. On about 20 March 2019, Mr Lehrmann committed a serious security breach by leaving a top secret classified document uncovered and uncontrolled in an unsecured office. As referred to in Part A above, Mr Lehrmann’s attempt to characterise the security breach as a “*very brief minor incident*” with no further consequences was exposed in cross-examination as untruthful evidence.

#### ***C.3.1 Christopher Payne***

185. The security breach was reported to Chris Payne by a staffer in Senator Reynolds’ office (T1414.4). Mr Payne is currently the Government Relations Manager for the Australian Institute of Marine Science (T1413.31). In March 2019, he was a DLO for the Department of Defence. He held the role of DLO under both Minister Ciobo and Senator Reynolds (T1413.34-39). Mr Payne first met Mr Lehrmann when he transitioned into the office with Senator Reynolds at about the time she became Minister for Defence Industry (T1413.37-45).
186. Mr Payne gave evidence that he was advised by another staffer in Senator Reynolds’ office that a secured document had been left on a desk. In cross-examination, Mr Payne identified that the document had been left on the keyboard of another person’s desk, and that person did not have the appropriate security clearance at that time to view the document (T1432.29-42). He said the document had a “top secret” classification level and that top secret is the most secure level of classification for classified documents. He was advised that Mr Lehrmann had been observed leaving it on the desk. Mr Payne obtained the document and secured it in a safe (T1414.4-25; T1415.1-3). Mr Payne explained that the matter had been referred to him because he was the DLO with an appropriate level of security clearance to handle the material (T1414.27-29).
187. Mr Payne took the view that the severity of the incident was quite significant. He said that top secret material cannot be handled in that manner by being left in the open. He said that such material is not generally accessed outside of secure facilities (T1414.40-44). In cross-examination, he confirmed that it was unusual for a top secret document

to be inside the Minister for Defence Industry's office, and it was inappropriate for the particular document to have been left out in the manner it was according to the risk-based security policy (T1433.13-21).

188. After Mr Payne secured the document, he approached Mr Lehrmann and asked his intentions for the document, why he had left it where it was and whether he could assist him to take it somewhere. He said that the conversation occurred in the open office area of the suite (T1415.5-11). Mr Payne said that Mr Lehrmann responded by saying that it was not Mr Payne's concern because it was not within his remit to be handling that document and that he wanted Mr Payne to return the document to him. He said Mr Lehrmann said "*it's not up to you, please give it back to me*" (T1415.20-24). Mr Payne returned the document to Mr Lehrmann. He made inquiries with the owning agency and later determined that Mr Lehrmann had returned the document by hand (T1415.26-44).
189. Mr Payne also notified Ms Brown that a security incident had taken place (T1415.46-47). He did so immediately after the incident. Ms Brown requested that Mr Payne complete a security incident report (T1416.1-10). A copy of the security incident report prepared by Mr Payne is Exhibit #R79 (CB27). Mr Payne explained that the words "*uncleared personnel*" under the heading "*security details*" referred to the individual on whose desk the document had been left (T1416.25-47). Mr Payne was taken through the contents of Exhibit #R79 (T1416-1418). He noted that the report recorded a conversation he had with Mr Lehrmann where he offered to provide him with access to training on handling documents of the relevant classification type, and that Mr Lehrmann declined (T1418.16-31). Mr Payne also asked Mr Lehrmann if he had any more material at the top secret level that he could assist him to store, and he was told that he did not. He said that an office-wide audit was initiated by Ms Brown in response to the incident (T1419.10-23); a matter reinforcing the seriousness of Mr Lehrmann's misconduct.
190. In cross-examination, Mr Payne agreed that he did not tell Mr Lehrmann that he had filed the security incident report. He said that there was no particular reason to do so and that he thought he "*had been quite clear with him that I felt that it was a significant security issue at the time...*" (T1430.29-41). There was an apparent attempt to suggest in cross-examination that Mr Payne had raised the security incident because of an asserted personality clash with Mr Lehrmann. The Court would reject any such suggestion. Mr Payne made clear that he could not recall any arguments with Mr

Lehrmann (T1430.43-46), that he kept a professional distance from most advisors (T1431.1-4) and that he sent the security incident report to the Defence Security Operations Centre (copied to Ms Brown) at Ms Brown's request and not in response to an email that Mr Lehrmann had sent (T1431.13-1432.27).

### ***C.3.2 Fiona Brown***

191. Fiona Brown, Senator Reynolds' Chief of Staff at the time, was advised about the security breach by Mr Payne on 19 or 20 March 2019, and was provided with a copy of Mr Payne's security incident report (Brown, [20]-[21]).
192. Ms Brown gave evidence that the Home Affairs DLO stated Mr Lehrmann's actions would be a sackable offence (Brown, [25]). She says a decision was made to conduct a Whole of Office Document Audit to ensure all classified documents were identified (Brown, [24]).
193. Ms Brown discussed the issue with Mr Lehrmann in a "low key way" (T2039.28-30).

## **C.4 The Kingston Hotel Incident - 2 March 2019**

194. On Saturday, 2 March 2019, Linda Reynolds was sworn in as the Minister for Defence Industry (Wotton, [8]: CB1084). A photograph of the attendees at the swearing in ceremony is Exhibit #55. The photograph depicts Mr Lehrmann, Jesse Wotton, Nicole Hamer and Michelle Lewis (T1053.13-31).
195. After the swearing in ceremony, there was a lunch at Agostini's, an Italian restaurant (T87.8). The lunch was attended by Senator Reynolds' friends, family and a small group of staff. The staff members included Mr Lehrmann, Mr Wotton, Ms Hamer and Ms Lewis (T1081.20-31).
196. After lunch, Mr Lehrmann, Mr Wotton and Ms Hamer attended the Kingston Hotel (T87.13; T1046.1-19; T1081 33-34). Mr Wotton's recollection was that the group arrived around mid-afternoon, somewhere between 2 and 3 o'clock (T1081.43-44).

### ***C.4.1 Nicole Hamer***

197. Ms Hamer is an external communications manager who lives in Western Australia (T1043.44-46). She worked for Senator Reynolds as her media advisor from October or November 2018 until around April 2021. From when she started in that role until around March 2019, Ms Hamer was based in Senator Reynolds' electorate office in

Perth and travelled to Canberra for sitting weeks (Hamer, [2], [3]: CB1083 and T1044.23-1045.2).

198. When Ms Hamer started working in Senator Reynolds' office, she knew that Mr Lehrmann worked for Senator Reynolds as a policy advisor and he was based in Canberra. She did not know Mr Lehrmann well, but worked with him when she required policy advice (Hamer, [5]: CB1083). They had a professional relationship, but were not friends (T1045.4-18).
199. Ms Hamer's impression of Mr Lehrmann was that he was lazy. She observed that he tried to get other people to do his work for him, and Ms Hamer had experienced some issues with him bossing her around and trying to get her to do his work for him and then presenting it as his own work. She gave an example of an occasion where Mr Lehrmann had to pull together a brief for speaking remarks for Senator Reynolds and he came to Ms Hamer and asked her to write the speech. Ms Hamer wrote the speech and Mr Lehrmann put it in the brief and subsequently passed it off as his own work (Hamer, [5]: CB1083).
200. Ms Hamer found out about Mr Ciobo's resignation on or about 1 March 2019 through media announcements. She was aware that Mr Ciobo's staff would be in deferment and have to reapply for their roles (Hamer, [7]-[8]: CB1083).

#### ***C.4.2 Jesse Wotton***

201. Mr Wotton is the Deputy State Director of the WA Division of the Liberal Party (T1080.22; Wotton, [3]: CB1084). Mr Wotton was an assistant advisor to Senator Reynolds (Wotton, [4]-[6]: CB1084). He worked in the Perth electorate office when Senator Reynolds became a Senator for Western Australia in July 2014, but travelled to Canberra more frequently after Senator Reynolds became Assistant Minister for Home Affairs in late 2018. At that time, he was promoted to the role of assistant advisor with a focus on emergency management, firearms and modern slavery (Wotton, [5]: CB1084). Mr Wotton started working with Mr Lehrmann a few weeks after Senator Reynolds became Assistant Minister for Home Affairs (Wotton, [6]: CB1084).

#### ***C.4.3 Events at the Kingston Hotel***

202. Mr Wotton gave evidence that Michelle Lewis also attended the Kingston Hotel on 2 March 2019 (T1081.36-37). Ms Hamer gave evidence that Ms Lewis popped in at some point (T1062.27-29). Mr Lehrmann could not recall Ms Lewis attending (T174.16-17).

203. Ms Hamer recalled that Austin Wenke may have been at the Kingston Hotel for a period even though he had not been invited as part of the group (T1062.33-40).
204. Mr Lehrmann's evidence was that he had drinks at the Kingston Hotel and there was possibly a discussion about what the composition of Senator Reynolds' office might be as a result of her promotion (T174.19-39). Otherwise, Mr Lehrmann's evidence was that he could not recall the conversations that occurred between the parties in attendance (T175.28-179).

***C.4.4 Mr Lehrmann says that Ms Higgins' is "good looking"***

***Mr Lehrmann asks Ms Hamer to invite Ms Higgins to the Kingston Hotel***

205. Ms Hamer's evidence was that she and Mr Lehrmann had a conversation in which Mr Lehrmann asked her if she could reach out to Ms Higgins and see if she was available to come to the pub that night. Ms Hamer's evidence was that the group was talking about who, from Minister Ciobo's office, might come and work for Senator Reynolds.
206. Ms Hamer said that Mr Lehrmann made a comment about Ms Higgins being "*good looking*" (T1047.2-18).
207. Mr Lehrmann then asked Ms Hamer if she knew Ms Higgins and asked Ms Hamer to reach out to Ms Higgins and see if she was free to come to the pub (T1047.15-18). Ms Hamer was unshaken about that request in cross-examination (T1056.1-2).
208. Ms Hamer explained that she then messaged Ms Higgins on Instagram (T1047.22-46).
209. In cross-examination, Ms Hamer said that it was only after Ms Higgins had come up in conversation (by Mr Lehrmann having said she was good looking and asking for her to be invited) that she would have had any reason to tell Mr Lehrmann that she and Ms Higgins were friends on Instagram (T1055.12-15). Ms Hamer denied that she invited Ms Higgins to the pub because Ms Higgins had reached out to her (T1055.40-43).
210. Ms Hamer invited Ms Higgins to the Kingston Hotel at Mr Lehrmann's request (T1047.26). Ms Higgins' evidence was also that Ms Hamer had invited her to the Kingston Hotel by messaging her on Instagram (T587.1-5). Ms Hamer's recollection was that Ms Higgins had indicated in her response message that she could only stay for a little bit because she had other plans that night (T1048.41-44).
211. Mr Wotton's evidence was that he and Mr Lehrmann played some pool. He said that while he and Mr Lehrmann were in the pool room, Mr Lehrmann said words to the

effect that “*he was inviting, or had invited, Ms Higgins to come down to the Kingston Hotel*” (T1082.1-6). Mr Wotton’s recollection was that Mr Lehrmann had said words to the effect that “*there’s this girl I know looking for a job*” and he had the impression that Mr Lehrmann and Ms Higgins had a pre-existing relationship or friendship (T1082.8-18). Mr Wotton’s recollection that Mr Lehrmann had said that he had invited Ms Higgins to the hotel was unshaken in cross-examination (T1088.4-32; T1089.10-12).

212. Mr Lehrmann initially gave evidence that he had not met Ms Higgins prior to attending the Kingston Hotel on 2 March 2019 and that he did not know of her specifically (T175.9-11). He subsequently gave evidence that he may have “*misspoke*” and would have met Ms Higgins when she was working at the reception desk for Minister Ciobo and he was there to see Karly Abbott (T175.36-39; T176.31-33).
213. The Court would be satisfied from the evidence of Ms Hamer, Mr Wotton and Ms Higgins that it was Mr Lehrmann who invited Ms Higgins to the Kingston Hotel via Ms Hamer. Mr Lehrmann’s evidence that it was Ms Hamer who initiated the suggestion that Ms Higgins be invited to the Kingston Hotel (T176.4) was false to his knowledge. It was a further example of Mr Lehrmann giving untruthful evidence by purporting to have an absolute recollection on an aspect of events he could not otherwise recall, and that he knew was unhelpful to his case, because it was consistent with him being physically attracted to Ms Higgins and wanting to meet with her.
214. Mr Lehrmann initially denied saying that Ms Higgins was good looking (T176.18) but then subsequently said that he did not recall the conversation occurring (T176.20).
215. Ms Hamer’s evidence should be accepted. She was never challenged on her evidence that Mr Lehrmann told her that Ms Higgins was good looking (T1071.8-24). There is significance in that evidence going unchallenged. Mr Lehrmann, on the other hand, was plainly not a witness of truth. He had a motive to deny having said that Ms Higgins was good looking; a motive that was also apparent in his denials and obfuscation under cross-examination as to whether he found Ms Higgins attractive (T176.35-7; T350.43-351.12).

#### ***C.4.5 Ms Higgins arrives at the Kingston Hotel***

216. Ms Higgins arrived at the Kingston Hotel at around 4pm (T587.11-12) and the group chatted together (T588.1.36), before she and Ms Hamer went outside to talk privately



(T588.38-589.27). Mr Lehrmann's evidence was that this was the first time he had met Ms Higgins in a "*one on one*" capacity (T176.28-29). Ms Higgins' evidence was that she broadly knew of his existence, but didn't know him (T586.16-17).

217. Ms Hamer's recollection was that Ms Higgins got a drink and the group sat around and chatted together. Shortly afterwards, Ms Hamer and Ms Higgins went outside into a courtyard area and had a chat. They talked about their pathways into politics and the fact they had both studied Communications at university. Ms Hamer could not recall a discussion about the role of assistant media advisor being offered to Ms Higgins, but she said that if Ms Higgins wanted a job, she would have to speak to either the Chief of Staff (**COS**) or Senator Reynolds (T1056.21-33).
218. Mr Wotton's evidence was that this was the first time he had met Ms Higgins and after an exchange of pleasantries, Ms Higgins and Ms Hamer left the group to have a discussion in another part of the Hotel (T1082.20-29).
219. After Ms Higgins and Ms Hamer had chatted for about 30-45 minutes, they returned inside to where Mr Lehrmann and Mr Wotton were sitting. Ms Hamer said that there was a conversation between the group after they had re-joined (T1048.37-39).
220. Mr Wotton's evidence was that Ms Hamer came back in and was "*quite excited*". His recollection was that Ms Hamer said words to the effect that "*Brittany is great. She can do the Canberra media and I can do the Perth media and it's all going to be wonderful*". He said that shortly thereafter, Ms Hamer said that she could tell Senator Reynolds that Mr Wotton and Mr Lehrmann had met Ms Higgins and that they agreed, more or less, with what Ms Hamer had suggested (T1082.41-44).
221. In cross-examination, Ms Hamer said that she could not recall a conversation about a role being offered to Ms Higgins (T1056.32-33) but denied having offered Ms Higgins a job because she "*didn't have that authority*" (T1056.30). That evidence was not inconsistent with Mr Wotton's evidence in the sense that he did not recollect Ms Hamer having actually offered a job to Ms Higgins; rather that he understood her to be conveying that she (Ms Hamer) believed that Ms Higgins could have a job in the Senator's office (T1082.46-1083.1; T1089.12-13). In effect, Ms Hamer was expressing excitement and positivity about the prospect of Ms Higgins joining the team, but she had not actually offered her a position, nor could she. Ms Higgins certainly had the impression, after speaking to Ms Hamer, that she would at least be put forward for a

job and, in fact, that she had got a job (T589.23-27; see also Dillaway 1, [16]-[20]: CB1145 and Exhibit #R99: CB15 pp 410-413 and 417).

#### **C.4.6 Ms Higgins attempts to leave the Kingston Hotel**

222. Ms Higgins then indicated that she needed to leave to meet a friend (T589.35-42; T591.30-31). Ms Hamer's recollection was that Ms Higgins said: "*I have got to head off to my other activity now*" (T1048.56-47). Mr Wotton's recollection was that Ms Higgins said she had to go to the night noodle markets with her flatmate (T1083.6-7).
223. Ms Higgins took out her phone and began to order an Uber (T1049.1).
224. Mr Lehrmann insisted that Ms Higgins stay:
- (a) Ms Hamer's evidence was that Mr Lehrmann said: "*Just stay for one more drink*" (T1049.8; T1056.39). Ms Higgins responded by saying "*I have to go. I am already running late*" (T1049.10).
  - (b) Mr Wotton's evidence was that Mr Lehrmann said: "*Come on, stay for a drink*". He made the same request (T1083.9-15). Ms Higgins reiterated that she had to go (T1083.11).
  - (c) Ms Higgins' evidence was that Mr Lehrmann told her to stay for another drink, and so she did (T590.16-25). Mr Wotton's evidence was that he didn't believe Ms Higgins stayed for another drink, but that she left shortly after (T1083.17-18).
225. Ms Hamer's evidence was that Mr Lehrmann took Ms Higgins' phone from her as a "*bit of play*" to "*stop her from being able to book her Uber*" (T1049.2-3; T1056.35-41), and that she (Ms Hamer) told Mr Lehrmann "*she told us she could only stay for a little while. She has to go. Give her phone back and let her go*" (T1049.12-14). Ms Hamer was unshaken in cross-examination about the fact that Mr Lehrmann had taken Ms Higgins' phone (T1057.13-15).
226. Ms Higgins also gave evidence about Mr Lehrmann joking around by taking her phone so that she could not order an Uber to leave (T590.29-46). Ms Higgins said that she stayed for a bit longer but eventually "*doubled-down*" by saying that she "*really [had] to go*" (T591.4-5).
227. Mr Lehrmann eventually returned the phone to Ms Higgins. She booked an Uber or caught a taxi and left (T590.45-46; T591.7-592.1; T104916-19).

228. Mr Wotton could not recall Mr Lehrmann having taken Ms Higgins' phone (T1087.44), but he did not deny that it occurred (T1095.5-17) and the Court would comfortably accept that it did occur having regard to the evidence of Ms Higgins and Ms Hamer. Mr Lehrmann's submission at [71] of the ACS that "Mr Wotton gave clear and credible evidence that the phone was never taken..." is simply wrong and should be rejected. Mr Lehrmann's unequivocal denials were dishonest, again motivated by his propensity to deny things that were unhelpful to his case, in respect of incidents he could otherwise not or only barely remember (T178.31-46).

#### ***C.4.7 The Argument***

229. After Ms Higgins left, Ms Hamer and Mr Wotton's evidence was that there was an argument about Mr Lehrmann and Mr Wotton having pressured Ms Higgins to stay.
230. Ms Hamer's evidence was that Mr Lehrmann said that she had overreacted in the way that she had spoken up and tried to defend Ms Higgins. Ms Hamer got "*quite defensive to that*" (T1049.26-28). Ms Hamer's evidence was that Mr Lehrmann said, "*something along the lines of me always being a feminist and feeling like I had to go and defend women*". Ms Hamer said that she told Mr Lehrmann that she disagreed with him (T1049.30-41) and "*just emphasised that Brittany told us that she could only stay for a little while and she had stayed for a little while and we had to let her go*" (T1049.47). In cross-examination, Ms Hamer was adamant that Mr Lehrmann had been involved in the argument (T1057.37-43).
231. Ms Hamer could not recall Mr Wotton participating in the conversation (T1050.4) or taking Ms Higgins' phone (T1056.45-1057.11). In cross-examination, Ms Hamer accepted that it was possible that she had made some comments to which Mr Wotton took offence and that he had defended himself, although she had no recollection of those things (T1057.28-35). She accepted that Mr Wotton may have also been involved in the argument, although she had no recollection of that (T1058.1-2). When it was put to her that she and Mr Wotton were the "*primary protagonists*" in the argument, Ms Hamer said that "*I just don't recall it that way*" but fairly accepted that it was possible (T1058.4-5).
232. Mr Wotton's evidence was that Ms Hamer was "*very upset and unhappy*" (T1083.25). He said that he clearly recalled Ms Hamer turning to Mr Lehrmann and saying "*You shut the fuck up*" before turning to Mr Wotton and repeating those words.

233. Mr Wotton's evidence was that Ms Hamer voiced her displeasure and unhappiness that Ms Higgins felt that she needed to stay for a drink in order to have a job in the Senator's office (T1083.33-34). Mr Wotton said he disagreed and that he was very unhappy about that accusation being made. He did not recall Mr Lehrmann saying too much other than supporting what he was saying to Ms Hamer. Mr Wotton's evidence was that the conversation concluded by Ms Hamer crying and going to the bathroom. Mr Wotton then returned to his accommodation (T1083.36-1084.6).

#### **C.4.8 Ms Hamer Resigns**

234. Ms Hamer gave evidence that on the way home from the Kingston Hotel she emailed Senator Reynolds to tell her that she did not want to work in the office anymore and was resigning. A copy of Ms Hamer's email is Exhibit #56.
235. In cross-examination, Ms Hamer agreed that she had not told Senator Reynolds at Government House that she was going to resign because "*I didn't feel a need to resign at Government House because there hadn't been an argument with Bruce*" (T1058.16-20). She explained that she had been unhappy in the office, but felt uncomfortable and as if she had been ganged up on by Mr Lehrmann's actions (T1058.22-29). Prior to the events at the Kingston Hotel on 2 March 2019, she had not decided to resign, but the argument with Mr Lehrmann caused her to make the decision on that day (T1067.36-45). She sent the resignation email walking on her way back home and after speaking to her father (T1058.40-46; T1059.42-47).

#### **C.4.9 The Reprimand – 3 March 2019**

236. The following day (Sunday), Ms Hamer attended Parliament House. She said that Senator Reynolds had reached out to her and asked her to come into Parliament House to have a chat (T1050.22-30). In cross-examination, Ms Hamer explained that she was not supposed to be working on the Sunday, but had been called in by Senator Reynolds to see if she could be talked around into staying (T1060.6-10).
237. Ms Hamer said that Senator Reynolds asked her why she had resigned. Ms Hamer told Senator Reynolds what had happened the previous night and "*how I had gotten into an argument with Bruce...*" (T1068.8-14). She said that she told the Minister "*when the phone was taken away from Brittany, I, kind of, stepped in to defend her. Bruce then, kind of, got defensive, made a comment about me always feeling the need to stand up for women. I got defensive and then I just, kind of, just from there, said that I was – it*

*was enough. I didn't want to be here anymore*" (T1068.10-23). Ms Hamer said that Senator Reynolds told her that she would speak to Mr Lehrmann and Mr Wotton, and she later observed them walking out of the Senator's office (T1068.29-35).

238. Mr Wotton gave evidence that he attended work on the Sunday and observed Ms Hamer in Senator Reynolds' office (T1084.20-25). Ms Hamer emerged from the office and he heard laughter and thought that all was well (T1090.33). Mr Wotton then observed Mr Lehrmann being summoned into the office by Senator Reynolds (T1084.27-31). Mr Wotton observed Mr Lehrmann emerge from the office shortly afterwards, with a *"shocked expression on his face"*. He took from what he had observed and the look on Mr Lehrmann's face that he would be next called into the office and that he would not be in for a very pleasant time (T1084.31-1085.4).
239. Mr Wotton was summoned into Senator Reynolds' office and asked for his version of events from the previous day. He said that he explained to Senator Reynolds that Mr Lehrmann had invited Ms Higgins to the Kingston Hotel and described the events that followed. He had already had a communication with Ms Lewis and was aware that Ms Hamer had resigned the previous evening (T1085.12-43; T1089.40-45). Mr Wotton said that Senator Reynolds told him that the events of the previous day had *"put her in a very difficult position in terms of whether or not Ms Higgins ultimately ended up with a job in her office"*. She said that Mr Wotton and Mr Lehrmann were senior males in her office and were in a position of power, that Mr Wotton should have understood the perception of what had occurred the night before and thought about it from Ms Hamer and Ms Higgins' point of view. Mr Wotton maintained that he disagreed with that view and subsequently left Senator Reynolds' office and returned to his accommodation (T1086.1-16). In cross-examination, Mr Wotton said that he thought that Senator Reynolds' construction of events may well have been accurate, but he disagreed with her interpretation of those events (T1090.24-26).
240. Mr Wotton spoke to Mr Lehrmann on the phone while Mr Wotton was at Canberra airport later on 3 March 2019. The effect of the conversation was that Mr Wotton and Mr Lehrmann were unhappy with the view that Senator Reynolds had taken on what had occurred at the Kingston Hotel on 2 March 2019 (T1086.18-35).
241. Although Mr Lehrmann claimed to have no recollection of having met with Senator Reynolds on 3 March 2019 (T225.16), he vehemently denied having been reprimanded

by her over the conversation at the Kingston Hotel and instead suggested that it had been Mr Wotton who was reprimanded.

242. Mr Lehrmann's evidence was another lie. Again, he purported to have no recollection of the meeting, but a distinct and absolute recollection of never having been reprimanded over the incident. That evidence is in direct conflict with the evidence given by Ms Hamer and Mr Wotton, and was intended to play down his role in the argument that occurred at the pub and to suggest that it had actually been an argument that had occurred between Mr Wotton and Ms Hamer. The Court would reject Mr Lehrmann's evidence about not having been reprimanded as yet another incident of untruthfulness.
243. Ms Higgins gave evidence that she had a formal interview with Senator Reynolds on 4 March 2019, during which Senator Reynolds made a comment about the behaviour of her team at the Kingston Hotel (T592.6-11). Ms Higgins was offered a job and immediately commenced working for Senator Reynolds (T592.26-31).

#### ***C.4.10 Analysis***

244. In cross-examination, Ms Hamer fairly conceded that she had struggled to remember some details of the evening, but that she had a clear memory of other details (T1055.7-8; T1059.20-26). Such is the hallmark of a truthful witness doing their best to recollect events occurring more than four and a half years ago. The attempt to impugn her evidence by suggesting that she was intoxicated from a long day of drinking on 2 March 2019 was not successful. As Ms Hamer explained, she had not been drinking straight since lunchtime and had only been drinking water for the last few hours or so before she left the Kingston Hotel (T1059.1-4). Mr Wotton's evidence was that, at the relevant time, he did not attribute Ms Hamer's reaction after Ms Higgins left to her having been intoxicated (T1087.46-1088.2). In any event, Mr Lehrmann's conduct on 2 March 2019 clearly left a strong impression with Ms Hamer, and was sufficiently upsetting so as to cause her to resign from her job that evening.
245. In Network Ten's submission, the Court would be satisfied on the evidence that it was Mr Lehrmann who arranged for Ms Higgins to attend the Kingston Hotel on 2 March 2019 because, as he told Ms Hamer, he found Ms Higgins "*good looking*".
246. Mr Lehrmann had seen Ms Higgins working in reception and thought she was attractive. He wanted to meet and get to know her, but Ms Hamer had monopolised Ms Higgins

and then Ms Higgins had to leave. Mr Lehrmann insisted that Ms Higgins stay and took her phone in a joking attempt to prevent her from leaving/encourage her to stay.

247. Mr Lehrmann sought to downplay the incident by intimating that it was unmemorable and characterising his interactions with Ms Higgins as “*very minimal*” (T87.21-24). He did so, conscious that it assists Network Ten’s case if the Court finds that he had invited Ms Higgins to the Hotel because he found her physically attractive, wanted to see if she could be employed in Senator Reynolds’ office, and tried to get her to stay.
248. While it may be true that Mr Lehrmann did not spend as much time as he had would have liked with Ms Higgins because she had been speaking to Ms Hamer outside, by suggesting that his interactions with Ms Higgins were minimal, Mr Lehrmann sought to downplay the incident. In fact, to his knowledge, he had invited Ms Higgins to the Hotel, repeatedly encouraged her to stay, took her phone from her in a joking attempt to stop her from leaving and had been reprimanded about his conduct the following day by Senator Reynolds. He emerged from the Senator’s office looking stunned. It was hardly a forgettable incident.
249. Mr Lehrmann’s evidence on this topic was not frank or honest.

### **C.5 The Attempted Kiss – 15 March 2019**

250. Ms Higgins gave evidence about attending the Kingston Hotel after Senator Reynolds had become Minister for Defence Industry. She said in evidence in chief that she sat next to Ms Lewis and some, but not all, of the team were there (T604.34-38). Ms Higgins described it as “*like a bonding exercise*” (T605.4) and an “*amalgamation of the Reynolds team*” (T605.10). She gave evidence that Mr Lehrmann was among the attendees (T605.8). It was her recollection that the dinner was on a Friday. In cross-examination, she conceded that she did not remember who was there specifically, although she remembered going to the Kingston Hotel (T932.17-18).
251. Ms Higgins was shown text messages exchanged with Ben Dillaway on 15 March 2019 – a Friday (Exhibit #R99: CB15, pp 588-589). Mr Dillaway was a senior media adviser from Mr Ciobo’s office and someone who Ms Higgins dated (T605.35-606.3; Dillaway 1, [4]-[15]: CB1145; T1255.34-38). At around 8:16pm on 15 March 2019, Ms Higgins messaged Mr Dillaway: “*At the kingo with people from parliament*” (p 588). At around 9:28pm, Mr Dillaway replied with “*How’s the Kingo?*” (p 589). Ms Higgins replied to Mr Dillaway at 9:06am on 16 March 2019 to say that “*The Kingo was fun. Mostly just*

*listening to the Reynolds office hate in (sic) the new team*” (p 589) (see also Dillaway 1, [23]-[24]: CB1145).

252. Ms Higgins evidence was that she had drunk quite a lot with the team and when she left the pub to catch an Uber or taxi, Mr Lehrmann came out with her (T607.23-26; T939.8-9). She described that while waiting for her Uber or taxi:

*“Mr Lehrmann came up to me. He came into my space and he tried to kiss me on the lips.”* (T607.33-34).

253. Ms Higgins explained they were standing close and Mr Lehrmann had taken a step forward *“into [her] space”*. After the attempted kiss, Ms Higgins felt shocked and apologised and said *“no”*. Her observation was that Mr Lehrmann seemed embarrassed. Ms Higgins felt embarrassed and thought that maybe she had done something to lead him on or give him that impression (T607.36-47), including by being too talkative (T608.1-4). Although Ms Higgins was not sure of the precise sequencing, her recollection was that Mr Lehrmann’s taxi or Uber arrived and he left in close proximity to his attempted kiss (T608.6-25). Ms Higgins did not discuss the incident with Mr Lehrmann afterwards for fear of embarrassing them both (T608.16-17). In cross-examination, Ms Higgins was adamant that she remembers Mr Lehrmann trying to kiss her before the rape happened (T932.12ff).
254. Unlike Ms Higgins’ detailed recollection of the incident, supported by contemporaneous text messages with Mr Dillaway, Mr Lehrmann’s evidence was that he had no recollection of the team dinner even happening (T205.16-206.16).
255. Despite having no recollection of the dinner whatsoever, Mr Lehrmann denied absolutely having attempted to kiss Ms Higgins on any occasion (T206.7-8).
256. In the circumstances, the Court would prefer Ms Higgins evidence over that of Mr Lehrmann. She provided a detailed account of the incident, supported by contemporaneous text messages. Further, an attempt by Mr Lehrmann to kiss Ms Higgins on 15 March 2019 is consistent with his declaration to Ms Hamer that he found her *“good looking”* and arranged for her to be invited to the Kingston Hotel on 2 March 2019, and with the evidence of Mr Lehrmann touching and *“pushing”* Ms Higgins at the 88mph nightclub the following week (discussed below). In cross-examination, Ms Higgins said that she did not mention the attempted kiss when interviewed for *The Project* because she had buried it on the basis that at the time it seemed so insignificant,



but was reminded of it when recounting information about the team dynamics to a journalist (T795.12-45). Her recollection about having not really thought about it and then remembered it and reporting it to police in her second interview is corroborated by what she says at Q276 (Exhibit #R885: CB964).

257. Ms Higgins agreed that she had been mistaken about the date of the attempted kiss when she gave evidence at the criminal trial. That inconsistency was explicable because she had been doing her best at the time to be helpful in her answers, knew that the incident had happened after a team dinner and had refreshed her memory from text messages that it was in fact on Friday 15 March 2019 (T604.35ff; T799.3-12). Mr Lehrmann submits at [82] of the ACS that Ms Higgins gave evidence in this proceeding that the attempted kiss occurred on 14 March 2019. That submission is wrong and should be rejected. Contrary to the submission at [83] of the ACS, Ms Higgins was not “caught out again in this lie” because, contrary to her evidence about Ms Lewis attending the dinner, Ms Lewis was in fact in Perth. In fact, there was no evidence adduced to establish that Ms Lewis was in Perth on 15 March 2019.

#### **C.6 Mr Lehrmann was physically attracted to Ms Higgins**

258. Having regard to the matters referred to above, the Court would be satisfied that, as at mid-March 2019, Mr Lehrmann was physically attracted to Ms Higgins. He had expressly said so to Ms Hamer and after inviting Ms Higgins to the pub, he urged her not to leave (including by confiscating her phone) in order to spend more time with her.
259. It is consistent with Mr Lehrmann considering that Ms Higgins was “*good looking*” that he would attempt to kiss her after a dinner where Ms Higgins (and presumably other participants) had been drinking. Ms Higgins’ first reaction was depressingly familiar to many women – she blamed herself for doing something that had unintentionally led Mr Lehrmann on or encouraged him to kiss her.
260. An attempt was made to undermine Ms Higgins’ evidence by pointing to the fact that she had not remembered the attempted kiss until 2021. There was ultimately nothing in that challenge. It was, as Ms Higgins frankly acknowledged, a minor incident that caused mutual embarrassment, that she had not thought of as being significant at the time. That is the hallmark of honest, not dishonest, evidence. Ms Higgins did not seek to exaggerate its significance in any way; its significance is simply the fact that it was consistent with Mr Lehrmann’s conduct on 2 and 22 March 2019.

## **D THE EVENTS OF 22-23 MARCH 2019**

261. As set out in [243] above, Ms Higgins was offered a job and immediately commenced working for Senator Reynolds on or about 4 March 2019 (T592.6-11). Her role was an assistant media advisor, but she was still “*covering front of house*” (T596.23-24). Ms Higgins described her position in the structure of staff members in the office as “*right at the bottom*” (T596.24).
262. Ms Higgins gave evidence that she sat at the desk at the entrance doors to the Ministerial Suite (T598.31-42 and Exhibit #18, p 5403). Ms Higgins was subsequently on and off at the reception desk and a desk in the support staff area (T939.32-39).
263. Her role involved more work in the media advisor space, but she was still doing a lot of administrative duties for everyone during the entire period she worked for Senator Reynolds (T601.34-42). Those duties included preparing new phone lists, collating information, directing emails to advisors and other “*grunt work*” (T601.44-602.4).
264. Ms Higgins described the staff members in the office at the time she worked there. Her evidence was that in the first two weeks after Senator Reynolds’ promotion there was no clear management in the office and there were a “*lot of egos competing*” in an environment of uncertainty as an election loomed (T600.25-35; T601.15-22). Things changed and a sense of order was introduced when Fiona Brown was appointed as Senator Reynolds’ COS (T601.28-32; T608.35-41).
265. Ms Higgins gave evidence of her interactions with Mr Lehrmann in the Ministerial Suite (T602). She described how he would give her tasks and that she felt like his secretary (T602.13). Those tasks included organising a new phone list so that Mr Lehrmann was on a particular spot in the pecking order of that list and moving a fridge, which Ms Higgins recalled as being “*particularly annoying*” because of the time they took to complete (T602.16-603.9). In cross-examination, she said that she felt like Mr Lehrmann’s secretary (T934.20). She understood that she was new to the office and apprehended that Mr Lehrmann was well in with Minister Reynolds and so picked her side. She told Mr Dillaway on 5 March 2019 that she was happy to hang out with Mr Lehrmann but said that that was not truthful, but she had just had to pick a team and not talk badly about people on that team (T934.1-936.24).
266. Ms Higgins’ evidence was that in the time she worked at Parliament House, during sitting weeks she would usually be in the office from around 7am to around 10pm. She

said that staff members would socialise outside work hours, including by having dinner and drinks usually on a Friday or Wednesday. She identified the Kingston Hotel as a venue that would often be attended (T603.11-46).

267. Ms Higgins said that Parliament was not sitting at the time Senator Reynolds became the Minister for Defence Industry. It is an agreed fact in this proceeding that there were no Parliamentary sitting dates in March 2019.

### **D.1 The Dock – 22 March 2019**

268. As at 22 March 2019, Ms Higgins had been in her job with Senator Reynolds for less than three weeks. She described the team as “*treading water*” until the election (T609.21-28).

269. Ms Higgins described the circumstances leading to her attendance at The Dock, a pub located on the Kingston foreshore in Canberra, on 22 March 2019. Her evidence was that there was a group of friends who worked at various levels in the Department of Defence that would get together for drinks at The Dock semi-regularly (T609.37-41). She started to get invited to the drinks and considered it a networking opportunity (T609.41-43). She had possibly been to one such event prior to 22 March 2019 (T610.5).

#### ***D.1.1 Invitation to The Dock***

270. Ms Higgins said that she had been invited to come to the event by Lauren Gain, someone who she had worked with in Mr Ciobo’s office and who Ms Higgins had known since around the time she had moved to that office (T610.7-19).

#### ***D.1.2 Lauren Gain***

271. Lauren Gain is a public servant. Between April 2017 and November 2018, Ms Gain was a communications advisor in the Department of Defence (Gain, [4]: CB1088). Between November 2018 and February 2019, she worked for Minister Ciobo in the office of the Minister for Defence Industry, where she met Ms Higgins (Gain, [5], [6]: CB1088). When Mr Ciobo resigned, Ms Gain returned to work as a communications advisor in the Department of Defence. The role involved liaising with Senator Reynolds’ office (Gain, [9], [10]: CB1088).

272. In late March 2019, Ms Gain and Ms Higgins had a professional working relationship and socialised at work events. They spoke about Ms Gain's background in media and communications (Gain, [11], [12]: CB1088 and T1105.16-19).
273. Ms Gain's evidence was that she came to be at The Dock on 22 March 2019 because she and her colleagues in the Department of Defence had organised to catch up after work for a drink. It was something they would routinely do on Friday nights (T1101.1-9). That group included Ben Couch (an aide-de-camp (ADC) to the Chief of Navy), Ben White (ADC to the Vice-Chief of the Defence Force), Nikita Irvine (ADC to the Minister for Defence Industry), a lady called Lisa (ADC to another Minister, possibly Defence Personnel), her boyfriend, Julian Tailladart (ADC to the Chief of the Defence Force), a lady called Courtney (ADC to the Chief of Air Force) and Jye O'Dell (a lieutenant commander who worked in Navy headquarters) (T1101.13-29). Ms Gain identified Exhibit #R61 (CB32) as a Facebook messenger group in which Mr White had organised the drinks at around 7pm on 22 March 2019 (T1101.37-34).
274. Ms Gain's recollection was that Mr Couch told Ms Gain that he was going to invite Ms Higgins to the drinks (T1102.37-42).
275. Whether it was Ms Gain or Mr Couch who invited Ms Higgins to the event, Ms Higgins extended an invitation to other people to come to The Dock (T610.29). She said that she did so to show that she was not just a receptionist and that she had contacts and value outside the grunt work that she had been doing (T610.31-35).
276. Ms Higgins' evidence was that she extended the invitation to "*pretty much all the Reynolds staff*" via word of mouth (T611.11-16). Ms Higgins also invited a date who she had met using the online dating app, Bumble (T611.4-9).

### **D.1.3 Austin Wenke**

277. Mr Wenke is a public servant. From January to June 2019, he was employed as a media advisor to Peter Dutton MP, then Minister for Home Affairs. He was based at Parliament House at the time (Wenke, [2]-[23]: CB1078). Mr Wenke knew Ms Higgins as they had worked in different Ministerial offices and would say hello to each other in the corridor (T1122.5-8).
278. Mr Wenke's evidence was that Mr Lehrmann invited him to dinner at the Kingston Hotel on 22 March 2019. In cross-examination, he agreed that it was a spur of the moment thing (T1124.10). His recollection was that he arrived at around 6 or 6:30pm.

He arrived separately by walking from home (T1121.1-13). Mr Wenke said that he and Mr Lehrmann probably drank about three or four beers each (T1121.15-25; T1124.1-3).

279. Mr Wenke said that Mr Lehrmann indicated to him that there was a drinks function with “*some of his new colleagues*” who Mr Wenke was likely to know from work in Parliament House (T1121.30-33).
280. Significantly, Mr Wenke’s evidence was that he had finished work for the week at the time he left to go to dinner at the Kingston Hotel (T1121.37-38) (see [15] above).

#### ***D.1.4 Nikita Irvine***

281. Nikita Irvine is a Major in the Australian Army. Major Irvine joined the Army in 2008 (Irvine, [3]: CB1082 and T1186.45-1187.3). From around June 2018 to June 2019, she was posted to Parliament House as an ADC. Her experience as an ADC was unusual in the sense that she served three Ministers (Marise Payne, Minister Ciobo and Senator Reynolds) (Irvine, [4]-[7]: CB1082). Her tasks as an ADC included ensuring that travel was booked, vehicles were organised, programs were confirmed and that the Minister’s advisers were aware of arrangements. Major Irvine describes the role of an ADC as akin to an assistant, but strictly within a military context (Irvine, [8]-[10]: CB1082). After leaving Parliament House in June 2019, Major Irvine worked as a Staff Officer in Russell, ACT, near Duntroon, for six months prior to studying a master’s degree full time. In January 2022, she was posted to her current position in Adelaide (Irvine, [11]-[12]: CB1082).
282. Major Irvine met Ms Higgins in November 2018 when Ms Higgins began working for Minister Ciobo. They had a friendly working relationship (Irvine, [13]-[14]: CB1082 and T1177.16-19).
283. After Minister Ciobo’s resignation, Major Irvine became Senator Reynolds’ ADC. She had very minimal interaction with Mr Lehrmann before he left (Irvine, [15]-[25]: CB1082).
284. Major Irvine was invited to The Dock on 22 March 2019 by Mr Tailladart or Mr Couch, who were ADC colleagues. She walked to the venue from her home. Major Irvine described the event as catch-up drinks at the end of the week (T1176.23-45).

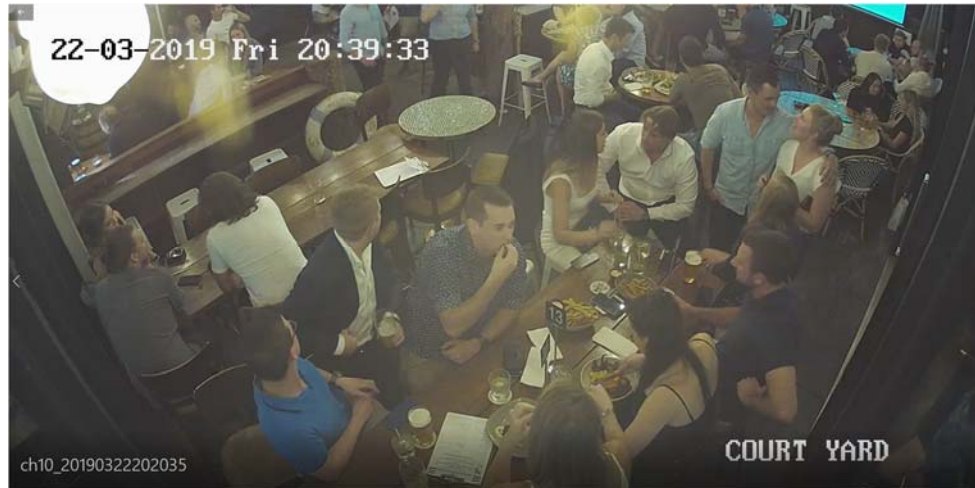
### ***D.1.5 Arrival at The Dock***

285. Ms Higgins arrived at The Dock at around 7pm (T611.18-19). She had previously driven home from Parliament House. At home she removed a cardigan over the white pencil dress she was wearing and changed handbags. She had a glass of wine, as she was nervous about meeting her Bumble date (T611.21-42). She travelled by taxi or Uber from home to The Dock (T611.44-45).
286. Exhibit #17A records the moment Ms Higgins arrived at The Dock and spoke to the group at the large courtyard table:



287. Ms Gain's evidence was that she arrived at The Dock at around 7pm (T1103.19). Ms Gain is the person in the white top pictured at the bottom right of Exhibit #17A. Major Irvine arrived at The Dock between 7 and 7:30pm (T1177.14). Major Irvine is the person in the black top pictured at the bottom right of Exhibit #17A.
288. Exhibit #17A shows that, prior to Mr Lehrmann's arrival at The Dock, Ms Higgins consumed a spirit-based drink she purchased at 7:24pm, a spirit-based drink she was handed at 7:50pm, a spirit-based drink that her Bumble date bought her at around 8:05pm; and a spirit-based drink that her Bumble date bought her at around 8:34pm.
289. Mr Wenke's evidence was that he and Mr Lehrmann arrived at The Dock around 8pm or 8:30pm (T1121.40-41). He knew some of the people there through work, including Ms Higgins and Ms Gain (T1121.43-1122.3).

290. Exhibit #R17 records the group at the large courtyard table with Mr Lehrmann and Mr Wenke approaching the table at 8:39pm. Mr Lehrmann agreed that the image recorded him and Mr Wenke arriving at The Dock on 22 March 2019 (T252.24):



#### ***D.1.6 Attendees at The Dock***

291. By reference to Exhibit #17A, Ms Higgins identified the other people at The Dock who she knew when she arrived. They included Nikita Irvine, Ms Gain, Ben Couch, Jye Thomas (O'Dell), Mr Wenke and Mr Lehrmann (T612.3-614.15).
292. Mr Lehrmann's evidence was that he only knew Ms Higgins and Major Irvine. He described Major Irvine's role as an ADC as a "*handbag carrier for their Minister*" (T93.28; T252.41). He agreed that an ADC role is a fairly low level administrative role (T253.7).
293. In cross-examination, Ms Gain identified the attendees at The Dock as including Mr Couch, Mr White, Lisa and Mr O'Dell (T1108.1-16). Major Irvine identified the attendees as including Courtney Back, Lisa White, Lisa's partner Ben, Julian Tailladart, Ben White, Ben Couch and Ms Gain (T1177.1.7). She described how she and Ms Gain had worked together with Minister Ciobo (T1177.9-11). Major Irvine saw Mr Lehrmann and Mr Wenke arrive (T1177.29-32).

#### ***D.1.7 Interactions at The Dock***

294. Ms Higgins described how the conversation at The Dock was "*super informal*" (T615.13) and "*social chit chat*" (T617.42) and mostly involved getting to know people without any real discussion about work (T615.9-23).

295. Ms Higgins started the night by talking to Mr Couch, Ms Gain and her date, whose name was Nick. Her recollection was that there was discussion or speculation about the imminent calling of an election (which was ultimately called on 11 April 2019 and held on 18 May 2019: T616.42-47).
296. Mr Lehrmann and Mr Wenke went to the bar, purchased some drinks and Mr Lehrmann had a sip of beer (Exhibit #18) (T263). Mr Lehrmann and Mr Wenke then went to the courtyard and sat at a smaller table at around 8:44pm (Exhibit #R19) (T264).
297. Ms Higgins introduced Mr Lehrmann to the people sat around the large table, and eventually joined Mr Lehrmann at the separate smaller table (T615.43-616.7). Exhibit #R20 shows Ms Higgins entering the courtyard from the right at 8:51pm with a drink in her hand (**First Drink**). Ms Higgins joined the smaller table and listened while Mr Lehrmann, Mr Wenke and Ms Gain discussed what the last election had been like (T616.7-11).
298. The following screenshot from Exhibit #17A records Ms Higgins sitting at the small courtyard table (at the top of the image) drinking with Mr Lehrman, Mr Wenke and Ms Gain:



299. Mr Wenke recalled drinking and talking, but could not recall the specifics of any conversations. He recalled spending time with Mr Lehrmann, Ms Higgins and Ms Gain. He said that he drank beers and possibly had spirits as well (T1122.10-35).
300. Ms Gain's evidence was that she had conversations with Mr Lehrmann and Mr Wenke throughout the night. She recalled that they were sat at the small courtyard table. She gave evidence about introducing herself to the group at the small table. Ms Gain had



not met Mr Lehrmann before (T1113.7), and she asked him where he worked. Mr Lehrmann told her that he was in Senator Reynolds' office (T1103.1-16).

301. Ms Gain said that Mr Lehrmann told her that he was waiting on a clearance to come through so that he could go and work at ASIS. Ms Gain was surprised because she understood that typically applicants wishing to work at an intelligence agency were not meant to tell people that they were applying to work at those agencies. She had that thought at the time, and may have said as much to Mr Lehrmann (T1104.6-8). While Ms Gain understood Mr Lehrmann's tone to be serious, she thought that what he had told her was nonsense (T1105.1-6). She gave evidence about telling Mr O'Dell about her conversation with Mr Lehrmann and saying that she thought Mr Lehrmann was "*an idiot*" for telling her about his application to ASIS (T1103.25-1105.10; see also T1113.34-37).
302. In cross-examination, Mr Lehrmann said that he could not specifically recall having a conversation with Ms Gain about his employment (T257.33-34). Notwithstanding having no specific recollection of his conversation, he denied in cross-examination telling Ms Gain that he was waiting on a clearance to work for ASIS (T257.38-45; T258.12-13).
303. It was put to Ms Gain in cross-examination that she did not discuss that Mr Lehrmann had an NV2 security clearance with ASIS and ASIO compartment briefings (T113.39-45). There was no evidence that Mr Lehrmann had such clearance, but in any event whether he did or not is beside the point. Ms Gain had a clear recollection of Mr Lehrmann mentioning working for ASIS as it was something that surprised her. Her evidence is to be preferred over Mr Lehrmann's denial in circumstances where he otherwise said he had no specific recollection of his conversation with Ms Gain.
304. Ms Gain gave evidence about observing Ms Higgins joining the small courtyard table when she was speaking to Mr Lehrmann and Mr Wenke, but she could not recall the specifics of their conversation (T1105.21-28). Ms Gain was drinking beer and may have had other drinks. She thought that she had six or seven drinks at The Dock (T1105.33-39). She moved between the small and large courtyard tables, and in cross-examination fairly accepted that having drunk alcohol on the night and the effluxion of time meant her recollection of how much time she spent at the different tables was not perfect (T113.14-28).

305. Major Irvine said that she had drinks (gin and soda and cocktails) and a meal at The Dock (T1177.39-42). She said hello to Ms Higgins briefly at the bar but did not recall having a conversation with her. She recalled that Ms Higgins went off to sit with other people at the smaller table (T1177.44-47; T1178.9-13; T11919-12). Major Irvine did not have any recollection of speaking to Mr Lehrmann (T1178.18-19).
306. Major Irvine gave evidence about speaking to Ms Higgins' date (T1191.17-19). She did not see any of the men she was with speaking to the date (T1191.21-22). She denied being rude to or bullying Ms Higgins' date or observing her Defence colleagues behaving in that way (T1191.24-33). Within an hour or so of arriving, Ms Higgins' date left (T6161.13-20; T1191.35). In cross-examination, Ms Higgins said that the date did not go well and she abdicated responsibility for her date to the rest of the group (T940). Ms Higgins said that she had not meant to abandon her date, but she was sitting at the small table with Mr Lehrmann, Mr Wenke and Ms Gain talking about the election and she was interested (942.44-47). Her recollection was that from when she was with the group at the large table, she observed others making fun of him and she accepted that he left because she had been rude (T943.42-47). In Network Ten's submission, nothing ultimately turns on the reasons why the date ended as it did.

#### ***D.1.8 No discussions about sensitive topics***

307. Mr Lehrmann's evidence was that he did not discuss any classified matters in the course of the evening on 22 March 2019 (T257.6-8). He was meeting a lot of people there for the first time, and most of the people were ADCs (T257.12-14). He did not meet any policy advisors on the night, only ADCs and Ms Gain, who was in communications (T257.26-29).
308. In cross-examination, Mr Lehrmann agreed that he was aware at the time he spent at The Dock that he could not discuss sensitive matters in public, and so kept the conversation friendly and social (T258.30-38; T259.1-2). He said he did not discuss anything that was not already in the public domain or related to everyday matters such as what people did for a living and where they lived (T258.43-45).
309. In response to a question from the Court, Ms Gain said that although she did not recall any discussion in her presence of defence policy issues of any substance while at The Dock, any conversation about such issues between members of the group would have been "*very general*" and "*unclassified*" in nature (T1119.3-8). She could not recall any

discussion about the French submarine contract, including the location of submarine construction (T1119.10-11). She could not deny that conversation on that topic might have taken place, but said that if it had been discussed, it would have been “*what was already in the media at the time*” (T1119.13-15).

310. Major Irvine’s unchallenged evidence was that anything to do with submarines was stored in the safe along with all classified and secret documents, and that Mr Lehrmann did not have access to the safe because she had had to retrieve documents for him from the safe in the past. She also gave unchallenged evidence that submarines were not part of Mr Lehrmann’s portfolio (Irvine, [93(b)]: CB1082).
311. Major Irvine gave evidence that she had watched Mr Lehrmann’s interview on *Spotlight* and that during the interview, he had said, in substance, that on the night of the incident he had received information from Department of Defence officials that was highly relevant to a sensitive issue and needed to be documented for Question Time. Major Irvine gave unchallenged evidence that, as a member of the group of Defence staff at The Dock on the night, she would never have spoken about anything sensitive and did not do so with Mr Lehrmann. She also gave evidence that she does not believe anybody in the group would have spoken to Mr Lehrmann about anything sensitive, as it would have been completely inappropriate for them to do so. Her evidence was that, in any event, based on her understanding of the positions held by the ADC attendees that evening and their roles at the time, she does not believe the ADCs that were in the group at The Dock would have had access to any sensitive material to disclose in the first place (Irvine, [94]: CB1082).

***D.1.9 Mr Lehrmann’s false evidence about having minimal contact with Ms Higgins***

312. Ms Higgins’ evidence was that she spoke to Mr Lehrmann when he first arrived and at the bar. She could not recall what they talked about, but she remembered that Mr Lehrmann bought her a drink (T616.24-28). The first drink that Mr Lehrmann brought for Ms Higgins was at around 9:32pm when they went to the bar together (Exhibit #R21) (T268).



313. Ms Higgins said that Mr Lehrmann was “*the nicest he had ever been to me*”. She attributed that to having invited Mr Lehrmann to an event attended by people that he might have perceived as important. She said that “*he was nice to me for the first time and I was pleased with how it was going*” (T617.22-26). She felt “*like an equal*”, like they were “*peers almost*” (T617.30-31).
314. By reference to Exhibit #R21, Mr Lehrmann agreed that he purchased a beer for himself, a beer for Mr Wenke and a spirit-based drink for Ms Higgins (T268.21-22). In fact, there were three beers and one spirit-based drink purchased; the third beer was for Ms Gain (T348.27-349.5). Mr Lehrmann said this purchase was possibly the \$16 round that he bought (T268.24) and that he paid for the drinks with a card (T268.33-37). He accepted in cross-examination that three drinks would have cost more than \$16, but was unable to explain how he paid for them (T269.1-9). The receipts from The Dock on the night (Exhibit #R84) show that two Great Northern beers cost \$14, a house vodka cost \$8, a single Peroni cost \$9 and 3 “\$5 Draught” beers cost \$15.
315. Mr Lehrmann and Ms Higgins returned to the small courtyard table at around 9:35pm (Exhibit #R22) (T269.26-29). He accepted that the drink he had purchased Ms Higgins was the second spirit-based drink that she had consumed from the time he had arrived (T269.39-45) (**Second Drink**).
316. Mr Lehrmann agreed after watching Exhibit #17A that at around 22:04:40, Ms Higgins walked into the courtyard with another spirit-based drink (**Third Drink**) and re-joined Mr Lehrmann, Mr Wenke and Ms Gain at the small courtyard table (T270.11-23) (Exhibit #R23).

***Ms Higgins stumbles at the bar – 10:07pm***

317. At 10:07pm, Ms Higgins is seen on Exhibit #17A standing at the bar. She can be observed swaying back and forth while standing. At 22:08:30, Ms Higgins can be seen losing her balance and stepping backwards to maintain balance. Dr Robertson's opinion was that Ms Higgins' BAC would have been around 0.08% and 0.12% at this point in time. He said that Ms Higgins' loss of balance was consistent with impaired balance associated with the effects of alcohol at or about the concentrations he had estimated (T1996.25-37). The evidence was consistent with Dr Robertson's opinion that individuals with BACs of between 0.1% and 0.15% typically experience impaired judgment, unsteady gait, impaired speech and emotional instability (Exhibit #877, p 5938).
318. Mr Lehrmann and Ms Higgins moved from the small table to the large courtyard table at around 22:24:14 (Exhibit #R24). Contrary to what he had said in evidence in chief (T94.35-41), Mr Lehrmann accepted in cross-examination that from the time he arrived at around 8:39pm until around 10:34pm he had spent the majority of time in conversation with Ms Higgins, Ms Gain and Mr Wenke at the small table (T271.40-272.3).
319. At around 22:34:27 of the Exhibit #17A recording, Mr Lehrmann agreed that he amassed what appeared to be three spirit-based drinks and put them on the corner of the large table close to Ms Higgins (T272.14-16). It was put to Mr Lehrmann that having amassed those drinks he said "*All hers, all hers*" to Ms Gain, indicating that the three drinks were for Ms Higgins to consume. Mr Lehrmann agreed that he was talking to Ms Gain, but disagreed that he said: "*All hers, all hers*" and disagreed that he was referring to the drinks being for Ms Higgins (T273.16-30).
320. In fact, in the opinion of Tim Reedy, the forensic lipreading expert, that is precisely what Mr Lehrmann said. Mr Lehrmann can be seen rearranging three drinks at the table. Mr Reedy observed the following exchange from around 22.34:23 (Exhibit #R881 VD2, pp 5-6):
- Ms Higgins: What are you doing?
- Mr Lehrmann: All hers; all hers.
- Ms Higgins: Oh stop; oh stop.
- (Oh, come on).

321. It is apparent from Exhibit #17A that as Ms Higgins is asking “*What are you doing?*”, Mr Lehrmann gathers the drinks together and gestures with his right hand over the drinks and then gestures with both arms over the drinks towards Mr Higgins (22:34:30) while smiling at both Ms Higgins and Ms Gain. Mr Lehrmann is facing almost directly towards the CCTV camera when he speaks and gestures. Mr Reedy’s observation was that this interaction stuck out because “*Ms Higgins was drinking and she’s literally in the corner of a table and there are some drinks there untidily on the table and they are pushed in her direction and this suggests she’s being plied by alcohol*” (T2180.7-10).
322. It was put to Mr Lehrmann that, in response, Ms Higgins patted him on the arm and said: “*Oh stop, oh stop*” (T274.1-2). He accepted that the CCTV showed Ms Higgins patting him on the arm, but disagreed with what she said (T274.20-21) after initially saying he couldn’t be certain (T274.1-2).
323. Again, Mr Lehrmann’s denial was shown to be untrue by the evidence given by Mr Reedy, referred to above.
324. It was put to Mr Lehrmann that he had lined up the drinks in front of Ms Higgins because he was encouraging her to get drunk, a proposition that Mr Lehrmann denied (T274.29-33). That was, however, the obvious inference to be drawn from watching the CCTV footage and the interactions between Mr Lehrmann and Ms Higgins. It was precisely what Mr Reedy had observed to occurred.
325. At around 22:42, Ms Higgins returned to the large courtyard table from the bar area. Mr Lehrmann agreed that he immediately engaged with her, and handed her a drink (T275.6-8) (Exhibit #R25 and #R26). He accepted that this was the fourth spirit-based drink he had observed Ms Higgins consume since he had arrived (**Fourth Drink**) (T275.10-11).
326. It was put to Mr Lehrmann that when he handed Ms Higgins the Fourth Drink, she rolled her eyes and said either “*Go on*” or “*Come on*”, to which Mr Lehrmann replied that he could not remember (T275.40-41; T276.21-23).
327. In Mr Reedy’s opinion, this is precisely what Ms Higgins said in response to being handed the Fourth Drink (Exhibit #R881 VD2, p 6).
328. At around 23:04:41, Mr Lehrmann agreed that he engaged Ms Higgins and Ms Gain in a further conversation (T277.36-40). Ms Higgins then finished the Fourth Drink by tilting her head back and consuming the contents at around 23:08:09. Mr Lehrmann

then finished his drink at around 23:08:31 and then immediately turned to Ms Higgins and walked with her towards the bar area (T278.46-279.5) (Exhibit #R27).

329. Mr Lehrmann and Ms Higgins then stood at the bar. Ms Higgins gesticulated with her hands in the air. At around 23:09:06 Mr Lehrmann ordered further drinks and produced a card to pay for them (T279.46-47; T280.9-11). Mr Lehrmann and Ms Higgins then returned to the courtyard area, each of them carrying a spirit-based drink. He agreed that one was for him and one was for Ms Higgins (T280.27). He agreed that was the fifth spirit-based drink he observed Ms Higgins drinking since his arrival at the bar (**Fifth Drink**).
330. Mr Lehrmann was unable to explain how he paid for the two spirit-based drinks and the previous round (T280.42-281.2).
331. Mr Lehrmann and Ms Higgins consumed their drinks at the large courtyard table (Exhibit #R28; T281.21-25).
332. Mr Lehrmann accepted that his evidence about only having a couple of rounds with Mr Wenke and not buying drinks for anyone else had been wrong having regard to the CCTV material (T288.30, 40). He was otherwise unable to explain how he had purchased two tranches of drinks (being three beers and three spirit-based drinks) on a card when his bank statement only recorded expenditure of \$16 (T289.10-290.36; T349.11-29). Mr Lehrmann accepted that he had told the police that he had spent only \$16 at The Dock based on his bank statement. He was simply unable to explain the discrepancy (T290.38-291.32).
333. In response to a question from the Court, Mr Wenke indicated that he had no recollection of lending his credit card to Mr Lehrmann and said that it would not be consistent with his usual practice to allow someone else to use his card to buy drinks (T1126.26-32).
334. Having regard to the interactions between Mr Lehrmann and Ms Higgins at The Dock on 22 March 2019, the court would reject Mr Lehrmann's evidence that they had minimal contact. Exhibit #17A records that he spent the majority of his time at The Dock with Ms Higgins and sometimes with others as part of a group. He went to the bar with her on two occasions and it is apparent from the footage and the words spoken that he was throughout the night observing how many alcoholic drinks she had and encouraging her to drink.

***D.1.10 Mr Lehrmann encouraged Ms Higgins to drink***

335. As the evening progressed, Ms Higgins was aware that she was very drunk. She said she “*drunk called*” Mr Dillaway at around 11pm and was having to go to the bathroom regularly (T617.44-618.6; T618.23-27). Exhibit #17A records Ms Higgins on her phone at around 11:36pm until around 11:37pm.
336. Ms Higgins’ evidence was that she continued to drink at the insistence of others to the point where her memory became “*pretty negligible*” and she is only able to recall certain parts of the rest of that evening (T618.8-21). She described being very inebriated and more intoxicated than anyone else she was with (T618.44-47).
337. At around 23:23:03 Ms Higgins was seated and using her phone. Mr Lehrmann was standing behind her talking to Ms Gain and Mr Wenke. At around 23:37:28, Ms Higgins got up holding a spirit-based drink in her hand and moved from the large table to engage with Mr Lehrmann, Ms Gain and Mr Wenke (Exhibit #R29; T282.25-33).
338. It was put to Mr Lehrmann that as Higgins approached the group she said “*I’m going. I’m going to go*”. Mr Lehrmann said he could not recall Ms Higgins expressing a desire to go home and could not tell what she was saying from Exhibit #17A (T283.3-12).
339. In Mr Reedy’s opinion, at this point in time, Ms Higgins said “*I’m going*” or “*I’m going to go*”. These words have been marked with brackets in Mr Reedy’s report, indicating a degree of uncertainty. However, they are consistent with the overall context in which the words are said to have been spoken. Ms Higgins had been spending time away from the group on her phone, it was getting late and the bar was emptying out, and members of the group had left or were leaving.
340. At 23:49:20, Ms Higgins picked up a full glass of a spirit-based drink from the large table. Mr Lehrmann accepted that Ms Higgins drank from the glass (T284.19-22), and that it was the sixth spirit-based drink he had observed her consume in his presence since he had arrived at The Dock (T284.40-43) (**Sixth Drink**).





341. It was put to Mr Lehrmann that at around 23:51 Ms Higgins skulled her spirit-based drink. He initially denied that, but accepted that she drank it quickly (T285.6-10) and then agreed she had skulled it (T286.24). It was put to Mr Lehrmann that he had pointed at her drink on the large table, to which he disagreed (T285.39-42).
342. It was put to him that he said to Ms Higgins: *“Drink that all. Now”* and Ms Higgins responded: *“I don’t want to”* and he then said: *“Drink it all. You can’t leave that. Come on, you’re not leaving that”*. Mr Lehrmann said that he disagreed that he said those things (T285.12-21). Ms Higgins is then seen skolling her drink. It was put to Mr Lehrmann that he then said: *“Well done. What a surprise”*. He denied saying those words (T285.26-29). Mr Lehrmann agreed that Exhibit #R30 was a still shot from the courtyard area at 23:51:02 showing Ms Higgins on the point of skolling a spirit-based drink (T286.37-39).
343. Contrary to Mr Lehrmann’s denials, in the opinion of Mr Reedy, the following exchange occurred between Mr Lehrmann and Ms Higgins at around 23:50:54 when Mr Lehrmann is seeing pointing at Ms Higgins’ drink on the table (Exhibit #R881 VD2, p 7):

Mr Lehrmann: Drink that all.

Now.

All.

Ms Higgins: I don’t want to.

Mr Lehrmann: Drink it all. You can’t leave that, come on. You’re not leaving that.

Ms Higgins: (I will).

Mr Lehrmann: (Well done).  
(What a surprise).

344. Mr Reedy described observing Mr Lehrmann encroaching into Ms Higgins' space and wanting her to drink more. He said; "*So she drinks the whole drink in one go and she's not able to stop so she has to drink all of them or-*" (T2181.37-39). He said the words were said in "more of a teasing way, a very light-hearted way, but she was encouraged, she was enticed to drink it all. So the woman decided it was in her best interests, if you like, to drink it all because then they were simply winding down for the night" (T2185.24-27).
345. After having that segment of the CCTV played in court, and asked about this exchange in cross-examination, Mr Reedy said: "*Yes. It's the same. Even if I had to do it again today I wouldn't change it*" (T2183.34-35). He was able to see Mr Lehrmann's and Ms Higgins' faces when they spoke, which made it easier for him to lipread (T2184.6-7). He disagreed with the proposition put to him in cross-examination, that he had reviewed this footage in less than optimum circumstances (T2184.39-41). Mr Reedy's evidence was that the video was "*one of the easiest aspects of video to lip read and I don't believe, I don't think, I'm certain of what was said*" (T2188.38-40). He had earlier described Exhibit #17A as "*a very good example of CCTV*" (T2178.7) and that the courtyard footage in particular was in colour and high resolution (T2177.1-12).

#### **D.1.11 Drinks at The Dock**

346. Ms Gain's evidence was that she had about six or seven drinks at The Dock (T1105.38-39). Major Irvine's evidence was that she bought five or six drinks for herself and probably bought drinks for other people. She recalled speaking to Ms Higgins while she was at the bar. She paid for the drinks with her own card (T1190.38-1191.3; see also T1192.1-13).
347. Ms Higgins drank the First to Sixth Drinks referred to above and below while she was at The Dock and with Mr Lehrmann. Her evidence was that by the time she left The Dock shortly before midnight on 22 March 2019, she had consumed 11 vodka lime and sodas or vodka Diet Cokes (T614.20-33; T617.37-40). She believed that she did not drink any non-alcoholic drinks (T614.37). She had also had at least one glass of wine at home before leaving for The Dock. In cross-examination, Ms Higgins said that if she was given a drink "*there was never a way I wasn't going to finish it*" (T946.22-24). He

recollection was that there was no water. She said that at that time, she was very conscious of her weight and body and should not drink water because it would make her bloat. She said that night she was “*drinking for a purpose. I was drinking to get drunk, so I wouldn’t have had a soda [soft drink] or a water. That just never would have happened*” (T946.33-38).

348. By reference to the CCTV footage, Ms Higgins identified that while at The Dock she ate a single slice of pizza. She had no recollection of eating anything else at The Dock (T614.42-46). Annexed to these submissions are screenshots from Exhibit #17A recording each of 10 drinks consumed by Ms Higgins at The Dock.
349. Ms Higgins’ evidence was that the number of drinks she consumed was unusual compared to other occasions on which she had been out. She described it as “*excessive and an abnormality*” (T615.4-5). She had never had a night that big in Canberra (T615.7).
350. Dr Robertson’s evidence was that at around 11:50pm, Ms Higgins was likely to have a BAC between 0.12% and 0.19% (Exhibit #877: CB1103, p 5937). He said that a BAC between 0.15% and 0.2% may typically cause nausea, vomiting and memory impairment, particularly when alcohol is consumed rapidly. His opinion was that obvious signs of drunkenness become more likely, such as an unsteady gait, impaired balance, and increase in drowsiness may occur. Dr Robertson’s observations were that Ms Higgins appeared to be walking unassisted and without any obvious impediment at this time (Exhibit #877: CB1103, p 5940). However, at around this time Ms Higgins had just skolloed a drink and was exhibiting some signs of drowsiness in that she had indicated that she intended to go home.
351. In cross-examination, it was suggested that in early 2019 Ms Higgins was a “*fairly big drinker*”. Presumably this line of cross-examination was intended to suggest that Ms Higgins had a higher tolerance to alcohol on 22/23 March 2019 and therefore would have been at the lower end of the concentration range in the table on page 7/11 of Dr Robertson’s report (Exhibit #877). In Network Ten’s submission, there is no reason to conclude that Ms Higgins would have had a greater tolerance for alcohol (or would have been toward the lower concern range of the table) because she was a ‘seasoned drinker’ or someone who consumed alcohol more frequently than an average person.

352. Her evidence was that “*in 2019, I was socially drinking with everyone*” (T927.35-36). In passing, it should be noted that Mr Lehrmann makes a submission about evidence Ms Higgins apparently gave in the criminal proceedings about drinking alcohol at [64] of the ACS. The asserted difference between her evidence about drinking given in this proceeding was never put to Ms Higgins in cross-examination and, as a matter of fairness, the Court should accordingly have no regard to this submission. She described her intoxication on 22 March as “*worse than even the worst night at schoolies*” and “*10 out of 10 drunk*” (T927.40-44). In cross-examination she was referred to (a) telling Mr Dillaway about feeling a little hungover from something that had occurred the night before the weekend of 24 February 2019, (b) an evening out with Guy Creighton and Mr Wenke and other friends over 2 and 3 March 2019 and (c) having a big night out on 15 March 2019 when the attempted kiss occurred (T930-932).
353. These were not the activities of someone who drank every day and heavily at the weekend (as senior counsel for Mr Lehrmann put to Dr Robertson in cross-examination: T1991.21-27), but rather a young social drinker, drinking at weekends with friends. In the circumstances, there is no reason to consider that Ms Higgins' BAC was any lower than the estimated ranges in Dr Robertson's report. That table sets out what is generally regarded as the range within which most individuals would metabolise alcohol. There was no basis to conclude that Ms Higgins was the kind of seasoned or regular drinker that Dr Robertson indicated might cause the person to have a lower than average BAC in a general sense (T1990.17-19).

## **D.2 88mph - 23 March 2019**

354. Ms Higgins' evidence was that she was invited to continue on with a smaller group after The Dock. Although she had no recollection of how she got to 88mph, she suggested that it was either an Uber or a taxi from The Dock (T618.40-619.2; T950.19-22).
355. Ms Gain could not recall how the group ended up at 88mph. She said that they would have just made a plan to move to another location (T1105.41-44). She recalled the topic being discussed among the larger group and thinking that most of the group would be coming to 88mph. In cross-examination, she said that she believed that other people were coming but that they had changed their minds (T1109.11-28). She fairly accepted that she could have been mistaken (T1109.41-46).

356. Major Irvine's evidence was that Ms Gain asked her if she wanted to come to 88mph with her, Ms Higgins, Mr Lehrmann and Mr Wenke. She declined and walked home (T1178.26-28). Her evidence was that she did not want to mix work with going to a club with people she worked with and that she did not want to socialise or spend time with Mr Lehrmann because he had "bad vibes", something she described as a matter of "women's intuition" (T1178.43-1179.3; see also T1196.4-15).
357. The group who attended 88mph after The Dock consisted of Ms Higgins, Mr Lehrmann, Ms Gain and Mr Wenke (T619.15).
358. Ms Higgins' recollections of 88mph were that:
- (a) It was the first time she had been there. She went down the stairs and observed the layout of the club. She observed a light up dance floor. There was a bar and a booth, where the group sat (T619.6-10).
  - (b) Mr Lehrmann and Mr Wenke bought her and Ms Gain drinks. Ms Higgins recalled that the drinks were shots (T619.11-12). She could not recall how many shots she had, but her recollection was that there were rounds of drinks, plural (T619.19).
  - (c) The group sat in a booth or corner lounge area. Ms Higgins was on the dancefloor by herself for a period of time (T619.28-45, T620.1-4).
  - (d) At some point she went to the bathroom because she felt unwell (T619.34-37).
359. Mr Lehrmann apparently sought to undermine Ms Higgins' evidence that she had never been to 88mph prior to this occasion, but it was clear from the evidence of relevant witnesses that Ms Higgins' position was entirely accurate: see T.1111.1-1112.35 (Ms Gain had no recollection of Ms Higgins being part of the group that attended 88mph after the Ciobo Christmas party, although she accepted that it was possible she was there). Mr Lehrmann's Senior Counsel asked Major Irvine whether she (Major Irvine) had been to 88mph at the Ciobo Christmas party, and ascertained that she had (T1195.36-39). Tellingly, however, he did not ask her whether Ms Higgins had also attended. The proper inference is that that was a forensic decision by experienced Senior Counsel who knew the answer would not assist his client's contention. Ms Higgins was not pictured in any of the photographs tendered by Mr Lehrmann of 88mph from December 2018 (Exhibit #38).

360. Ms Higgins' observations of Mr Wenke and Ms Gain at 88mph on 23 March 2019 were that they were seated close together. She recalled thinking that they appeared to really like each other (T620.36-40).
361. Mr Wenke's evidence was that he could not recall how the group arrived at 88mph (T1122.37-1123.4). He had been to the venue before. His recollection was that the group sat down and there was talking and drinking (T1123.6-17). He could not recall any specific conversations or interactions at the venue (T1123.16-21), including having seen Mr Lehrmann and Ms Higgins kissing or Ms Higgins having fallen over (T1127.1-23).
362. Ms Gain could also not recall how the group arrived at 88mph (T1106.10).
363. Ms Gain's evidence was that she had at least one drink, and recalled sitting in a booth opposite the bar area. She recalled that Mr Lehrmann and Ms Higgins sat on the opposite side of the booth to her and Mr Wenke (T1106.15-18).
364. Ms Gain recollected that Ms Higgins was intoxicated. She knew the difference between when Ms Higgins was and wasn't drunk, and she characterised Ms Higgins as drunk on the evening of 22-23 March 2019 at 88mph (T1106.25-33; T1116.37-43).
365. Ms Gain also recalled Ms Higgins falling over and having to be helped back up (T1106.19). She recalled that it happened close to the booth, that Ms Higgins was on the ground and that Mr Lehrmann helped her to her feet and back into the booth. She said he stood up, reached over and pulled her back on her feet before helping her back into the booth (T1106.35-46). She could not recall if Ms Higgins injured herself in the fall (T1116.30-35).
366. Mr Lehrmann vigorously denied this incident (T296.11-23): "*That did not happen.*" His denial was, Network Ten submits, yet another example of deliberately false evidence. Again, Mr Lehrmann professed an unequivocal recollection that something had not happened, at an event of which he otherwise professed little or no recall, in a context where the evidence that it had occurred was unhelpful to his case.

#### ***D.2.1 Mr Lehrmann touched and kissed Ms Higgins***

367. Ms Higgins gave evidence about her interactions with Mr Lehrmann at 88mph. She described him as sitting really close to her and that:

*“I remember him having his arm around my shoulder. I remember him touching me and I remember having, like, a thought process of – of discomfort, but not wanting to vocalise a discomfort, so I remember that. I – I called it handsy. I felt him being handsy with me.”* (T620.7-10).

368. Ms Higgins described Mr Lehrmann’s conduct as “*in the field of tolerance*”. She did not push him away or snap at him and, although she did not want him to touch her, she tolerated it (T620.12-15).

369. When asked to describe what she meant by “*handsy*”, Ms Higgins said that Mr Lehrmann was touching her legs up to her thigh area, being over her shoulder and “*all over my space*” (T620.17-24).

370. In respect of Mr Lehrmann and Ms Higgins’ interactions, Ms Gain gave the following evidence (T1106.19-21):

*“I remember Brittany and Bruce sitting quite close together. I remember them being quite touchy with one another. I remember them kissing...”*

371. Ms Gain said that she observed “*his hands on her thighs and her hands on his thighs*”. She described the kiss as a “*real kiss*” that went for a period of time. It was not a peck; it was a passionate kiss on the lips (T1107.4-21). When challenged in cross-examination about her recollection of the kiss, Ms Gain rejected the suggestion that the kiss did not happen and asserted “*that is a memory that I have*” (T1116.28). It was clear from her evidence that this was a vivid and distinct memory in respect of which Ms Gain was unshaken. It was entirely consistent with Ms Higgins’ account, and impossible to reconcile with Mr Lehrmann’s. It should be noted that, contrary to Mr Lehrmann’s submission at [90] of the ACS, Ms Higgins did not deny that a kiss happened, she simply had no recollection of anything other than him touching her (T620.22-24), and otherwise gave graphic evidence of her state of intoxication and the gaps in her memory.

372. In cross-examination, Ms Gain denied that it was not possible to see below people’s waists in the booths (T1114.19-29). She was adamant that she saw Mr Lehrmann and Ms Higgins with their hands on each other, including their thighs, while the group was in the booth (T115.10-14). She explained: “*The table was quite low, like, coffee-table height. So it wasn’t, sort of, like a traditional booth when you sit down and have dinner somewhere. It was a low coffee table in the middle of the curved lounge*” (T1115.17-

19). Given the cogency of her evidence, there is no reason to doubt the observations Ms Gain made as to Mr Lehrmann and Ms Higgins touching and kissing each other in the booth.

373. The following day (23 March 2019), Ms Gain and Major Irvine exchanged Telegram messages, including the messages that are Exhibit #R59 (CB55). Those messages include the following exchange:

*Major Irvine: How was 88?*

*Ms Gain: It was really fun!*

*Major Irvine: Oh nice!!!*

*Ms Gain: Brittany hooked up with Bruce.*

374. Ms Gain’s evidence was that the words “*hooked up*” were intended to mean “*kissed*” in the sense she described in her evidence (see [370]-[371] above) (Gain, [57]-[58]: CB1088; T1114.17). Major Irvine gave evidence that she understood the words “*hooked up*” to mean that Mr Lehrmann and Ms Higgins had been seen kissing (T1194.12-1195.15). Contrary to Mr Lehrmann’s submission at [91] of the ACS, Ms Gain intended and Major Irvine understood the phrase “*hooked up*” to mean that Mr Lehrmann and Ms Higgins had kissed.

375. Ms Gain and Major Irvine are good friends and they met up on 24 March 2019. Ms Gain’s evidence was that they discussed in general terms what had happened on the Friday night prior and that Mr Lehrmann and Ms Higgins had kissed (Gain, [58]-[60]: CB1088). Major Irvine recollected her message exchange with Ms Gain, and gave evidence about catching up with her the next day for dinner. Major Irvine said that Ms Gain told her over dinner that Mr Lehrmann and Ms Higgins had hooked up (T1179.9-19). Neither Ms Gain nor Major Irvine were challenged at all on the evidence they gave about meeting up the next day and discussing the kiss.

#### ***D.2.2 Credibility and Reliability of Ms Gain and Major Irvine***

376. Ms Gain was a very credible witness. She was prepared to make concessions where appropriate, including by accepting that she had a limited recollection of certain events from 22-23 March 2019 (T1108.18-1109.3). Where Ms Gain had a clear memory of an event, it was anchored to the events of the night. She denied that the media coverage of issues relating to the proceeding had impacted on her ability to distinguish between matters to which she has an independent recollection and matters she had read about



subsequently (T1110.12-18). That position was consistent with Ms Gain's frankness about the scope and detail of her recollections. She gave careful and considered evidence and was not prepared to agree to propositions that were inaccurate or did not accord with her memory. For example, when it was put to her in cross-examination that the evening consisted of a group of staffers lamenting that they were about to lose their jobs in the upcoming election, Ms Gain disagreed on the basis that, other than Mr Lehrmann and Mr Wenke, the attendees were members of the public service or Defence Force. She was otherwise a witness who gave careful consideration to her answers, including when a question was put to her in cross-examination based on a mischaracterisation of evidence she had earlier given (see T1117.18-24).

377. Similarly, Major Irvine was an impressive and very credible witness. She gave careful and considered evidence. As with Ms Gain, she was prepared to concede where she had no recollection of events, but was steadfast in respect of matters that she could recall. It was put to her that she had not made notes of information provided by Ms Higgins (see below) and that, given the passage of time, she had difficulty delineating between her independent recollection and things she found out subsequently. Major Irvine appropriately conceded that she was trained to take notes, but said she deliberately decided not to make any records so as to be protective of Ms Higgins' information and disagreed that this meant her independent recollection of events could have been impacted by subsequent publicity (T1187.28-1188.2). Where Major Irvine had a clear and independent recall of events, it was because they were particularly striking or memorable. For example, when it was suggested that she did not have an independent recollection of events at The Dock, she disagreed and indicated that she remembered them very well and had an independent recollection because three days later someone had told her that she was raped (T1190.19-23). She indicated that she had a very good memory of the night, which proved to be the case when tested by Senior Counsel for Mr Lehrmann (T1190.29ff). At the same time, Major Irvine fairly and entirely reasonably agreed with the proposition that her recollection of “*general details as to whether you had bought drinks for people and they were all gin and tonics, or vodka, lime and soda or whether you asked for rounds, or things like that*” was potentially affected by the alcohol that she had consumed on the night and the passage of time (T1193.15-24).

378. Ms Gain and Major Irvine were both asked in cross-examination if they believed Ms Higgins (see T1108.38-43 and T1194.1-10). Both answered in the affirmative. Those questions appear to have been asked for the purposes of subsequently putting, at least to Major Irvine, that she was prepared to say things in her affidavit that were implicitly false or unreliable because she believes Ms Higgins and wants to support her. When that proposition was put to Major Irvine in cross-examination, she was understandably affronted (T1198.15-17).
379. On the topic of her conversation with Mr Payne, it was also quite unfair to suggest to Major Irvine that she was “*changing her evidence*” having regard to the answer she gave at T1197.16-18 (T19-42).
380. In Network Ten’s submission, the Court would entirely reject any suggestion that Ms Gain or Major Irvine had given false evidence or made “subconscious additions” to their evidence because they believe Ms Higgins or otherwise. There is simply no basis to make that suggestion and it should not have been made to Major Irvine.
381. We have earlier addressed the disgraceful public assertion by Mr Lehrmann on the *Spotlight* program to the effect that Ms Gain had colluded with Ms Higgins to make up false evidence about the events at 88mph in order to pervert the course of justice in his criminal trial, and Mr Lehrmann’s appalling doubling down on, and failure to withdraw, that accusation in this trial (T297.17-31). We have also addressed the fact that Mr Lehrmann’s slur was not even put by his Senior Counsel to Ms Gain when she was in the witness box. Mr Lehrmann’s conduct in respect of Ms Gain, who was transparently a witness of truth, is of such a character that, in our submission, it alone ought to operate to deprive Mr Lehrmann of any entitlement to damages: cf *Joseph v Spiller* [2012] EWHC 2958 (QB). We are aware of no analogue for Mr Lehrmann’s conduct as an applicant seeking to vindicate his reputation in the Australian defamation jurisprudence.

### **D.3 Leaving 88mph / Journey to Australian Parliament House**

382. Ms Higgins gave evidence that she fell over when going up the stairs while trying to leave 88mph as she was “*completely obliterated*” (T620.41). She described how the top of the heel of her shoe caught on the step and she fell forward. Mr Lehrmann picked her up and they went up the stairs and out of the venue to wait for taxis or Ubers (T621.1-15).
383. Outside 88mph, Mr Wenke and Ms Gain left by sharing a taxi or Uber.

384. Mr Wenke's evidence was that he left 88mph by Uber or taxi with Ms Gain as they lived in the same direction (T1123.23-31). Ms Gain could not recollect leaving 88mph (T1107.27-31).
385. Ms Higgins' recollection was that someone told her that she and Mr Lehrmann lived in the same direction and by that stage she was "*so compliant*" that she agreed and got into a cab or Uber with him (T621.23-41).
386. Mr Lehrmann's evidence was that everyone left 88mph at the same time. He denied seeing Ms Higgins trip on her way out. He understood that Mr Wenke and Ms Gain had "*paired off in the course of the night*" and agreed that they had indicated they were leaving together (T304.14-24).
387. Mr Lehrmann's evidence was that he indicated to the group that he had to go back to Parliament House to get his keys (T121.1-2). He said that Ms Higgins indicated that she needed to go to Parliament House. When asked what Ms Higgins said about why she needed to go back to Parliament House, he said that she did not give a reason and he didn't ask her any questions. Mr Lehrmann claimed that upon Ms Higgins saying that she needed to go back, he suggested that they should share a vehicle because he was going there. He ordered an Uber (T121.12) and they travelled to Parliament House together. Mr Lehrmann had no recollection of any discussion in the car. He accepted, although said it was unlikely, that he and Ms Higgins might have driven silently to Parliament House (T305.35-43).
388. Mr Lehrmann's evidence on the circumstances as to how Ms Higgins came to be in the Uber with him was entirely nonsensical. Mr Lehrmann accepted that Ms Higgins was the most junior member of Senator Reynolds' office (T305.14), that she had started a matter of weeks earlier and it was a non-sitting week for the Parliament (T305.14-16). There was absolutely no reason for Ms Higgins to need to go back to Parliament House in the early hours of the morning after an evening of drinking and dancing, in circumstances where she had finished work for the week and already gone home and freshened up before heading to The Dock. It is utterly unbelievable that Ms Higgins would have said that she also needed to go back to Parliament House without volunteering why or without Mr Lehrmann asking why.
389. Ms Higgins' evidence was that she thought she was going home. She said that at some point during the ride, Mr Lehrmann said something to the effect of "*I have to just pick*

*something up from work*” (T621.46). She could not remember talking about anything else while in the vehicle going from 88mph to Parliament House (T622.9).

390. Ms Higgins gave evidence that she had been to Parliament House at “*strange times*” such as Saturday morning or first thing over the weekend, but those occasions had always been planned and she would bring her pass with her. Those occasions had “*intention and purpose*” and she would be in and out pretty quickly. She had never been to Parliament House at 2am after a night out. Her evidence was that in her administrative and assistant media roles, there was no reason for her to be at Parliament House at that time (T624.21-36).

#### **D.4 Parliament House - 23 March 2019**

391. Mr Lehrmann accepted that if the reason he needed to return to Parliament House was to collect his keys, he could have texted his girlfriend to have her meet him at the door or called her (T306.13-14). He said that going back to his house and knocking to get let in was not a possibility because it was a “*process*” to get in. The truth is he could have done any of those things. Or, if he had really needed to collect his keys from Parliament House, Mr Lehrmann could have said so upon arrival, been escorted to the Ministerial Suite, retrieved his keys and left immediately.
392. Ms Higgins recalled getting out of the car and walking to the gate 8 entrance to the back of Parliament. She could not recall why she had got out of the car, she just thought that because Mr Lehrmann had got out she should too (T622.17-22).
393. Upon arrival at the gate to the entry into Parliament House, Mr Lehrmann agreed that he told a lie to security (T306.34). He pressed the intercom and said: “*Oh, hi mate. Bruce Lehrmann here with Minister Linda Reynolds. I’ve been requested to pick up some documents. I’ve forgotten my pass.*” (Exhibit #16: CB37 and CB38). He admits this was false (T307.9). This was a serious lie. It implicated Senator Reynolds in his deceit.
394. If the true reason Mr Lehrmann sought access to the Ministerial Suite was to recover his keys, he could have explained to security that he had locked himself out of his apartment over the weekend. He accepted that he could have said that to security (T309.33-35), but said that he did not tell security that reason because they would have thought it was a “*minor thing*” (T308.39-42).

395. In response to a question from the Court, Mr Lehrmann said that prior to lying to security through the intercom, he never made any enquiry with Ms Higgins as to her reason for needing to access Parliament House, including for the purpose of ascertaining whether she had a better reason to enter (T310.1-19).
396. Ms Higgins could remember Mr Lehrmann pressing the intercom, but not what he said into the intercom (T622.31-47). Ms Higgins also recalled Mr Lehrmann saying “*just be quiet*” after they had been let through gate 8 and were walking through the ministerial carpark to the security desk (T625.40-626.6).

## **D.5 Entry into Parliament House**

397. There were two security guards on duty at the Point 8 carpark security entrance of Parliament House (**Point 8**): Mark Fairweather and Nikola Anderson.

### ***D.5.1 Mark Fairweather***

398. Mark Fairweather was a security guard for Armaguard between 1996 and 2006. Between 2007 and 2020, he was a security guard at Parliament House (Fairweather, [2]-[3]: CB1081).
399. Between around 11pm on 22 March 2019 and 7am on 23 March 2019, Mr Fairweather was the officer in charge of Point 8 (Fairweather, [4]: CB1081).

### ***D.5.2 Nikola Anderson***

400. Between 2008 and 2021, Nikola Anderson was a security guard at Parliament House.
401. Ms Anderson was working with Mr Fairweather as “Foxtrot Four”, the reference given to the security guard who is on foot patrol (Fairweather, [5]: CB1081). Ms Anderson was required to walk through the ministerial wing of Parliament House to ensure that everything was secure (Fairweather, [6]: CB1081; Anderson, [6]-[8]: CB1089).
402. In March 2019, staff members who wanted to gain entry to Parliament House through Point 8 were required to swipe their pass at the entry gate at the carpark and then proceed to Point 8. If a staff member did not have his or her pass, they could still access Parliament House. They would be required to press a button at the entry gate to the carpark. The Parliamentary Security Operation Room (PSOR) would answer the button call and ask the staff member who they were and what they wanted. The staff member would be required to explain that they were a passholder without their pass and give their name. PSOR would look up their name and if they were recorded as a passholder,

authorise them to come through the gate to Point 8. The staff members would then enter through the security entrance at Point 8 to gain access to the ministerial wing (Fairweather, [7]-[8]: CB1081).

### **D.5.3 Point 8**

403. At around 1.41am on 23 March 2019, Mr Lehrmann and Ms Higgins came in to Point 8 (Fairweather, [9]: CB1081; Anderson, [11]: CB1089 and Exhibit #17A: CB35). Ms Higgins described her state of intoxication at this stage as “*very, very extreme*” and that she was “*very, very inebriated*” (T623.10-12). In cross-examination, she said she was “*10 out of 10 drunk*” (T953.18-19). She could not remember much conversation between her and the security guards (T623.17-18).



404. Mr Fairweather’s evidence was that he said to Mr Lehrmann and Ms Higgins words to the effect of: “*Geez guys, can’t this wait until Monday?*” (Fairweather, [10]: CB1081; Anderson, [13]: CB1089).
405. Mr Lehrmann responded “*No*” or “*No, it couldn’t*” (Fairweather, [11]: CB1081; Anderson, [14]: CB1089). Mr Lehrmann had no recollection of Mr Fairweather asking him if it could wait to Monday or his response (T308.1-5).
406. Ms Anderson’s evidence was that she paid particular attention to Ms Higgins because she thought she looked nice, and she noticed that she had grass stains or something similar down one side of her dress (Anderson, [12]: CB1089).
407. Mr Fairweather’s evidence was that he had seen Mr Lehrmann and Ms Higgins at Parliament House before, but he did not know their names (Fairweather, [12]: CB1081).

In order to gain entry late at night, passholders were required to provide a reason for their entry otherwise entry could be refused (Fairweather, [13]: CB1081).

408. Mr Lehrmann told Mr Fairweather that: “*We’re here to do some work*” (Fairweather, [14]: CB1081). He also told Mr Fairweather that they had to go to Senator Reynolds' suite (Fairweather, [15]: CB1081). Ms Anderson recorded in her later incident report that she and Mr Fairweather were advised “*that they had urgent business that needed tending (sic) to*” (Exhibit #R67: CB1056). In cross-examination, Mr Lehrmann could not recall telling Mr Fairweather that he and Ms Higgins were there to do some work (T307.39-47). He could not rule out having to give an account of why they were there (T308.7-9). The evidence of Mr Fairweather and Ms Anderson is to be preferred. It demonstrates further lies by Mr Lehrmann in relation to the events of 22-23 March 2019.
409. Mr Lehrmann did not have his pass. He gave Mr Fairweather his name, and Mr Fairweather looked it up on the computer. Mr Fairweather was able to confirm the identity of Mr Lehrmann and Ms Higgins and the office they were allowed to enter from the computer records (Fairweather, [16]-[21]: CB1081; Anderson, [17]-[19]: CB1089). Ms Higgins did not have her pass with her because she was never anticipating going back to work. Her pass was at home (T623.32-35).
410. Staff members entering Parliament House without a pass are required to fill out a sign-in-sheet, also referred to as a visitor pass register. The security guard admitting the staff member also completes the register by entering the security guard's pass number, the staff member's pass number and the time the staff member entered and left Point 8 (Fairweather, [23]: CB1081).
411. Mr Fairweather's evidence was that Mr Lehrmann completed the register for himself and for Ms Higgins (Fairweather, [22]-[27], [61]: CB1081; T1172.42-45). A copy of the register is Exhibit #R2 (CB39).

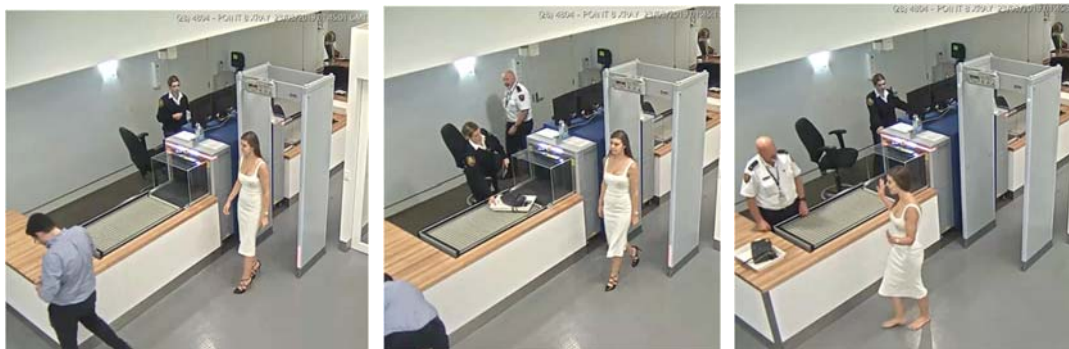


412. Exhibit #17A records Mr Lehrmann signing the register for him and Ms Higgins. Mr Lehrmann denied signing the register on behalf of Ms Higgins, but accepted that at no point is Ms Higgins recorded as bending down to write anything on the sign-in sheet (T313.18-19). He sought to suggest that one of the two security guards signed her name, even though the handwriting in the register is obviously the same and the orientation of the page was facing Mr Lehrmann and Ms Higgins. The evidence of Mr Fairweather and what is recorded in Exhibit #17A is to be preferred. Again, Mr Lehrmann's evidence was plainly dishonest.
413. Mr Fairweather's evidence in relation to CCTV at Point 8 was that, in March 2019, there were three CCTV cameras at Point 8 (one pointing towards the metal detector/x-ray machine, one above the lift pointing towards the metal detector/x-ray machine and a third camera pointing towards where the security guard on duty sat at Point 8). Mr Fairweather saw CCTV footage from the first two cameras as a result of his involvement in the ACT criminal proceedings, but has never seen footage from the third camera (Fairweather, [63]-[64]: CB1081).
414. The solicitors for Network Ten subpoenaed the Department of Parliamentary Services (DPS) for copies of the CCTV footage from the Point 8 area, including from the third camera referred to by Mr Fairweather. On 11 July 2023, the solicitors for Network Ten wrote to the solicitors for the DPS setting out their understanding that (a) there was footage captured by the cameras, including the third camera, (b) the footage is no longer available, and (c) the reason is because it was not quarantined and was overwritten. The



letter recorded an understanding that the footage had been searched for but could not be found (Exhibit #R886: CB1053). The response from the solicitors for the DPS confirmed that understanding (Exhibit #R887: CB1054).

415. Ms Anderson recalled Mr Fairweather saying to Mr Lehrmann words to the effect of: *“Did you just want to sign her in?”* (Anderson, [19]: CB1089). Her recollection is that she said words to the effect that: *“They’re both passholders. They can sign themselves in on their own passes”* (Anderson, [21]: CB1089). Ms Anderson’s evidence was that Mr Lehrmann wrote his name on the register first and then Ms Higgins wrote her name on the register. Ms Anderson must be mistaken about that, as it is contrary to what is captured in Exhibit #17 and Mr Fairweather’s recollection.
416. Ms Higgins has no recollection of the sign-in process. She was shown the register by police and identified that the handwriting is not hers (T624.1-19, 41-47).
417. Mr Lehrmann and Ms Higgins were each issued with a green temporary access pass (Fairweather, [24]-[28]: CB1081).
418. Mr Lehrmann and Ms Higgins then proceeded to put personal items into trays that went through an x-ray scanner. Mr Lehrmann walked through a metal detector and Ms Higgins followed him. The metal detector was activated when Ms Higgins went through (Exhibit #17 – Figure A below). Ms Higgins returned through the metal detector and walked through it again. The metal detector was activated once again when Ms Higgins went through (Exhibit #17 – Figure B below). Ms Anderson realised that Ms Higgins’ high heel shoes were setting the metal detector off and asked her to go back and remove her shoes (Anderson, [23]: CB1089). Ms Higgins then returned back through the metal detector and removed her shoes on the other side. She put her shoes in a white tray and pushed it through the x-ray machine. She came through the metal detector without wearing her shoes, and it was not activated (Exhibit #17 – Figure C below) (Anderson, [24]-[25]: CB1089).



**A**

**B**

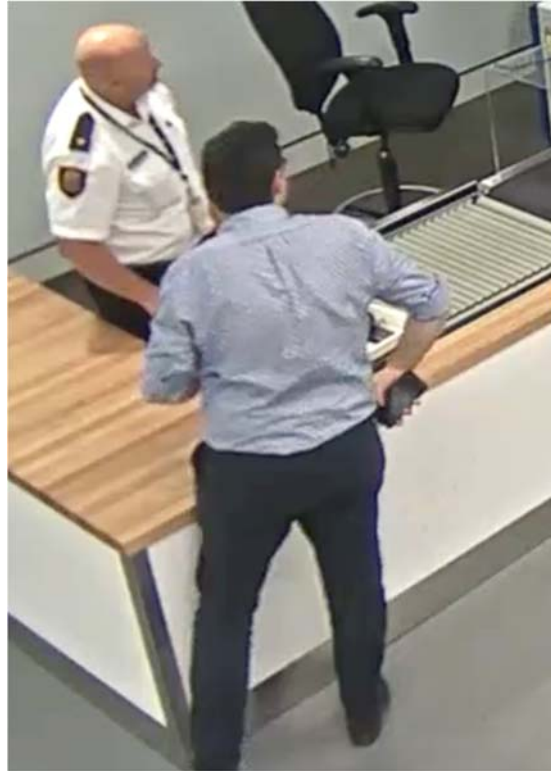
**C**

419. In cross-examination, Mr Fairweather was asked whether he observed Ms Higgins stumble when walking through the metal detector, to which he answered: *“from what I can recall, she did stumble a little bit with her shoes...”* (T1171.33-35).
420. Ms Anderson then walked towards the lift with Mr Lehrmann. She turned back and observed Ms Higgins struggling to put her shoes back on.
421. Exhibit #17 records Ms Higgins trying to put her shoes back on, struggling for some time and steadying herself against the security desk.
422. Ms Anderson’s evidence was that she called out words to the effect of: *“Don’t worry about it, just carry your shoes. It’s okay but put them on when you get up there”* (Anderson, [29]: CB1089).
423. Ms Higgins gave up trying to put her shoes back on, collected her items from the tray and hurried through a set of double doors out of Point 8 and towards a lift (Exhibit #17A at around 1:46:55am).
424. Ms Higgins’ evidence was that she has no memory of having problems with her shoes or not being able to put them back on (T623.18-19). She did have a clear memory of *“fiddling with [her] shoes”* but she cannot remember giving up on putting the shoes back on (T625.44).
425. The footage of Ms Higgins’ state as she struggled with her shoes is equivocal. On the one hand, it is true that she does not fall over and is eventually successful in navigating the metal detector. On the other hand, she is not successful in putting her shoes back on, stumbles and has to hold onto the table to steady herself, and then skips barefooted after Ms Anderson and Mr Lehrmann. Her answer in cross-examination ought to be accepted: *“I was skipping in the middle of parliament with no shoes on, so it – it indicates someone who is pretty drunk, yes”* (T953.42-46). Ms Higgins was in the seat

of Australia's democracy in the middle of the night, for no apparent reason. Her conduct was not that which would be expected of a sober person or a person in reasonable command of their faculties.

#### ***D.5.4 Mr Lehrmann removed a single mobile phone***

426. Exhibit #R22 is a still taken from the footage that is Exhibit #17A. Mr Lehrmann's evidence was that he had two phones and a wallet with him on 22-23 March 2019 and he had them with him for the whole evening (T92.5-6, T249.12, T316.6-9). In cross-examination, he denied having just one phone and said that he had both phones with him when he entered Parliament House and took both out when he came through the other end of the security device (T250.21-251.4; see also T314.3-16).



427. He said his wallet was in his pocket when he went through the metal detector (T316.11-14). In Network Ten's submission, Exhibit #R22 depicts Mr Lehrmann removing a single phone from the security tray. The Court would reject Mr Lehrmann's evidence that it shows two phones; an iPhone Max and a smaller iPhone on top of each other (T315.1-14).

#### ***D.5.5 Ministerial Corridor***

428. Ms Anderson's evidence was that, after passing through Point 8, Mr Lehrmann told her where to go, either by saying Senator Reynolds' suite or M1-23 (Anderson, [31]: CB1089). She escorted Mr Lehrmann and Ms Higgins to the suite. When they reached the suite, Ms Anderson radioed the PSOR (Anderson, [34]: CB1089). She used a key to open the suite. She let Mr Lehrmann and Ms Higgins into the suite and continued to patrol the ministerial wing until she had to give Mr Fairweather a break (Anderson, [35]-[36]: CB1089; T1164.32-33). Recordings of Ms Anderson radioing the PSOR are Exhibits #R64: CB42, CB44 and #R65: CB43, CB45.

429. Exhibit #17A records Ms Higgins and Mr Lehrmann waiting outside the Ministerial Suite before Ms Anderson unlocks the door:



430. Ms Higgins has no recollection of being escorted to the suite and did not even know there had been a security guard with them. Her next memory was sitting on the ledge in the suite (T626.19-22).
431. The footage at the time of the above still image is consistent with Ms Higgins' evidence of severe intoxication. It shows her walking barefoot through Parliament House, and then tossing her head back and looking towards the ceiling while she is waiting to be let in through the door. That is not the conduct of a person in control of their faculties.

#### **D.5.6 Intoxication**

432. Mr Fairweather's evidence was that when Mr Lehrmann and Ms Higgins entered Point 8, he could smell alcohol on one or both of them. He recalled a general smell of alcohol. He observed that they were possibly affected by alcohol, but did not think that they were overly affected (by which he meant slurring, falling over, vomiting level drunk) so as to be refused entry (Fairweather, [29]-[32], [62]: CB1081).
433. After Mr Lehrmann and Ms Higgins had passed through Point 8 and were walking to the Ministerial Suite, Mr Fairweather radioed a security controller, Mario Pripic, in the PSOR to let him know that they were going to Senator Reynolds suite. The audio recording of that communication is Exhibit #R69 (CB40) and a transcript is at CB41. During that communication, Mr Fairweather said:

*"Yeah, I can't remember which suite it is, mate, twenty-three or something like that. They're half pissed anyway."*

434. Mr Fairweather prepared an incident report on or about 24 March 2019. The report became Exhibit #R70 (CB57). In that report, Mr Fairweather observed that “*the female may have been affected by alcohol as she stumbled whilst trying to self-clear through the Walk through Metal Detector*”. That record was consistent with the evidence that Mr Fairweather gave in cross-examination and the observations recorded in his contemporaneous incident report (Exhibit #R70: CB57).
435. Mr Fairweather said in cross-examination that he considered Mr Lehrmann and Ms Higgins’ scale of intoxication to be “*very moderate*” but not “*heavily intoxicated*”. He said he would have refused entry if they had been heavily intoxicated because of his duty of care and worry about them “*vomiting or smashing up the suite or something*” (T1172.4-27). There may have been an understandable degree of understatement in that evidence. Objectively, Mr Lehrmann and Ms Higgins ought to have been denied entry to Parliament House having regard to their state upon arrival, or they ought to have been supervised when going to the Ministerial Suite and then immediately escorted out. Mr Fairweather and Ms Anderson are open to criticism for allowing Mr Lehrmann and Ms Higgins to access Parliament House and the Ministerial Suite of the Minister for Defence Industry at around 2am on a Saturday morning, and then leaving them there unsupervised. At the same time, security had been told by Mr Lehrmann that he and Ms Higgins were there to pick up documents for the Minister. As events transpired, it was a very serious misjudgement on their part, compounded by their later failure to appreciate the significance of Mr Lehrmann hurriedly exiting alone some 40 minutes later.
436. Ms Anderson’s evidence was that she realised Ms Higgins was intoxicated after she observed her struggling to get her shoes back on coming through the metal detector (Anderson, [27]-[28]: CB1089). In cross-examination, Ms Anderson confirmed that she had formed the view that Ms Higgins was intoxicated in that she had been drinking (T1164.32-39). That evidence is consistent with the observation that Ms Higgins was intoxicated that Ms Anderson recorded in her incident report (Exhibit #R67: CB1056).
437. Dr Robertson’s observations of Ms Higgins at around 1:50am on 23 March 2019 were that she exhibited no obvious signs of intoxication in the sense of being able to walk through the check point unassisted, although he observed that she was required to support herself by holding on to the table when seeking to put her shoes back on (T1997.8-13) (Exhibit #R877, p 5940). In his report, Dr Robertson observes that, at this

stage, it was likely that Ms Higgins had developed an amount of acute tolerance to alcohol and, as such, was likely to appear less intoxicated, particularly if her BAC was falling at this time (Exhibit #R877, p 5940).

438. Dr Robertson was asked to opine on the likelihood of Ms Higgins falling asleep having regard to her level of intoxication between 1.50am and 2.15am on 23 March 2019. Dr Robertson's evidence was that after the completion of drinking at or shortly prior to 1.30pm, it is likely that at 1.50am and 2.15am, Ms Higgins' BAC would have peaked and was likely falling. With an estimated BAC of approximately 0.25% and a falling BAC, the effects of alcohol would likely have included sedation and increased tiredness (Exhibit #877, p 5940). Dr Robertson's opinion was that the sedative effects of alcohol would increase the likelihood of falling asleep relative to the likelihood of falling asleep in the absence of alcohol (Exhibit #877, p 5941).
439. The cross-examination of Dr Robertson did not materially affect the reliability of his conclusions. The Court should not accept Mr Lehrmann's apparent submission that Ms Higgins was, as at March 2019, an alcoholic or anything like it. The evidence went nowhere near establishing any such proposition. Even if Ms Higgins drank more than the average person (a matter also not established on the evidence), Dr Robertson was clear that all that meant was that her BAC would sit somewhere between the "low" and "average" columns of the table on page 7 of his report (Exhibit #R877). Importantly, and contrary to Mr Lehrmann's submission at [116] of the ACS, Dr Robertson did not "accept in cross-examination that given Ms Higgins was a fairly regular drinker, all things being equal her elimination rate was likely to place her at or slightly below the 'average' calculations in his table." As already submitted, there was no evidence that Ms Higgins was a fairly regular drinker or drank more than most people and Dr Robertson did not accept those characterisations. Having regard to the CCTV footage and evidence of Ms Higgins, there is no basis for reducing the number of drinks consumed by Ms Higgins as assumed by Dr Robertson – indeed, Ms Higgins said she had had at least one glass of wine at home before going to The Dock, so if anything the numbers assumed by Dr Robertson are conservative. We invite the Court to accept that Ms Higgins likely had a BAC of about 0.23% during the period from 1.50am to 2.15am on 23 March 2019.

## **D6. The Rape**

440. Mr Lehrmann and Ms Higgins entered the Ministerial Suite at around 1:48am on 23 March 2019. Mr Lehrmann left through the Point 8 security point at around 2:30am.
441. Ms Higgins described entering the Ministerial Suite by reference to Exhibit #R1.
442. Ms Higgins first memory is of sitting on the ledge in the support staff area of the suite. She cannot remember walking into the suite. She remembers sitting on the edge of the ledge by the windows overlooking the Prime Minister's courtyard (T626.19-22).

### ***D.6.1 First touchpoint: the ledge***

443. She remembers sitting on the ledge. She was by herself, and she did not understand where Mr Lehrmann had gone and why she was still at Parliament. She wanted to go home. She just sat on the ledge for a period of time (T626.38-46). Ms Higgins was unsure how long she sat there, she said it could have been five minutes (T627.18-19) or one minute (T628.8). She accepted that it probably was not a very long period of time, but she had thought that they were going to be in and out quickly (T628.9-10). In cross-examination, she said that it felt like a long time at the time, but she accepted it could have been more like minutes (T955.1-5).
444. By reference to Exhibit #18 (CB1059), p 5437, Ms Higgins identified that she sat on the middle ledge with the pot plants on it in the support staff area. She recalled having a view down through all the computers and looking for Mr Lehrmann and not being able to see him (T628.1-5). She had sat on the ledge before, and would usually have got there by walking through the main entrance at the front desk where she usually sat, turning left, walking past the main desktop area and then perching herself on the ledge (T628.14-18). In cross-examination, Ms Higgins denied that she was sat at the ledge in the Minister's office (T956.4-5).



445. Ms Higgins said that Mr Lehrmann was not within eyeshot and therefore was not at his desk. She could not recall seeing Mr Lehrmann at his or anyone else's desk. She thought he was either in the kitchen or the DLO area because she could not see him from where she was sitting (T627.5-9; see also T954.18-45). Ms Higgins' evidence was entirely consistent with what she told police during her interview (T957.5-21) and what she told Ms Maiden and Ms Wilkinson (T959-961; Exhibit #50: CB167, #42: CB132). Contrary to the submission at [107] of the ACS, there is no basis to conclude that Ms Higgins immediately took herself into the Minister's private office. If her consistent evidence about sitting on the ledge and not seeing Mr Lehrmann at his desk is accepted, then the Court would reject Mr Lehrmann's evidence that he went straight to his desk to get his keys and started marking up the Question Time briefs (see [460]-[462] below).

***D.6.2 Second touchpoint: Ms Higgins awakes to Mr Lehrmann having sex with her***

446. The next thing Ms Higgins remembers is being in the Minister's private office on the couch. Her evidence was extremely graphic and distressing. It had none of the hallmarks of fabrication.

447. Ms Higgins said (T628.23-28):

*"So the first thing I remember when I woke up was a pain in my leg; that was the thing that kind of stirred me up. Bruce was on top of me. I was – so my head was in the back corner of the couch. He was on top of me, his arms were over the top of the couch. He was having sex with me at that point in time. And that was what I first woke up to at that point in time and is, like, the next touchpoint that I have. It's the next thing."*



448. Ms Higgins was visibly distressed when giving this evidence.

449. She was asked to describe where her head was on the couch. She said (T628.36-40):

*“I was lodged in between the armrest and the back of the couch. My head was jammed in the corner and he was on top of me, over – he wasn’t looking at me, he was lurched over the top of me. I was spread open and exposed. I had one leg open, on the side of the couch, and then one open, which is where his knee was, in my leg.”*

450. Ms Higgins marked on Exhibit #R1 where she was lying on the couch and marked with an “H” where her head was. Her hands visible shook as she showed the markings to the Court and counsel. Ms Higgins described her recollection (T629.29-45):

*“I told him “No”, on a loop. I don’t know how many times I said it. I told him to stop. I couldn’t – I couldn’t scream for some reason. I don’t know, it was just, like, trapped in my throat; I couldn’t do it. I know I felt really, like, waterlogged and heavy and I couldn’t – I couldn’t move. I was under the impression it had been going on for, like a little bit of time. I used the expression, like, “I was – I was late to the party”. Yes, I felt like it had been going on for a little while and I was only, kind of, coming to right at the end.”*

*“I just – it seemed like he was going quite fast and he kind of seemed a bit sweaty, or I don’t know, maybe I was the one who was sweaty. But it, like, it wasn’t – there was no, like – there was no, like – it – he was very much in the throes of it. It was very much rough and happening, and it didn’t matter that I was talking or awake or whatever, it just felt like he was doing it and – like, it didn’t matter, like I was an afterthought, like, he was – it felt like he was going to climax soon, or, like it had been going on for a while and that he was – I don’t know. I don’t know if “speeding up” is the right word, I don’t know. Yes, that’s – that was my impression at the time. Yes.”*

451. Ms Higgins said that she was laying down, with her head in the back of the couch and her legs pinned open. Mr Lehrmann was on top of her. One leg was pinned against the side of the couch and other one was pinned open (T630.21-23). Mr Lehrmann wasn’t wearing pants, but he still had his shirt on (T631.1-3). Her recollection in cross-examination was that one leg was up against the couch and the other one was spread

open (T962.41-45). A bruise being caused to either leg would be consistent with her having been pinned in the way Ms Higgins describes.

452. Ms Higgins repeated that she had tried to scream but nothing came out. She recalled saying “no” and telling Mr Lehrmann to stop. Her evidence was that he did not stop or even acknowledge that she was telling him to stop (T630.1-8).
453. Ms Higgins said that she believed that Mr Lehrmann climaxed or finished inside her. She said it stopped suddenly, and when it stopped he got off her (T630.14-16). She said she did not believe he ejaculated anywhere else but inside her (T630.23-25).
454. After it had stopped, Mr Lehrmann did not say anything. He looked at Ms Higgins and then he left (T630.27-29). Ms Higgins recalled him leaving through the back exit or the back slip door (as opposed to the main doors) from the Minister’s office.
455. After Mr Lehrmann had left the room, Mr Higgins could not get off the couch. She said: *“I couldn’t get up off the couch. I don’t know if it was, like, shock, or if I was just so drunk that I physically couldn’t get up, but I couldn’t pick up my body off the couch. And then I passed out”* (T630.38-40; T631.31-32). She did not want to be there, but she could not get up and did not know why (T630.42-44).
456. Ms Higgins said that her top was exposed (by which she mean that her breasts were exposed) and her bottom half was exposed. She was not sure where her dress was, but it was conceivable that it was around her waist, although she wasn’t sure (T631.18-20). She explained that she is not sure if her dress was scrunched around her waist or if it was complete taken off (T631.27-29).
457. This evidence was, in our submission, coherent, compelling and obviously traumatic to recount by Ms Higgins. If accepted, the respondents’ truth defence must succeed. Conversely, having regard to its specificity, in order to reject the respondents’ truth defence, the Court would have to find that Ms Higgins was giving deliberately false evidence when she recounted the rape.
458. Mr Lehrmann denied any sexual contact with Ms Higgins at all, obviating the need for any enquiry as to whether the intercourse described by Ms Higgins could have been consensual or as to whether his conduct was other than wilful or reckless (*Crimes Act 1900* (ACT), s 54). If intercourse occurred as described by Ms Higgins, it was obviously rape. But putting that to one side, Mr Lehrmann said he did not at any stage seek to procure consent to have any sexual intercourse with Ms Higgins (T319.6-20). Further,

Mr Lehrmann knew that Ms Higgins had had at least six spirit-based drinks at The Dock and then several further drinks at 88mph. If intercourse occurred, then having regard to those matters, his conduct in respect of consent to intercourse was at least reckless.

## **D.7 Mr Lehrmann leaves Parliament House**

### ***D.7.1 Missed Calls***

459. Mr Lehrmann's evidence was that at about 2:30pm he picked up his phone for the purpose of ordering an Uber to go home (T319.46-57). He had received six missed calls from his girlfriend between 2:16am and 2:18am on 23 March 2019 (T320.16; Exhibit #R85A: CB51). Mr Lehrmann did not seek to return the calls, despite the fact that his girlfriend was likely still awake (T320.42).

### ***D.7.2 Mr Lehrmann leaves the Ministerial Suite***

460. Mr Lehrmann's evidence was that he had no interaction with Ms Higgins before he left the Ministerial Suite (T144.43-44, T321.1-2). Mr Lehrmann's evidence was that he had spent the entire 40 minutes at his desk in the suite (T144.12-13, T321.17-18). He said he left using the rear exit near his desk in the support staff area (T145.20-21).

461. Mr Lehrmann's evidence was that he did not tell Ms Higgins he was leaving, or check on her, because he had spoken to her upon entering the suite (T145.25-27, T321.4-5). He said that he did not know where Ms Higgins was (T321.7). He agreed that Ms Higgins was a junior media assistant in a new job and whose desk was immediately adjacent to his (T321.10-13).

462. In the circumstances, the proposition that Mr Lehrmann would leave without checking on Ms Higgins is simply unbelievable, as is his evidence that he at no time subsequently ever enquired as to how Ms Higgins had gotten home, what she had done while in the Suite, or whether she had been reprimanded or lost her job (as he had) for accessing the Ministerial Suite without authority (T324.22-29). All of these omissions, in our submission, support an inference of a consciousness of guilt on Mr Lehrmann's part.

### ***D.7.3 Leaving Point 8***

463. At about 2:30am on 23 March 2019, Mr Fairweather observed Mr Lehrmann coming back through Point 8 and departing Parliament House (Fairweather, [42]: CB1081). His evidence was that he observed Mr Lehrmann as he got to the metal detector and walk

through the metal detector instead of the electronic doors (Fairweather, [44]: CB1081). Mr Lehrmann admitted to this (T322.33-39).

464. Mr Fairweather said “*Oi, are you coming back?*” to which Mr Lehrmann replied “*No*” in a hasty manner. Mr Fairweather’s observation was that Mr Lehrmann did not want to stop and talk, and that he was looking down on his phone (Fairweather, [45]-[47]: CB1081; T1173.5-7). Mr Fairweather’s observations about Mr Lehrmann leaving in a hurry are also recorded in his incident report (Exhibit #R70: CB57). Mr Lehrmann said that he could not recall the exchange with Mr Fairweather (T323.1-10). Mr Fairweather’s evidence is to be preferred, particularly where it is corroborated by his contemporaneous report.
465. Mr Lehrmann flicked his green pass onto Mr Fairweather’s desk and before Mr Fairweather could ask him any more questions, Mr Lehrmann had already walked out of Point 8. Mr Fairweather has a distinct memory of the pass being flicked on to the desk as he felt that it was rude and he was annoyed about it at the time. He was also annoyed at Mr Lehrmann having left through the metal detector. He wanted to ask Mr Lehrmann about Ms Higgins because he wanted to secure the Ministerial Suite and needed to know if she had left (Fairweather, [48]-[50]: CB1081).
466. Exhibit #17A records Mr Lehrmann exiting through the security gate and being collected by an Uber from the side of the street and driving off.

#### **D.8 The Welfare Check**

467. At about 3am, Ms Anderson returned to Point 8 to give Mr Fairweather a break. They had a conversation to the following effect (Anderson, [38]: CB1089):

*Mr Fairweather: Well that was a little bit weird.*

*Ms Anderson: Why, what do you mean?*

*Mr Fairweather: The man left approximately 20 minutes after you let them into the office. He seemed to be in a hurry to get out and sort of threw the pass at me. I said to him “That was quick. Are you finished?” and he said “yeah” and hurried off.*

468. Given Ms Higgins had still not left during the hour and fifteen minutes in which Mr Fairweather has his break, it was decided between Mr Fairweather, Ms Anderson and

Kevin Callan, their supervisor, that Ms Anderson should go up to the Ministerial Suite to do a welfare check (Anderson, [39]-[43]: CB1089; Fairweather, [51]-[54]: CB1081).

469. At about 4.20am, Ms Anderson went to Senator Reynold's suite. She entered through the front doors and starting shouting "*Security, hello security*". She walked through the reception/waiting room and noticed that the door of the Senator's office was closed. She approached the Senator's office and said "*Security. Hello? Security*". There was no answer (Anderson, [45]: CB1089).
470. Ms Anderson's evidence was that she then opened the door to the Senator's office and saw Ms Higgins lying on her back on the couch completely naked (T1166.15). She observed that her dress and shoes were on the floor next to her, and that Ms Higgins' head was up facing the window. In cross-examination she said that the dress was right next to the lounge, but could not specify whereabouts on the floor (T1166.22-34). She said: "*it just looked like it had been taken off and thrown on the floor*" (T1166.43-44). Her evidence was that she saw Ms Higgins' vagina as her feet were facing towards the door where Ms Anderson was standing and Ms Higgins' knees were up and slightly apart because the couch was not long enough to lie flat on (Anderson, [46]-[49]: CB1089; T1166.17-20).
471. Ms Anderson was startled. She observed Ms Higgins opening her eyes and looking at her. Ms Higgins then rolled over to Mr Anderson's left into the foetal position, facing the Minister's desk (Anderson, [50]-[55]: CB1089).
472. Ms Anderson's evidence was that she did not observe Ms Higgins to be in any trouble or distress, and noted that her face makeup appeared to be intact. Ms Anderson thought that Ms Higgins was sleeping off a big night (Anderson, [56]: CB1089).
473. Ms Anderson closed the office door and walked out of the Suite. She reported what she had seen to Mr Callan. Mr Callan asked Ms Anderson to pass her information to the day shift relief and was told not to say anything to anyone else (Anderson, [57]-[62]: CB1089). Mr Fairweather's evidence is that when Ms Anderson returned to Point 8 she said words to the effect of "*I found her naked*" and "*she had her you know what showing*". Mr Fairweather was upset at what Ms Anderson had told him (Fairweather, [57]-[58]: CB1081).
474. These observations should have elicited further urgent action. Mr Lehrmann and Ms Higgins should not have been left unsupervised in the Ministerial Suite in the first place;

when Mr Lehrmann left hurriedly and rudely, a welfare check should have been conducted immediately, not left for a period of hours; and upon Ms Higgins being found naked in the Minister for Defence Industry's office, she should not have been left to "sleep it off". None of this would, one would hope and expect, be tolerated in any Australian workplace, much less in the office of a Minister of the Crown in Parliament House. It is simply extraordinary.

- 475. Before Ms Anderson finished her shift at around 7am on 23 March 2023, she checked Mr Lehrmann and Ms Higgins' names on the computer system or on the register and wrote them in her diary. She also noted some other details in her diary for her incident report (Anderson, [57]-[64]: CB1089 and Exhibit #R66: CB50).
- 476. Ms Anderson subsequently prepared an incident report (Exhibit #R67: CB1056).
- 477. Mr Fairweather prepared an incident report on or about 24 March 2019 (Fairweather, [60]: CB1081 and Exhibit #R70: CB57).
- 478. On 20 March 2021, Ms Anderson also prepared a letter to the police about the incident after she had been requested to provide details of what had happened. Since re-reading the letter, Ms Anderson has identified that she incorrectly recorded the Ministerial Suite as M1-45 when in fact it was M1-23 (Anderson, [66]: CB1089 and Exhibit #R68: CB941).

#### **D.9 Ms Higgins in the Ministerial Suite**

- 479. Ms Higgins was woken in the morning by light coming through the Minister's shutters in her office (T631.34-35). She was sick almost immediately and threw up in the toilet in the Minister's bathroom. She sat on the floor for a while as she was sick. She attributed her sickness to the amount of alcohol she had drunk (T631.39-42). She stayed in the Minister's bathroom for somewhere between 15-30 minutes (T632.1-3).
- 480. Ms Higgins' recollection was not of waking up and being nude and having to pick up her dress and put it on. She cannot remember the series of events relating to her dress clearly, and had always assumed that it was still on her body, scrunched up around her waist. She said quite fairly that she could have been wrong about still wearing her dress (T632.14-17). She did not remember being naked walking around the Minister's office, and she recalled wearing her dress again when she was being sick in the bathroom (T632.17-19).

481. In so far as there is an inconsistency in relation to whether Ms Higgins woke up fully, or partly, naked, it is in Network Ten's submission of no moment. It is a matter of detail. Ms Higgins' confusion is readily explicable by the combination of trauma and alcohol; of seeking to understand what had happened to her; of piecing together the fragments of her memory. Her concession that she was likely naked, having regard to the observations made by Nikola Anderson at the time she conducted her "welfare check" at approximately 4:20am stands very much to Ms Higgins' credit (T746.32-42).
482. Ms Higgins started to pull herself together and make herself look presentable and normal again, by fixing her hair and mascara (T632.9-11, 21-23). She realised her phone was flat and she had to charge her battery (T632.10-11).
483. Ms Higgins described that she knew what had happened to her, but at that stage was still in shock and processing it. She said she could not digest it yet. She sat there, she was aware of what had happened, she was upset, but she was not ready at that stage to confront what had happened (T632.25-30).
484. Having been sick, Ms Higgins said she felt "*gross still*" and wanted something to eat so she might feel a bit better (T632.32-34). She went into the kitchen and found a box of Roses chocolates. Her recollection was that she sat in the DLO's office and ate the box of chocolates (T632.35-38). The attempted attack on Ms Higgins' credit based upon whether the chocolates were located in the kitchen or in the DLO's office fell flat. This was, as with whether the dress was fully or partly off, a matter of inconsequential detail, readily explained by trauma, alcohol and the vagaries of memory.
485. Ms Higgins recalled that at some point she received a text message from Mr Dillaway, and she sent him a message back (Exhibit #R99, pages 666-667). She said that in her message, she tried to "*downplay*" or "*pretend everything was fine*" (T632.43-47). Ms Higgins said she did not say anything to Mr Dillaway about what had happened because at that stage she was still processing what had just happened (T633.1-18).
486. The next thing Ms Higgins remembers is a security guard calling into the office suite and saying something to the effect of "*is everyone okay in there?*" (T633.20-31). Ms Higgins' recollection is that she responded: "*I'm fine*" (T633.33). She was not fine, and her evidence was that she said those words because she was felt scared and shocked about being in the Minister's office. She described how she was "*freaked out*" and those words came out as a "*kind of an automatic response*" (T633.37-41).

#### **D.10 Ms Higgins leaves Parliament House**

487. Ms Higgins described how there was a box of “*goodwill stuff*” in the Ministerial Suite that she had to take for Minister Reynolds to the charity bin in the coming days (T633.45; T963-965). She took a jacket out of the box to cover herself because she was feeling self-conscious (T633.46-47). Ms Higgins put the jacket on and went downstairs.
488. She went out of the same security entrance that she had walked through earlier that morning. She tried not to talk to the security guards, but had to hand them back her visitor pass. Her recollection is of having no real interaction with the security guards. That is corroborated by the CCTV that is Exhibit #17A showing Ms Higgins leaving the Point 8 security entrance.



489. Ms Higgins took an Uber home. Exhibit #R3 (CB52) is a copy of Ms Higgins’ Uber receipt. It records her trip at 10:08am on 23 March 2019 from Parliament House to her then home in Launceston Street at 10:19am.



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

### **E.1 23 March 2019**

#### ***E.1.1 Email from Mr Lehrmann to Ms Higgins – 23 March 2019***

490. At 10:56am on Saturday, 23 March 2019, Mr Lehrmann forwarded an email news summary to Ms Higgins with the message “*might see about getting you on this list! :)*” (Exhibit #20: CB53).
491. The message was sent around eight hours after Mr Lehrmann had left Parliament. It said nothing of the night before or their entry into Parliament that morning. It is simply inconceivable that, if Mr Lehrmann’s version of events is correct, he would not have asked about Ms Higgins, including how she was feeling, what time she left and whether she got home safely. In fact, Mr Lehrmann never *at any time* made any enquiry of Ms Higgins about what occurred in the early hours of the morning on 23 March 2019, even after their access after hours featured in the reasons for him being terminated. Mr Lehrmann’s failure to raise these issues in an email sent on the same morning as he and Ms Higgins had entered Parliament House is a further and compelling reason why his version of events cannot be accepted.
492. Ms Higgins gave evidence about receiving the email. She first saw it on Monday, 24 March 2019 (T638.38). She would usually read emails on the weekend, but was not in a state to do so over that particular weekend (T640.22-25).
493. The tone of the email is consistent with Ms Higgins’ interpretation of it: “*I think because we had never had sort of, like, a friendly social relationship, and then suddenly after he raped me, there was this familiarity and a smiley face that I felt was undeserved, and it really – it just – it gave me the heebies. I don’t know. It just – I don’t know. So dumb. It really freaked me out and still does. I don’t know*” (T638.40-44).
494. The email was unusual, not just because it was sent hours after Mr Lehrmann and Ms Higgins had been in Parliament House and mentioned nothing about that event or whether Ms Higgins had got home safely, but also because of the unusual friendliness and familiarity that Ms Higgins had not experienced from Mr Lehrmann before. In Network Ten’s submission, the real purpose of the email was Mr Lehrmann testing the water with Ms Higgins to see how she would respond (if at all) after the events earlier that morning and, in that respect, it is suggestive of a guilty conscience on the part of Mr Lehrmann.

### ***E.1.2 Communications with Mr Dillaway***

495. Mr Dillaway gave evidence that he awoke early on 23 March 2019 because he had to drive from the Gold Coast to Orange. He noticed that he had a missed call from Ms Higgins and texted her back during his drive (T1215.9-15): “*Morning! Let me know when your up and I’ll call you back. I was asleep when you called haha*” (Exhibit #R99: CB15, p 666). Ms Higgins messaged Mr Dillaway back at 8:17am (Exhibit #R99: CB15, p 667).
496. Mr Dillaway and Ms Higgins then had a short telephone conversation. Ms Higgins’ evidence was that she had the conversation while she was in the Uber leaving Parliament House (T634.35-37). Her recollection was that Mr Dillaway had called her (T634.39). Mr Dillaway’s evidence was that he asked Ms Higgins about her night and she said words to the effect that “*we brought the party back to Parliament House*”. Ms Higgins’ recollection was that Mr Dillaway asked her how her night had been and she told him that she had ended up back at Parliament House. She said that she did not explain the circumstances or what had happened (T634.41-47). Her evidence was that she did not say anything to Mr Dillaway because, at that stage, she was not ready to talk to anyone. The assault had just happened, and she was in shock (T635.1-2).
497. Mr Dillaway thought Ms Higgins’ response was strange and asked her questions, including who she came back with (T1216.16-32). Ms Higgins’ evidence was that she recalled Mr Dillaway saying something to the effect of: “*wow, that’s really wild*”. She took, from his tone, that Mr Dillaway had never done anything like going back to Parliament House in the middle of the night after being out drinking (T635.4-7).
498. Mr Dillaway understood from their conversation that she had been drinking and that it had been a big evening (T1218.10-13). Mr Dillaway said that Ms Higgins acted “*cagey*” and he got the sense that she was hiding something or not telling him the complete picture. Ms Higgins said: “*I have to go*” and hung up abruptly (T1216.16-1217.39). In cross-examination, Mr Dillaway said that he suspected that Ms Higgins was not telling him the truth about what had happened. He suspected that she might have hooked up with someone (by which he meant anything from kissing to sexual intercourse) (T1244.1-8, 1244.29-43). He said that he thought it was odd to bring people back to Parliament House on a Saturday night (T1245.18-19).

499. Later that day, at around 6:59pm, Mr Dillaway sent a text message to Ms Higgins: “*How’s the hangover?*” (Exhibit #R99: CB15, p 667; Exhibit #R4: CB56, p 2237). In cross-examination, Mr Dillaway said that he understood from the messages that followed that Ms Higgins had had a big night or night of heavy drinking (T1255.15-17; Exhibit #R4: CB56, p 2237-2238). Ms Higgins was cross-examined on her text message exchange with Mr Dillaway over the weekend, and in particular her references to having been studying. She explained that she had not been studying but wanted to placate Mr Dillaway because she wasn’t ready to at that stage to talk to him about the assault (T975.12-17).

### ***Ms Higgins returns home***

500. Ms Higgins returned to her home, which she shared with Ms Humphreys and another person. Her recollection was that when she got back Ms Humphreys’ friend, Vivian, was there. Ms Higgins was asked how her night was and where she had slept, and Ms Higgins said she had gone to Parliament. She did not say anything about what had happened, because she was still in shock and processing what had happened. Ms Higgins said that “*it just wasn’t in my thought process to disclose it at that point. I hadn’t dealt with it myself*” (T635.19-636.9).

501. After speaking to her housemate, Ms Higgins said that she was really upset and stayed in bed for the rest of the weekend. She did not leave the house, and ordered food using Uber Eats. Ms Higgins describes feeling distraught and crying hysterically (T636.11-17). She only emerged from her bedroom on Monday when she had to go back to work (T636.21-22).

### ***E.1.3 Messages between Ms Gain and Major Irvine***

502. As set out in paragraphs [373] to [374] above, on 23 March 2019, Ms Gain and Major Irvine exchanged Telegram messages about the previous evening, including that Ms Higgins had “*hooked up*” with Mr Lehrmann (Exhibit #R59: CB55). On 24 March 2019, Ms Gain and Major Irvine met up and discussed what had happened the previous night, including that Mr Lehrmann and Ms Higgins had kissed (Gain, [60]: CB1088 and T1179.16-19: see also T1180.9-19 (Major Irvine)).

## **E.2 Monday, 25 March 2019**

503. On Monday, 25 March 2019, Mr Lehrmann and Ms Higgins attended the Ministerial Suite for work. Ms Higgins’ evidence was that she arrived by around 8am (T637.9) and

sat at the front desk. She described siloing herself and just focusing on functioning and focusing one task at a time (T637.11-14). Ms Higgins described how she tried to keep herself busy. She didn't talk about what had happened, she wasn't thinking about what had happened. She was just doing the bare minimum to get through (T637.15-17). When asked about her state of mind at that time, Ms Higgins said (T637.19-24):

*"I wasn't crying. It was, like, a very weird, like fugue state almost of, like – I was just completely detached from all emotion. I was completely just doing – I was there for work and I went to work and I wasn't talking to anyone and I was just doing what I had to do during the day. I was completely disconnected from myself. It was – yes, I was disassociating, probably."*

504. That description is entirely consistent with the form of dissociation that sexual assault victims are apt to experience in the aftermath of an assault.

***Mr Lehrmann buys Ms Higgins a take-away coffee***

505. Ms Higgins worked on her normal administrative duties, and a task she had been set earlier by Senator Reynolds to create backbench packs ahead of the election (T637.26-29).
506. Ms Higgins said that the first time she saw Mr Lehrmann in the office was when he gave her a coffee around mid-morning. She was sat at her desk at administration. Mr Lehrmann came up, placed the coffee on Ms Higgins' desk, said it was for her and then kept on walking. The coffee was a long black, the same type of coffee Ms Higgins always gets (T637.31-46).
507. Mr Lehrmann could not recall whether he purchased a coffee for Ms Higgins on the Monday. An extract from the *Spotlight* interview (Exhibit #R16 at 51:33) was played to Mr Lehrmann, and he accepted that he was seeking to convey in that interview that he had gone and had a coffee with Ms Higgins (T326.40-42). The evidence of Ms Higgins is to be preferred as to Mr Lehrmann buying her a takeaway coffee. The obvious intention behind Mr Lehrmann's comments on the *Spotlight* program was to discredit Ms Higgins account by falsely suggesting that they had gone and sat for a coffee together on the first working day after the incident.

### ***Further email from Mr Lehrmann***

508. At 7:34am, Mr Lehrmann followed up on his email to Ms Higgins from 23 March 2019 by forwarding a further news summary with the message “*Not letting me send to private email! Will email David and get your gmail on the mail list! BL*” (Exhibit #21: CB59). Ms Higgins’ responded several hours later at 1:15pm with the message “*So weird! Honestly, that would be best if you could*”.
509. Ms Higgins gave evidence about this email exchange. She said that it led her to believe that Mr Lehrmann had not spoken to anyone about what had occurred, and that he wanted to “*normalise the situation*”. She said that made her feel “*weirdly relieved*” because she was worried that Mr Lehrmann may have gone around and told people they had had consensual sex, but that his normalising the situation meant that she did not have to have a fight about whether or not it had been consensual right at that moment (T639.28-44). That evidence was credible and ought to be accepted.

### **E.3 Tuesday, 26 March 2019**

510. Ms Higgins arrived at work around 8am (T640.33).
511. At 9:51am on 26 March 2019, Mr Dillaway received an email from Ms Higgins in which she said: “*Also what’s your work email I need some info from the Tudge portfolio*” (Exhibit #R4: CB56, p 2251). Mr Dillaway replied at 9:54am to say: “*What kinda info you need? I’ll give you relevant adviser to reach out too. As I really don’t have anything haha*” Exhibit #R4: CB56, p 2252). Mr Dillaway said: “*I’d email the main media adviser*” and “*And if there’s no luck, I’ll follow it up*” (Exhibit #R4: CB56, p 2252).
512. It was put to Mr Dillaway in cross-examination that he had indicated in that message that he would email an advisor and he agreed, although his message is equally open to an interpretation that he was suggesting Ms Higgins email the main media advisor and if she had no luck, he would follow it up. That interpretation would be consistent with his earlier message about giving Ms Higgins the details for the relevant advisor.
513. At 10:28am on 26 March 2019, Ms Higgins sent an email to Mr Lehrmann asking for some help with a task that Drew Burland had set her. This was the same task that she had earlier emailed Mr Dillaway about. She explained that she needed “*portfolio stats*” to generate some “TPs” (talking points) to put into a campaign prep pack. She asked Mr Lehrmann if he could help (Exhibit #22: CB61).

514. Ms Higgins explained that she was prompted to send that email because she had been set a task by Senator Reynolds the week before to provide a breakdown of all the office portfolios for each electorate in the country. She described it as a huge task and she did not have the contacts at that time to do it (T640.42-45). As to the timing of when the task was given to Ms Higgins, she accepted in cross-examination that at the criminal trial she had said that the task had been given on the day and that she could not be certain that it had been set the week before (T793-794). She was consistent that the task had been set by Senator Reynolds in person with Drew Burland present (T641.3-6; T794.1-11). To the extent that there was any inconsistency in her evidence as to *when* the task was set, it is immaterial. Ms Higgins was clearly doing her best to recall when she had been given the task. There was no doubt that she had been given the task and she was reaching out to people for help with it. She referred to having reached out to Mr Dillaway (see [511] above) and because she could not think of anyone else who would know the information, she reluctantly asked Mr Lehrmann because she knew it was his area (T640.45-47; T791.1-5).
515. Ms Higgins was asked about using the phrase “*phoning a friend*” (T641.12). She explained that she was trying to defuse the situation and make things as normal as possible, including by appearing “*benign*” and downplaying everything that had happened and pretending that the rape had never happened (T641.12-18). She was still in denial about what had occurred and needed help with the work task. Ms Higgins said that she did not consider Mr Lehrmann a friend. She said she used that word to try to “*soften the situation to show that I wasn’t a threat. To show that, like, I’m not here to destroy your life. I just – I just wanted to move on at the time*”. Ms Higgins explained that she was not processing what had occurred to her at that stage. She had to continue to work with Mr Lehrmann, and he was a more senior person in the office who knew everyone, whereas she was new to the office (T641.23-30).
516. Network Ten invites the Court to accept that explanation as credible and consistent with what might be expected from a sexual assault survivor in the days immediately following an assault, in circumstances where she worked with the assailant, had an ongoing work relationship with him to manage, was still processing what had happened, and had reached no conclusion as to whether the matter would be taken further. At its highest, when understood in that context, it is “counter-intuitive” evidence that is of neutral significance: *MA v R* [2013] VSCA 20, [22]-[23]

***Fiona Brown***

517. Ms Brown gave evidence at the tail end of the trial. Her evidence has to be treated with some caution.
518. First, she conceded, as was obvious from her evidence, that her notes were selective, far from complete and not contemporaneous. Examples of matters that were not included in Ms Brown's notes include:
- (a) the meeting with Chris Payne on or about 26 March 2019: T2056.33;
  - (b) that an ambulance had been called: T2061.40;
  - (c) Ms Higgins having been found naked: T2063.16-17; and
  - (d) the call with Senator Reynolds on 26 March 2019: T2073.5.
519. *Secondly*, at times, Ms Brown professed to have a recollection of matters not recorded in her notes, including matters not raised in her record of interview with police in March 2021 (Exhibit #61) (T2031.6-10).
520. *Thirdly*, Ms Brown had a general tendency to understate the obvious significance of what she had learned about the incident on 22-23 March 2019. It is difficult to accept her evidence that she thought that the possibility there had been sexual intercourse or a sexual assault or that a crime had been committed was no more than something that could "not be ruled in, and could not be ruled out": T2053.27-28; T2055.42-43, T2060.20-22; T2090.8-9, T2090.11-12, T2090.38, 2091.43-44; 2092.1-3.
521. Objectively, the accumulation of matters known to Ms Brown or understood by her to have occurred in March 2019, pointed to the likelihood that sexual intercourse had taken place, and that it may well have been an assault:
- (a) Mr Lehrmann and Ms Higgins' age: T2053.40.
  - (b) They had entered through the security checkpoint: T2040.27-28.
  - (c) They came back intoxicated: T2040.30.
  - (d) They had drunk whisky (which she thought was unusual): T2050.31-39; T2050.44-45.
  - (e) Ms Higgins had been subsequently found naked and passed out on a couch: T2040.40.

- (f) Ms Higgins had been offered an ambulance and medical assistance: T2040.42-43.
  - (g) Mr Lehrmann had left Parliament House at about 2:30am on 23 March 2019: T2040.34-35.
  - (h) Ms Higgins left Parliament House at about 10am on 23 March 2019: T2040.45.
  - (i) Mr Lehrmann left without talking to Ms Brown and handed his pass to someone else. This was behaviour that Ms Brown found unusual: T2054.40-44.
522. Ms Brown agreed that, having heard or become aware of those matters, she was worried that something terrible had happened (T2041.4-5). She conceded at least that it had entered her mind that there had been non-consensual sex: T2055.5-47; T2058.42-44.
523. The matters most relevant to the determination of the facts in this proceeding that had been documented in Ms Brown's notes at the time, and to which she had an independent recollection were that:
- (a) When asked about what else he did in the office, Mr Lehrmann said that he "*didn't wish to get into that*" (T2052.4-5). Ms Brown's evidence was that she found that answer concerning (T2052.7-9).
  - (b) Mr Lehrmann said that he and Ms Higgins "*chatted*" and they went into the "*outer office*" or the "*general area*" (being the support staff area): T2051.31-38.
  - (c) Mr Lehrmann said that Ms Higgins was "*fine*" when he left: T2054.21-29.
524. It is otherwise important not to overstate the significance of Ms Brown's evidence as to the matters in issue in this proceeding. She is not the applicant, and ultimately her management of the allegations in March 2019 is, in our submission, simply not in issue, save to the extent that it has a bearing on the assessment of Ms Higgins' credit in relation to the allegation of rape.
525. Hence, whether Ms Higgins told Ms Brown that she remembered Mr Lehrmann being "on top of me" (T2096.30-31) at their first or second meeting is immaterial. On one view, Ms Brown's account (that she was told at the second meeting (Brown, [87])), favours Network Ten. In those circumstances, Mr Lehrmann's case theory that Ms Higgins said she had been sexually assaulted at the first meeting to save her job, falls apart. Importantly in respect of that case theory, Ms Brown's evidence was that there was never any risk to Ms Higgins' job (T2157.17-20).



525A. Similarly, Mr Lehrmann’s submissions at [137], [138] of the ACS that it may be inferred that Ms Higgins used her media management skills to, in effect, make up a narrative about having been raped because she was humiliated and embarrassed about being found naked or to “obfuscate the truth and excuse her own conduct” should be rejected. Apart from the extremity of that submission, it is simply contrary to the evidence of what occurred after Ms Higgins’ first meeting with Ms Brown (as developed below) and was never put to Ms Higgins in cross-examination.

### ***E.3.1 Fiona Brown’s First Meeting with Mr Lehrmann – 26 March 2019***

526. The notes prepared by Fiona Brown (Exhibit #R87: CB64) record that she had a meeting with Mr Lehrmann at around 11am on 26 March 2019. The purpose of the meeting was to discuss him “*finishing up today*” and it was agreed that he would not have to come into the office but would remain available during his “*work out*” period (p2302). Mr Lehrmann agreed that he had a discussion with Ms Brown about finishing up on Friday 29 March 2019, the week before the next Parliamentary sitting day (2 April 2019). They discussed whether Mr Lehrman had any outstanding work matters to do (T327.24-47). Mr Lehrmann was unable to recall many of the matters recorded in Ms Brown’s notes of their discussion (T328-329). His recollection was different from Ms Brown’s notes; in particular he did not agree that they had agreed he would finish up that day (T328.1-8).

### ***E.3.2 Fiona Brown’s communication from Lauren Barons – 26 March 2019***

527. At around 11:45am on 26 March 2019, Ms Brown received a call from Lauren Barons from the Department of Finance who told her that she had something sensitive to raise. Ms Brown’s note records some of the things she was told by Ms Barons, including that Mr Lehrmann and Ms Higgins had entered Parliament House in the early hours of Saturday morning intoxicated, that Mr Lehrmann had left the office around 2:30am and that a security guard had found Ms Higgins “*naked and passed out*”. Ms Brown gave evidence in cross-examination that she thought that sexual activity may have occurred in the Ministerial suite on 23 March 2019 (T2042.17-20). Ms Brown’s prevarication on this topic reflects poorly on her credit. It is the ineluctable inference from what Ms Barons said.

528. Ms Brown’s note of her conversation with Ms Barons records that Ms Higgins was offered an ambulance and medical assistance which she declined. On any version of

events, that was not accurate. The note records that “*DPS were preparing a report*” and that because the “*office was inappropriately accessed*” Mr Lehrmann and Ms Higgins would be given the option to explain what happened. The note records that a breach of the Ministerial Staff Code of Conduct would have to be referred to the PMO. The note also records “*put the facts, give time to respond, offer to work from home.*” None of Ms Anderson's incident report (Exhibit #R67), Mr Fairweather's incident report (Exhibit #R70), nor the Parliamentary Security Services Executive Summary of Events (Exhibit #R86) refer to an ambulance being called or medical assistance being offered to Ms Higgins.

### ***E.3.3 Fiona Brown's Second Meeting with Mr Lehrmann – 26 March 2019***

529. At around 12pm on 26 March 2019, Ms Brown asked Mr Lehrmann to meet with her. Ms Brown's note records the following matters (Exhibit #R87: CB64, pp 2303-2304):

- (a) Ms Brown said that she had something serious to raise regarding his access to our “*MO*” [Ministerial Office] over the weekend. She told Mr Lehrmann that she had been advised that he and another person had arrived in the early hours of Saturday morning inebriated and could he please explain. Mr Lehrmann “*said he didn't agree with that he was intoxicated*”. Ms Brown asked him who he came with and Mr Lehrmann said “*Brittany*”.
- (b) Ms Brown's note records: “*I asked why he attended the office at that time, he said to drink his whisky*”. The note goes on to record: “*I said so you're telling me that came (sic) specifically to the office at 130am to drink whisky he said yes. I asked how much he drank, he said 2 glasses*” (p 2302).
- (c) Ms Brown informed Mr Lehrmann that he had breached “*Min Wing security protocol and the ministerial staff standards and I would have to report this to the PMO.*” (p 2302).
- (d) Ms Brown's note records: “*I asked him what he did whilst he was here and he said they chatted. I asked what part of the office he accessed and he said the office, I asked what else did you do whilst in the office, he said he didn't wish to get into that.*” (pp 2302-2303).
- (e) Ms Brown asked Mr Lehrmann if he had accessed any documents or secured areas, to which he said no. The note records other matters that were discussed, and that Ms Brown asked that he leave the office immediately. Mr Lehrmann is

recorded as asking for 15 minutes to collect his things. Ms Brown agreed, but said that she wanted to see him prior to his departure for a further talk and she wanted to walk with him to retain his security pass. After 5-7 minutes she went to check and Mr Lehrmann was gone.

530. Mr Lehrmann's evidence regarding his conversation with Ms Brown is considered in [56] above. He agreed that he told Ms Brown that he had come back to the suite to drink his whisky or to have a drink and said that was a lie (T352.41-43). He recalled her expressing incredulity and asking him to confirm his explanation about drinking. Mr Lehrmann said he responded and Ms Brown asked how much he drank. Mr Lehrmann agreed that he had said two glasses (T353.18-40). Mr Lehrmann recalled Ms Brown asking him what else he did in the office, but he did not recall telling her that he did not want to get into it (T357.16-21).
531. Ms Brown's note then records a text exchange between Ms Brown and Mr Lehrmann. Those messages are Exhibit #R33 (CB65) and are referred to in section [77] above.
532. There are remarkable features about this account. If it is to be accepted, then Ms Brown did not disclose to Mr Lehrmann that Ms Higgins had been found naked and passed out in the office. Nor did she press Mr Lehrmann when he said he did not want to get into what else he had done while in the office with Ms Higgins. Nor did Ms Brown ask Mr Lehrmann whether he and Ms Higgins had sexual intercourse, despite her concern they had. It beggars belief, given what Ms Brown knew, that she would not have put two and two together, and it is beyond strange that she did not think to insist that Mr Lehrmann give a proper account in respect of his conduct, and in particular to enquire about why he had left Ms Higgins in a naked and passed out state in the office. If her account is correct, then it discloses a serious dereliction on her part. She did not follow Ms Barons' advice to "*put the facts*". Rather, she omitted the key facts of which she was aware.

#### ***E.3.4 Meeting between Ms Higgins and Ms Brown – 26 March 2019 (First Meeting)***

533. At around 1:30pm on 26 March 2019, Ms Higgins met with Ms Brown. Ms Brown's notes record that she advised Ms Higgins that she had received advice that she (Ms Higgins) and Mr Lehrmann had accessed the Ministerial wing and office after hours on the Saturday. Ms Brown asked Ms Higgins what time she arrived at the office. Her notes record Ms Higgins' response (Exhibit #R87: CB64, p 2303):

*“...she said she didn’t remember accessing the office, she said she’d been out and was inebriated, she remembered coming through the security checkpoint in the min wing basement, she remembered being woken up but didn’t know which time and that she was semi-naked, she remembered waking up at about 8am on Saturday morning on the couch.*

*I asked if she was alright, she said yes. I asked her was there anything else she recalled she shook her head to say no, she said I am responsible for what I drink and my actions. I offered the EAP, provided her a print out off the M&PS site and explained the independent support and service the EAP provides.”*

534. It was only after Ms Higgins had given that explanation that Ms Brown appears to have explained that entering the wing inebriated was a security breach and she would need to advise the PMO. The note records Ms Higgins as saying: “yes” and “*I understand*” (Exhibit #R87: CB64, p 2303). Ms Brown’s notes also disclose that she asked Ms Higgins if she was alright and after checking her desk later after the meeting and discovering that she was gone, Ms Brown called Ms Higgins. Her note records that “*I called her and she sounded upset, I asked where she was, she said sitting in the car, she had been crying...*” (Exhibit #R87: CB64, p 2304).
535. Ms Higgins gave evidence about her conversation with Ms Brown. She said that it was noteworthy that Ms Brown was in the office because it was not a sitting week (T641.35-37). Ms Higgins was aware that Ms Brown had indicated that she needed to speak to her and Mr Lehrmann, and from that she knew immediately that Ms Brown wanted to discuss the rape. Ms Higgins said she was “*just gearing up to talk to her*” while Mr Lehrmann went in to speak to her (T641.45-642.3).
536. Ms Higgins continued to work at her desk. She observed Mr Lehrmann leave his meeting with Ms Brown, and she saw him go back to his corner and start putting things in a box. She thought that Mr Lehrmann had been fired from the way he came out of the meeting and the way he was half throwing things into a box. It gave her the impression that he had been fired or quit (T642.14-21).
537. Ms Higgins was then called into Ms Brown’s office. She said that Ms Brown said to her: “*I had been made aware that there was a security breach over the weekend. That the office had been accessed after hours, and that it was in breach of ministerial standards*” (T642.31-36). Ms Brown then asked Ms Higgins what happened. Ms

Higgins told Ms Brown that he had gone out and that she was so drunk and inebriated that she could not remember coming back in. Ms Brown said something to the effect of: “*you don’t remember?*” and looked confused (T642.38-41).

538. Ms Higgins’ described her conversation with Ms Brown (T642.43):

*“At that point, it was like I had finally kind of – it was the first time I had vocalised it, and I said – I said that he was on top of me, I said I was barely lucid. And it was the first I had ever disclosed the rape to someone. I didn’t use the word rape in that first meeting. It was, like a confronting word...”*

539. Ms Higgins said that she told Ms Brown that she went out in a group to The Dock, she and Mr Lehrmann came back to the office, she was completely inebriated, she did not remember coming back in, she remembered Mr Lehrmann on top of her and her recollection is that she said the word “*assault*” (T643.24-28).

540. Ms Brown was shocked and upset and said: “*Oh God*” (T643.30-32). Ms Higgins said that it was like it was the first time that Ms Brown had found out there was a sexual element to what had occurred. Her evidence was that Ms Brown did not tell her that she had been found naked (T643.34-39), despite that being a matter that had been earlier reported to Ms Brown by Ms Barons.

541. Ms Higgins was hysterical and crying at that point (T643.43-44). Ms Brown gave her tissues. She said that at that point the meeting broke down and Ms Brown said that Ms Higgins could contact the Employee Assistance Program (EAP). Ms Brown gave Ms Higgins a brochure for the EAP, which had a number to call for support (T643.43-47). Ms Brown’s evidence as to her observations of Ms Higgins was not frank, and was indicative of what appeared to be a general antipathy towards her. In a fairly transparent and insensitive attempt to play down Ms Higgins’ reaction, Ms Brown described how Ms Higgins had “*a little bit of water in her eyes*” and that she gave her a tissue “*for the watery eye*” (T2058.20.29).

542. Ms Higgins said that Ms Brown told her something to the effect that she would have to let the Prime Minister’s Office know (T644.1-3).

543. Ms Higgins also gave evidence that Ms Brown told her that Mr Lehrmann had come back to the office for whisky and that Ms Higgins had not been able to sign her name. Ms Higgins found that odd, because she had had the impression from Ms Brown’s initial comments that she did not know that she had been inebriated. She also thought

it was odd that Ms Brown had started the meeting as if she was just discussing a security breach, when in fact she appeared to know that Ms Higgins was inebriated and could not sign her own name. These things caused Ms Higgins to suspect that Ms Brown was not being honest with what she actually knew about what had occurred (T644.5-15). In that respect, she was clearly correct, even on Ms Brown's version of the meeting.

544. To Ms Higgins' recollection, Ms Brown showed her the ministerial statement of standards and reminded her of the content and that her conduct was a breach of the standards (T644.22-32).
545. The meeting concluded. Ms Higgins was really upset and Ms Brown offered for Ms Higgins to go home for the day. Ms Higgins believed that she went home (T644.37-41).
546. Ms Higgins also gave evidence about stepping into the broom closet opposite the Ministerial Suite on her way out to call the number on the EAP brochure. She called the number for the purpose of making an appointment to see a psychologist. The substance of what she was told was that she could not get to see a psychologist for two months and Ms Higgins thought it would be too late as that would be around the time of the likely election (T644.43-645.16).
547. Ms Higgins' evidence was that she disclosed the assault in that conversation, using the words, "*he was on top of me*" and "*I was barely lucid*". In cross-examination, she was adamant that she told Ms Brown about the assault on this day (T992.24-26). It is likely that Ms Higgins' account is correct. This will have been an extremely confronting conversation for her. Her evidence in respect of it was clear, consistent and unshaken in cross-examination (see: T781.20-782.11).
548. Ms Brown's evidence, on the other hand, relied entirely on notes that were likely not truly contemporaneous, but were rather prepared over a series of days, and which were certainly, on Ms Brown's own admission, selective and far from comprehensive, missing (on her account) many relevant details. Nothing, however, ultimately turns on this. Ms Brown agrees that Ms Higgins used the words she recalls, but places them in the subsequent meeting on 28 March 2019. One thing appears clear: Ms Brown knew or strongly suspected by the end of the meeting on 26 March 2019 that something untoward of a sexual nature had occurred. She knew that Mr Lehrmann and Ms Higgins had been in the Ministerial Suite without authority on 23 March 2019, each of them

inebriated; she knew that Ms Higgins was later found naked and passed out; she had been told (it seems wrongly) that Ms Higgins had been offered an ambulance; she knew that Mr Lehrmann had alleged that he had drunk whisky but had otherwise declined to explain his conduct, saying that he “did not want to get into” what else he had done; she knew that Mr Lehrmann had left Ms Higgins rather than ensuring that she got home safely; and she knew that, at the meeting on 26 March, Ms Higgins was distressed to the extent that Ms Brown appears to have changed tone to one of probing for further information and being generally concerned. If she did not strongly suspect that something untoward of a sexual nature had occurred, she must have been blind to that accumulation of obvious signs: any objective person knowing those matters would have thought it more likely than not that sexual activity had occurred, and have strongly suspected the possibility of an assault. In any event, however, Ms Brown then had two telling conversations with Mr Payne and Senator Reynolds.

549. Ms Brown said that she called Ms Higgins later and asked where she was. Ms Higgins told her that she was sitting in her and that she had been crying (Brown, [66]).

***E.3.5 Ms Brown’s conversation with Chris Payne – 26 March 2019***

550. Mr Payne gave evidence about a conversation with Ms Brown concerning the events of 22-23 March 2019 at some point early in the week commencing 25 March 2019. He thought the conversation had occurred on the Monday or Tuesday, or possibly on the Wednesday 27 March 2019 (T1420.4-19). He was clear, however, that the conversation occurred before Mr Lehrmann had left the office, which means it likely occurred on 26 March, because that was the day when Mr Lehrmann was told to pack his belongings and leave. Given Mr Payne’s evidence about the timing of his conversations with Ms Brown and Ms Higgins, and the content of Ms Higgins’ subsequent conversation with Major Irvine on Wednesday, 27 March 2019 (which appears to refer to matters discussed with Mr Payne) it is almost certain that Mr Payne’s conversations with Ms Brown and Ms Higgins occurred on Tuesday, 26 March 2019 or at the latest on Wednesday, 27 March 2019. Ms Brown professed no recollection of the conversation; evidence that in Network Ten’s submission has to be rejected as untruthful having regard to the memorability of its contents.
551. Mr Payne’s evidence was that his conversation with Ms Brown occurred in the DLO room in the Ministerial Suite around lunchtime. Mr Payne said the conversation

occurred before Mr Lehrmann had left the office, and after a conversation with Ms Brown about Mr Lehrmann's departure. He said that Ms Brown told him that Mr Lehrmann was no longer employed and requested that Mr Payne initiate the necessary administrative action to finalise his employment (T1420.36-45).

552. After the conversation with Ms Brown about Mr Lehrmann's departure, Mr Payne had a further conversation with her (T1421.1-6). He said that Ms Brown came into the room and said: "*you're never going to believe this*".
553. Ms Brown told Mr Payne that she had had a conversation with someone and found out that Ms Higgins and Mr Lehrmann had returned to the Ministerial wing over the weekend and, at some point later on, Ms Higgins had been found in a state of undress on Senator Reynolds' couch. Mr Payne distinctly remembered Ms Brown using the words "*state of undress*" (T1420.24-31). He was surprised and asked if there was anything Ms Brown needed him to do with regards to the incident. Ms Brown said not at that time. Mr Payne said that Ms Brown asked him if the incident would be something which would need to be reported to Defence from a security standpoint, and Mr Payne said that he did not believe so (T1421.10-22).
554. Mr Payne said that Ms Brown made a comment that she was going to attempt to obtain access to CCTV footage to understand what had happened in the lead up to Mr Lehrmann and Ms Higgins being in the office (T1421.26-41; T1435.1-19). In cross-examination, he disagreed that he was confusing this part of the conversation about CCTV with unspecified subsequent accounts he had heard (T1435.18-23). Mr Payne described Ms Brown as "*frustrated*" (T1421.43-45).
555. It is notable that Ms Brown's notes are not a complete or comprehensive record of events. For example, there is no record of her conversation with Mr Payne on 26 March 2019. This sheds very significant doubt upon the reliability of her notes as a whole. The reference to CCTV footage was particularly notable. Ms Brown's denial of having raised CCTV with Mr Payne or at all simply has to be rejected as untruthful in light of Mr Payne's clear and credible evidence.

### ***E.3.6 Senator Reynolds – 26 March 2019***

556. Major Irvine gave evidence about contact with Senator Reynolds on 26 March 2019 (T1208.30). She said that she received a phone call from Ms Brown telling her that the Minister needed to call her as soon as possible (T1208.34-37). Major Irvine waited for



Senator Reynolds to arrive because she considered Ms Brown's call to be urgent. She observed Senator Reynolds call Ms Brown back.

557. After Senator Reynolds had taken the call, she hung up and said to Mr Wotton: "*Have you spoken to Bruce or have you had any conversations with Bruce?*" Mr Wotton said no, and Senator Reynolds told him: "*You're not allowed to talk to Bruce*" (T1209.8-10).
558. It may be inferred from Major Irvine's evidence that Ms Brown had informed Senator Reynolds on 26 March 2019 of what she had been told that day about the incident on 23 March 2019, including that Mr Lehrmann had been in the Ministerial Suite with Ms Higgins, and had left Ms Higgins there passed out and naked. Indeed, it would be extraordinary if Ms Brown had not reported what she knew to her Minister.

### ***E.3.7 Ms Higgins' messages with Mr Dillaway – 26 March 2019***

559. At around 1:57pm on 26 March 2019, Ms Higgins sent the following text message to Mr Dillaway: "*So I think I may not continue to be employed with Linda*" (Exhibit #R99: CB15, p 692; Exhibit #R4: CB56, p 2254). Ms Higgins said that she thought she sent this message a couple of hours after her meeting with Ms Brown (T646.1-2). Ms Higgins said that after the meeting with Ms Brown, she still thought that she might get fired.
560. Ms Higgins' evidence was that once she had vocalised the rape to Ms Brown, it all finally came out. She described it as being like the genie was out of the bottle and she started to feel empowered to start telling people in her life about what had occurred (T646.10-17).
561. At 1:59pm on 26 March 2019, Mr Dillaway responded: "*What? Did something happen?*" and Ms Higgins replied at 2:05pm: "*Yeah, it's pretty bad. I genuinely don't know how it's going to play out/how I want it to play out*" (Exhibit #R99: CB15, pp 692-693). Ms Higgins explained that having vocalised what had happened to Ms Brown, she had started to think about going to the police and reporting what had happened (T646.32-36).
562. At 2:09pm, Ms Higgins sent a further text message to Mr Dillaway: "*So Friday night how I ended up in the Ministerial office it didn't play out how I made out. I don't remember getting there at all, vaguely remember Bruce being there and then I woke up in the morning half dressed by myself in the Ministers office on Saturday morning*"

- (Exhibit #R99: CB15, p 694). Ms Higgins explained that Mr Dillaway was someone she used to date and was cognisant of his feelings when making her disclosure to him. She described the process as inching her way into putting it all out there (T647.7-11).
563. Mr Dillaway said that he was curious when he received that message, and messaged Ms Higgins back: *“Was it just you and Bruce who went back there or a group of people? Did you hook up in there or did someone take advantage of you?”* (Exhibit #R99: CB15, p 694).
564. Ms Higgins replied at 2:23pm: *“Yeah, it was just Bruce and I from what I recall. I was barely lucid. I really don't feel like it was consensual at all”* (Exhibit #R99: CB15, p 695). Ms Higgins explained that she wasn't in any doubt at that stage that the intercourse had not been consensual, but expressed herself in this way to Mr Dillaway because she was still trying to be *“sensitive and soft with [her] language”*. She thought that the word “rape” was so confronting and was not ready to talk about what had occurred in those terms, even to herself (T647.28-37).
565. Mr Dillaway said that upon receiving that message, he thought something sexual had happened (T1220.4-5). Further messages were then exchanged between Mr Dillaway and Ms Higgins (Exhibit #R99: CB15, p 695-697).
566. At 2:27pm, Ms Higgins said: *“I just think if he thought it was okay, why would he just leave me there like that”*. She explained that at that stage, part of her wanted to give Mr Lehrmann the benefit of the doubt or did not want to believe what had happened. She said she was thinking that maybe Mr Lehrmann had not heard her say “no” or that she had led him on somehow, but even giving him the benefit of the doubt she could not understand how he could have thought he was having consensual sex when she was so drunk or how he could leave her on the couch when she was unable to get up (T648.1-7; T980).
567. Ms Higgins' messages to Mr Dillaway at this time show her processing in real time what had happened to her (T648.8-10).
568. At 2:31pm, Ms Higgins said: *“Fiona our COS knows. She followed up on the security report about it...”*. Ms Higgins said that she was conveying to Mr Dillaway that Ms Brown knew about the rape (T648.14-19). That message is consistent with Ms Higgins' account of what had happened during the meeting with Ms Brown.

569. In one message, Ms Higgins told Mr Dillaway that she had spoken to her father and he was flying down on Friday (Exhibit #R99: CB15, p694; Exhibit #R4: CB56, p 2255). Ms Higgins could not recall when she spoke to her father (T647.13-15). She also accepted that she had not told her parents, notwithstanding her message to Mr Dillaway that she had. She told Mr Dillaway this because she did not want to put pressure on him and make him think that he was the only person besides Ms Brown at that point who knew about what had occurred. She knew her father was coming to Canberra that weekend and had intended to try to tell him (T649.1-9).
570. Mr Dillaway and Ms Higgins then had a telephone conversation about the subject matter of their message exchange. Mr Dillaway asked some more questions, including “were you raped”. Ms Higgins became upset, started to cry and the conversation ended.
571. Mr Dillaway sent a message apologising for upsetting Ms Higgins (Exhibit #R99: CB15, p 697) (T1220.7-31; T1258.15-18). By reference to the messages that followed between them (Exhibit #R99: CB15, pp 698-699), Mr Dillaway’s evidence was that he understood that Ms Higgins had been sexually assaulted and that her greatest desire was that she did not want a soul to know about it. He promised he would not tell anyone and offered her support (T1221.22-27).
572. Ms Higgins explained that she was terrified of becoming a story. She said that her job meant everything to her and she wanted to keep everything on track. She said that she wanted to report to police but in a way that could somehow protect her privacy. She wanted to do it with the support of work (T68.36-43).
573. In cross-examination, Mr Dillaway said that he had no cause for concern that something untoward had happened in Parliament House until his communications with Ms Higgins on this day (T1245.36-39). That is unsurprising given Ms Higgins’ evidence about initially wanting to shield Mr Dillaway from what had occurred.
574. These messages by Ms Higgins are telling. As she explained in the witness box, she was processing what had happened to her in real time (T647.45-648.10):

*“I think there was still, like, a part of me that wanted to give him the benefit of the doubt or didn’t want to believe what had happened. And so it was continuing, like, this line of thinking of, like, well, maybe he didn’t hear me, or maybe – I don’t know – maybe I led him on somehow or – and then – and then I was kind of getting to the point was where I was starting to continue to go*

*through it and process it and was like even if he didn't hear me – even if he didn't hear me say “no” or “stop” or whatever, how could he see me in this state, see me so drunk, and, after he, in his mind, has consensual sex with me, how could he leave me on that couch unable to get up. Even in his mind, if I give him the benefit of every doubt, how could he leave me there like that? I just – and so I was going through all the steps and trying to, like, give him the benefit, and I – I couldn't. And so I was putting it, I guess, with Ben, that I was putting it into messages and processing it in, like, real time, I guess ...”*

575. The messages and that evidence are, again, completely inconsistent with Mr Lehrmann's case theory. A person who has fabricated a rape allegation in order to save their job is hardly likely to engage in the form of self-doubt and blame evident in the messages and that evidence. They are precisely the kinds of sentiments one, unfortunately, expects to hear from a survivor of sexual assault, interrogating themselves to see whether they brought the assault upon themselves, or whether they could have misinterpreted what happened to them.

#### ***E.3.8 Ms Higgins' message to Matthew Higgins and conversation – 26 March 2019***

576. At 7:17pm on 26 March 2019, Ms Higgins sent her father, Matthew Higgins, a text message in which she said: *“Hey Dad, I'm fine, but just wanted to give you a heads-up there was an incident with someone at work being inappropriate”* (Exhibit #R882: CB 21, p 1925).
577. Mr Higgins' evidence was that, following receipt of that message, he had a conversation with Ms Higgins before travelling to see her in Canberra, but his daughter did not want to talk about the incident and said they would have a chat when he came down (T1468.1-32). Ms Higgins' evidence was that she told her father that she was: *“having a really hard time”*. She also said that she was excited to see him. She may have said that something bad had happened at work (consistent with her message), but that they could talk about it later.
578. In the end, she just could not tell her father during his visit (T649.11-31).

#### ***Messages with Ms Brown – 26 March 2019***

579. At 5:10pm on 26 March 2019, Ms Brown sent Ms Higgins a text message: *“Hi Brittany, checking in to see how you are? I'm here if you need anything. Happy for you to work from home tomorrow or come into the office. Let me know what you'd like to do. Best,*

- Fiona*” (Exhibit #R4: CB56, p 2258: message 15049). At that point, Ms Higgins understood that Ms Brown was being supportive and she appreciated it (T650.43-45).
580. At 5:36pm on 26 March 2019, Ms Higgins replied to Ms Brown: *“Hi Fiona. Sorry I missed your call. I’m doing fine, just vocalising things in such a way is quite confronting. I’ll be in the office tomorrow – honestly I enjoy being busy. Plus there is plenty of work to be done for campaign prep and a front desk that needs to be covered”* (Exhibit #R4: CB56, p 2258; message 15053).
581. Ms Higgins explained that her reference to *“vocalising things in such a way”* was to the fact that she had told Ms Brown that she had been assaulted by Mr Lehrmann. She said it was her stating to Ms Brown that the fact she had told her in person was confronting and it was overwhelming (T651.35-38). That is the obvious meaning of her message. It supports Ms Higgins’ account of what had happened in the meeting with Ms Brown.
582. Ms Higgins explained that she did not want to be a problem in the office and was trying to make things seem as normal as possible, like she was a team player who would be back (T651.45-652.2).
583. Conversely, Ms Brown gave evidence that she understood what Ms Higgins meant by this was that she was embarrassed about having been in the office drunk and was found naked (T2074.31-35). Such an interpretation should be rejected in light of Ms Brown’s concession that she thought sexual intercourse may have occurred.
584. Ms Brown replied by text message at 5:55pm: *“Hi Brittany – I understand completely. See you tomorrow!! Call if you need to talk. Kind regards Fiona”* (Exhibit #R4: CB56, p 2258; message 15054). Ms Higgins explained that she understood Ms Brown to be saying that if she wanted to talk about the assault she was offering to talk to her about it (T652.4-15). Again, that is the obvious meaning of Ms Brown’s message, and is consistent with Ms Higgins’ account of what had earlier occurred between them.
585. Mr Wotton recalled travelling to Brisbane with Senator Reynolds and Major Irvine, where Senator Reynolds was attending a Cabinet meeting. He said that Major Irvine got a call to pick up Senator Reynolds as soon as the meeting was finished. Whilst Major Irvine was doing that, he got a call from Mr Lehrmann (Wotton, [39]-[40]: CB1084).
586. Mr Wotton said that Mr Lehrmann told him, in substance, that he was leaving the office and it was time for him to go off and do other things. Shortly afterwards, Mr Wotton

found out more information about the circumstances of Mr Lehrmann's departure (Wotton, [41]-[43], CB1084).

#### **E.4 Wednesday, 27 March 2019**

587. Major Irvine gave evidence that she returned to Parliament House from Brisbane on Wednesday or Thursday of the week commencing 25 March 2019 (T1179.21-33).
588. She arrived at work that morning and Mr Payne informed her that there had been an incident in the office (T1179.34-42). Major Irvine's evidence was that Mr Payne said that: *"there had been an incident in the office. It's quite serious. It involved Bruce and Bruce doesn't work here anymore"*. She knew that the incident involved Ms Higgins because Mr Payne may have mentioned it (T1179.44-47).

##### ***E.4.1 Ms Higgins' conversation with Major Irvine (Passport Office) – 27 March 2019***

589. Major Irvine noticed that Ms Higgins was very down. She had to go to the passport office and asked if anyone wanted to walk with her. Major Irvine said that she was trying to invite Ms Higgins because she was concerned about her and looked very sad (T1180.15-19). Ms Higgins accepted the invitation and they had a conversation on the walk to the passport office.
590. When walking to the passport office, Major Irvine asked Ms Higgins if she was okay. Ms Higgins said that she was not okay and asked Major Irvine if she had heard what happened. Major Irvine said no.
591. Major Irvine's evidence was that Ms Higgins said: *"On the weekend Bruce, Austin and Lauren and I went to 88. Bruce and I were in an Uber to go home and he wanted to come back to Parliament House. He had some whisky to show me or something. When we came back to Parliament House, I fell asleep on the couch and I woke up and he was on top of me"* (T1180.41-46).
592. Major Irvine then said: *"okay, was it..."* and then she paused.
593. Ms Higgins said: *"Yes, definitely"*.
594. Major Irvine understood Ms Higgins to be saying that it was an assault (T1180.46-47). She asked if Ms Higgins had spoken to Senator Reynolds or Ms Brown and Ms Higgins told her that, at that stage, she had spoken to Ms Brown but not yet spoken to the Minister.

- 594A. In passing, at [19] of the ACS, Mr Lehrmann submits that if Major Irvine’s evidence about Ms Higgins having told her that “*she and Lehrmann returned to APH because Bruce wanted [to] drink his whiskey*” is accurate, it undermines the entirety of Ms Higgins’ “*narrative*” that she had no idea she was being taken to APH. That submission should be rejected for a number of reasons. It does not reflect the evidence that Major Irvine gave about what she was told by Ms Higgins (as to which, see [591] above). In any event, the submission is misleading because: (a) Ms Higgins had already been told by Ms Brown that Mr Lehrmann had come back to the office for whiskey (see [543] above), (b) Ms Higgins’ evidence was that she told Major Irvine what Ms Brown had told her about whisky (see [599] below), and (c) when Major Irvine asked Mr Higgins why she had come back to Parliament, Ms Higgins disclosed what Ms Brown had told her about Mr Lehrmann saying he came back to the office for whisky (see [600] below).
595. Major Irvine recalled that Ms Higgins also told her that she had either booked to see the police or was going to book to see the police (T1181.1-13, T1200.34-1201.25).
596. Major Irvine also told Ms Higgins that “*this is big news*” to which Ms Higgins replied: “*Yes, with the election so close*” (T1181.11-17).
597. Major Irvine also recalled that Ms Higgins talked about CCTV footage, either that it would show how drunk she was or she wanted to see it or someone had seen it and told her how drunk she was (T1181.19-28).
598. The conversation ended with Major Irvine saying that she was sorry and that she wanted Ms Higgins to press it as “*it’s really bad what’s happened*”. Major Irvine reassured Ms Higgins and told her that she was there if she needed to talk (T1181.30-32).
599. Ms Higgins gave evidence about her conversation with Major Irvine. She recalled that the conversation occurred when they were walking together. She recalled telling Major Irvine that she was really drunk, that she ended up back at Parliament House with Mr Lehrmann and that, in substance, she had been assaulted. She recalled telling her about what Ms Brown had told her about whisky.
600. Ms Higgins said that Major Irvine had asked her why she had gone back to Parliament and she disclosed what Ms Brown had told her, namely that Mr Lehrmann apparently said that he came back to the office for whisky (T653.24-654.4). In cross-examination, Ms Higgins confirmed that as at 1 April 2019 she did not know the name of the second bar (88mph) that she went to. That is also what she had told police when she first met

with FA Thelning and FA Cleaves (T1387.30-31). Her recollection of the conversation with Major Irvine was that she had told her that they had gone to “a club” or “second venue”. She explained that she did not know the name of the venue until she Googled it much later. The explanation for the inconsistency between Major Irvine’s recollection may simply be that she learned of the name of the venue later on, or that Major Irvine mistakenly recalled that Ms Higgins had referred to the venue by name because she already knew on the night that that’s where they were going (T1178.27-28). Ms Higgins was consistent in her evidence about not knowing the name of the venue until later, and was consistent with her evidence that she had never been there (and so the name of the venue when she later found out did not ring any bells) when someone else’s photographs that had been shared on a WhatsApp group were put to Ms Higgins in cross-examination (T777.1-778.3; Exhibit #38).

601. In any event, Mr Lehrmann’s theory, that Ms Higgins lied about not knowing the name of the club, lacks coherence. Ms Higgins was very focused on the availability of CCTV footage from The Dock and Parliament House. If CCTV footage had been available from 88mph, it may well have shown what Ms Gain said occurred, namely Ms Higgins falling over drunk, and Mr Lehrmann touching and pushing her. On the objective evidence, CCTV footage from 88mph was much more likely to assist Ms Higgins’ version of events than Mr Lehrmann’s.
602. When Major Irvine asked her why she had gone back to Parliament, Ms Higgins told her that Mr Lehrmann had said he needed to go back and that she had no reason to be back there (T654.6-8).

#### ***E.4.2 Meeting between Ms Higgins and Ms Brown – 27 March 2019***

603. Ms Brown’s note records that she met with Ms Higgins again on 27 March 2019 and offered her support if she wanted to lodge a complaint (Exhibit #R87: CB64, p 2304). That note can only rationally be understood as an acknowledgment by Ms Brown that, as at 27 March 2019, she knew or strongly suspected that something untoward had happened.

#### ***E.4.3 Meeting with Mr Dillaway – 27 March 2019***

604. On 27 March 2019, Mr Dillaway came up from Melbourne to visit Ms Higgins in Canberra (T1221.41). Mr Dillaway sent a message to Ms Higgins at 6:45pm: “Arrived in your hood” (Exhibit #R99: CB15, p 706).



605. Mr Dillaway and Ms Higgins went for a drink at the bar across the road from where Mr Dillaway was staying at the Burbury Hotel. They returned to Mr Dillaway's hotel room and he asked Ms Higgins questions about the events of the previous weekend.
606. Mr Dillaway said that: "*my recollection of that is she was crying a lot, sobbing, and I was somewhat, you know, holding her and supporting her. She was kind of, you know, very upset and appeared very broken*" (T1222.21-36).
607. In cross-examination, Mr Dillaway agreed that Ms Higgins stayed for at least one night with him at the Burbury Hotel. He said that he could not recall seeing any bruise or marks on Ms Higgins body, but that he also did not recall seeing her "*not clothed*" (T1259.23-29).

## **E.5 Thursday, 28 March 2019**

### ***E.5.1 Ms Higgins' conversation with Mr Payne - 26 March 2019***

608. Mr Payne gave evidence about a conversation he had with Ms Higgins later on the same day as those conversations with Ms Brown. He said the conversation with Ms Higgins also occurred in the DLO room (T1422.1-10; T1434.18-35). Ms Higgins' recollection was that her conversation with Mr Payne occurred later in the week on Thursday, 28 March 2019. They agree that the conversation occurred in the DLO room (T654.31-32). It is likely that the conversation actually did occur on 28 March 2019, particularly having regard to Ms Higgins' message to Mr Dillaway about having spoken to Mr Payne that day (see paragraph [633] below).
609. Mr Payne described seeing Ms Higgins passing the door of the DLO room and looking upset. She had teary eyes. Ms Higgins came into the room and the door was closed. Mr Payne asked Ms Higgins what was wrong. Ms Higgins' evidence was that Mr Payne could tell she had been upset and pulled her aside for a check in (T654.37-38).
610. Ms Higgins told Mr Payne that she and Mr Lehrmann had arrived in an Uber at Parliament House, they had come through security and gone to the Senator's suite. She told Mr Payne that she had been sitting on a windowsill and did not remember anything after that until she woke up on the couch in the Senator's office. Ms Higgins told Mr Payne that Mr Lehrmann was having sex with her on the couch (T1422.22-37).
611. In cross-examination, Mr Payne said that when Ms Higgins had mentioned sitting on a window ledge, she gestured to the window ledge in the area of the room through the

DLO door (i.e. the support staff area). He said that he did not believe she was indicating the windowsill in Senator Reynolds' room (T1436.9-44).

612. Mr Payne described how Ms Higgins was very upset and he paused to let her collect herself. He said: "*may I ask you a very direct question*" and Ms Higgins said "*Sure. Go for it.*" Mr Payne then asked Ms Higgins "*Did he rape you?*". Her response was "*I could not have consented. It would have been like fucking a log.*" (T1422.39-43). Mr Payne had a very clear recollection of those words, as he found them quite confronting and they stuck with him (T1422.45-1423.2).
613. Mr Payne said to Ms Higgins: "*If you want my advice, you must go and see a doctor and you should go to the police. And I can help you do those things. If you want to go now, I will take you.*" He said that Ms Higgins thanked him for his concern and said that she did not want to proceed at that time (T1423.4-8).
614. In cross-examination, Mr Payne agreed that it was possible that Ms Higgins may have mentioned CCTV during their conversation, although he had no recollection of it (T1435.21-.32).
615. Mr Payne's evidence was that Ms Higgins asked him what he knew.
616. He told Ms Higgins that he was aware that she had come back to the suite and that she had been found naked in the Senator's office by the AFP. He recalled that she expressed surprise that she had been found (T1423.20-29). Mr Payne described how Ms Higgins was still quite upset. He told Ms Higgins that his offer to help still stood and Ms Higgins left the DLO room (T1423.31-39).
617. In cross-examination, Mr Payne agreed that he later told police that what Ms Higgins had told him in March 2019 was "*very consistent*" with the subsequent media reporting (T1426.3-32). He fairly accepted that to some extent it was possible that his memory might have been affected by things he had learned years after the event. Even accepting that possibility, it was apparent from Mr Payne's evidence that he had clear and distinct memories of what Ms Higgins had told him in March 2019, and that those memories were anchored to the confronting nature of what he had been told, for example Ms Higgins' reference to the sexual intercourse being like "*fucking a log*".
618. In her evidence, Ms Higgins said that Mr Payne asked if she was okay, to which she had replied "*no*". Her recollection is that he said words to the effect of "*Is this about the weekend?*" and she said "*yes*". They had a discussion and then, consistent with Mr

Payne's account of the conversation, Mr Payne asked her point blank whether she was raped. Ms Higgins said that he was the first person to say the word, and she cried and said "yes". Her recollection was that he tried to console her (T655.28-45).

619. Ms Higgins also said that Mr Payne told her that she had been found naked in the middle of the night. She said that he said words to the effect: "*Did you know that a security guard came in during the night and found you naked?*" (T655.16). She said that she had not been told that information before and, consistent with Mr Payne's observations, she was shocked and upset (T654.43).
620. Ms Higgins said that Ms Brown had not disclosed that to her, and it was the first time she felt a massive amount of mistrust within the office because Mr Payne had information about what had occurred and Ms Higgins had thought that no one else knew (T654.44-45). She was entitled to feel that way.
621. On any view of it, therefore, Ms Higgins had made a vivid disclosure of rape to Mr Payne. That disclosure is not consistent at all with Mr Lehrmann's case theory that Ms Higgins fabricated the allegation of rape in order to save her job. On Mr Lehrmann's theory, at the time of the disclosure to Mr Payne, Ms Higgins had not disclosed the alleged assault to Ms Brown. Mr Payne had no responsibility for Ms Higgins' employment. Mr Payne's evidence is only consistent with what Network Ten invites the court to find, namely a contemporaneous report by a distressed Ms Higgins of a rape for no motivation other than telling the truth to a colleague.

### ***John Kunkel and Daniel Wong***

622. Ms Higgins gave evidence of seeing John Kunkel, then Chief of Staff to the Prime Minister, and his executive assistant, Daniel Wong, come into the Ministerial Suite in the morning on 28 March 2019. They walked past Ms Higgins and met with Ms Brown. Ms Higgins described it as abnormal for someone in Dr Kunkel's position to be coming into Ms Brown's office (T656.5-34).

### ***E.5.2 Meeting between Ms Higgins and Ms Brown – 28 March 2019 (Second Meeting)***

623. Ms Higgins gave evidence of attending a meeting with Ms Brown on 28 March 2019. She said that the meeting occurred after Dr Kunkel and Mr Wong had left their meeting with Ms Brown (T656.36-38). The meeting was around midday and took place in the meeting room in the Ministerial Suite (T657.12-20).

624. Ms Higgins could not recall the substance of what was said at the meeting, but did observe a distinct change in Ms Brown's tone and demeanour from the meeting on Tuesday, 26 March 2019.
625. She said that the empathetic, warm and helpful demeanour from that meeting had been replaced by a clinical tone and it was a very procedural meeting (T657.22-46). Ms Brown made Ms Higgins sign the Ministerial Statement of Standards (Exhibit #R5: CB66). She said that it felt like a formality (T657.25-34). Otherwise, Ms Higgins could not recall any further discussion of what occurred on the weekend (T658.42).
626. Ms Higgins' recollection was that she had a discussion with Ms Brown about the availability of CCTV footage from Parliament House, and that this discussion probably occurred at this second meeting (T668.35-45). Ms Higgins said to Ms Brown: "*can I see the CCTV*" or "*can I have access to the CCTV*" (T669.20). Ms Higgins had made a point in the first week of counting all the cameras between entering Parliament House and the Ministerial Suite and had counted seven. She said to Ms Brown: "*There's seven cameras between where I entered Parliament and where I ended up. They have to have seen something*" (T669.23-26). Ms Higgins's evidence was that Ms Brown rebuffed her request and did not really answer it (T669.34-36).
627. Ms Brown's note records that she met with Ms Higgins on 28 March 2019 and again offered her support. The note records that: "*she said she was taking up the counselling to which I replied good, I was pleased to see she was accessing it, and then she said, I recall him being on top of me. I was shocked. I didn't know what to say at first. I said if this was something that she had not wanted then she should think about reporting it, I offered our continued support.*" (Exhibit #R87: CB64, p 2304).
628. The Court would reject the accuracy and truthfulness of this record in Ms Brown's notes. It is simply inconsistent with Ms Higgins' evidence, the contemporaneous text message she sent to her at 5:36pm on 26 March 2019 (see paragraph [580] above) and the evidence of Mr Payne (see E.5.1 above). Ms Brown well knew that Ms Higgins had told her about Mr Lehrmann being on top of her, and had been shocked at the time, when Ms Higgins disclosed the sexual assault to her during their meeting on 26 March 2019.
629. Whatever Ms Brown's state of mind was before this meeting, on her account of what Ms Higgins said, it must have been crystal clear by this point that Ms Higgins was

alleging that she had been sexually assaulted by Mr Lehrmann on 23 March 2019 in the Minister's office. The reference to reporting it if it was "*something she had not wanted*" puts the matter beyond any rational doubt (see paragraph [627] above).

### ***E.5.3 Conversation between Ms Higgins and Mr Dillaway – 28 March 2019***

630. Mr Dillaway and Ms Higgins had a further conversation on 28 March 2019 (T659). Mr Dillaway's recollection was that he said to her that she should go to see a doctor and consider whether it was something that she wanted to report to police. He encouraged Ms Higgins to see a doctor to get tested for any STDs and also to create a record of having seen a doctor in case she wanted to pursue action down the track (in cross-examination, Mr Dillaway accepted that he may have mentioned seeing a doctor and having an STD check in his earlier conversation on the Tuesday (T1258.20-37). Mr Dillaway's recollection was that Ms Higgins said that was something she would do, and that she subsequently sent him a text message that she had done so (T1224.3-10).
631. Ms Higgins told Mr Dillaway that her main concern was that she did not want anyone to know what had happened. She told him that she "*had concerns about becoming known as the girl who was raped in Parliament, and she was worried about how it could affect her job and her career*" (T1223.33-35, T1224.16-26). Mr Dillaway said that Ms Higgins told him that she was concerned about how it could affect her job and career, and he relayed to her that she had nothing to worry about because she was the victim and should have nothing to fear in terms of her job (T1224.42-45).
632. Ms Higgins' failure to see a doctor is explicable by the fear of re-traumatisation and her concerns that if she were to take the matter further it could affect her job and her career. She was clearly in a very vulnerable state. As she put it at T782.19-22 and 35-38:

*"I told him that I was going to the doctor in the same way that I said I was looking after myself and I was doing okay. I was placating him, and it was wrong. Never went to the doctor. I should have. I didn't and I regret it..."*

...

*I wanted to go to the doctor, but I just – I couldn't. I – I don't know. I was terrified. I don't know. I don't know why I couldn't, but I didn't have the support of people around me and I was scared, and I – I – I just – I couldn't."*

633. Ms Higgins sent Mr Dillaway other text messages that afternoon, including one at 2:58pm in which she said: “*Chris just said apparently the AFP came into the suite during the night or morning sometime. And they just left me there*” and “*Because he was briefed on what happened*” (Exhibit #R99: CB15, p 723). Ms Higgins said that she was mistaken in her message that Mr Payne had said that it was the AFP who had come in, and that he had actually said it was Parliament House security (T659.26-27). Ms Higgins said she was really distraught and upset that there was someone in the middle of the night who had found her just after she had been raped and they had not tried to wake her up or call for help (T659.29-32). Mr Dillaway understood the reference to Chris to mean Chris Payne. He was shocked and surprised, prompting him to send the “*WTF*” message at 3:41pm that day (Exhibit #R99: CB15, p 724).
634. At 7:53pm on 28 March 2019, Ms Higgins sent Ms Brown a message asking if it would be okay to take the next day off and she had a doctor’s appointment. At 8:04pm, Ms Brown replied to say that it was fine for her to take the day off (Exhibit #R4: CB56, pp 2274-2275, messages 15250, 15256-15258).

#### ***E.5.4 Seeking medical treatment***

635. Ms Higgins was asked about whether she sought medical treatment in relation to what happened to her. Her evidence was that she did not. She said that she kept making appointments and then she did not have it in her to go or was ashamed, embarrassed or upset and she could not follow through on those appointments (T686.26-30). Ms Higgins gave that explanation in relation to having told police that she had gone to a doctor (T780.16-30). She said that she had told Mr Dillaway that she had gone to the doctor to placate him (T782.15-24). Her evidence was that when she messaged Ms Brown about taking the day off to see a doctor, she had intended to do so but could not do so because she was “*terrified*” and felt unsupported (T782.29-47; see also T784.24-785.2).
636. That conduct is, in Network Ten’s submission, of neutral significance. It is understandable that a sexual assault survivor who was still processing what had happened to her, and unsure about whether it was in her interests to take the matter further, might elect to avoid the re-traumatisation inherent in seeing a medical professional.

637. Exhibits #R90 and #R93 indicate that in fact Ms Higgins had made appointments for counselling and to see a psychologist.

#### **E.6 Friday, 29 March 2019**

638. Ms Higgins' evidence was that she took 29 March 2019 off work because she felt as if she wasn't coping after her conversation with Mr Payne (T659.44-660.4).

##### ***E.6.1 Conversation between Major Irvine and Ms Brown – 29 March 2019***

639. At the end of the week, most likely on Friday, 29 March 2019, Major Irvine told Ms Brown that she was aware of what had happened (T1181.37-1182.5). They were at the doctor's office picking up X-rays for Senator Reynolds and Major Irvine said "*Fiona, Brittany has told me what has happened*". Ms Brown responded by saying "*Yes, it's very disconcerting*". Ms Brown mentioned that Mr Lehrmann was already in trouble over a security incident and that "*he wasn't hard to get rid of, and they moved him on pretty quickly*" (T1182.7-16).
640. This was an extraordinary admission. An alleged rape had occurred in Parliament House. It was not just disconcerting, it was an allegation of a serious crime committed in the workplace. It had to be properly documented and investigated. Instead, however, here was Ms Brown stating to Major Irvine that Mr Lehrmann had been "moved on", on a pretext. This was deeply—profoundly—wrong; and a wrong that was not corrected until Ms Higgins went public with her allegations some two years later. The "moving on" of an alleged rapist is reminiscent of the conduct of which a number of religious institutions stood rightly condemned in the Royal Commission into Institutional Child Sex Abuse, save that this time it occurred in the second decade of the 21<sup>st</sup> century in the heart of Australia's democracy on the eve of a federal election.
641. Major Irvine understood from the conversation that Ms Brown was going to sit down with Ms Higgins over the next couple of days, gain more facts and go forward from there. She also recalled Ms Brown speaking about an upcoming meeting between Senator Reynolds and Ms Higgins (T1201.38-39).

##### ***E.6.2 Conversation between Ms Higgins and Ms Brown – 29 March 2019***

642. Ms Brown's note records that she called Ms Higgins on 29 March 2019 and offered to report the incident to police. At this time, Ms Brown was getting pressure from Senator Reynolds and Alex Hawke for the incident to be reported to the AFP. Mr Chamberlain

had told Ms Brown that Senator Reynolds had told Mr Hawke about what Ms Higgins had said, and that Mr Hawke wanted Senator Reynolds to report the incident to police (T2123.14-24). Ms Brown understood from Mr Chamberlain that Mr Hawke and Senator Reynolds were of the view that the allegation should be reported to police. Ms Brown considered that they were only doing so because they were worried about covering themselves (T2126.14-32).

643. Ms Higgins is recorded as saying “no”, and that she wanted to see her father. Ms Brown’s note records that she then “*called the Minister to update her*” and that the Minister asked her to arrange a meeting for them to meet with Ms Higgins on the following Monday. Ms Brown recorded that she called Ms Higgins back to tell her about the meeting with Senator Reynolds and that Ms Higgins said about the meeting “*that would be daunting*” (Exhibit #R87: CB64, p 2305). Ms Brown’s note records that she called Senator Reynolds back to report that Ms Higgins did not want to report the incident.

#### ***E.6.3 Communications between Ms Higgins and Mr Dillaway – 29 March 2019***

644. At 10:39am on 29 March 2019, Mr Dillaway sent a text message referring to a draft email that he had drafted for Ms Higgins to use at her discretion (Exhibit #R99: CB15, p 731). Mr Dillaway explained that over the preceding days he had had a conversation or conversations with Ms Higgins in which she had expressed that she was struggling and that she was finding it hard being in the office.
645. Mr Dillaway suggested that she might need help and drafted her an email that she could use with her COS to note that she was struggling and seeking help (T1225.10-19). That draft email appears at the bottom of p 732 in Exhibit #R99 (CB15). Ms Higgins did not send the email.
646. Mr Dillaway left Canberra on Friday, 29 March 2019. His recollection of the conversations he had with Ms Higgins while in Canberra was that she was finding out more information herself. He gave, as an example, Ms Higgins’ text message about being found by the AFP in the Minister’s office on the morning of 23 March 2019.
647. Mr Dillaway said that he thought Ms Higgins had told him that the AFP had been in contact with her during that time. The main thing he remembered from his time with Ms Higgins was that she told him that she was not coping well and had become aware that more people knew of the incident, which was concerning to her (T1227.12-21).



#### ***E.6.4 Samuel O'Connor***

648. Samuel O'Connor gave evidence about a text message exchange with Ms Higgins on 29 March 2019 (T1919ff). Mr O'Connor is the Member for Bonney in the Parliament of the State of Queensland (T1919.44-18). He gave evidence about the circumstances in which he first met Ms Higgins in around April 2018 and her assisting in the office at that time. Ms O'Connor and Ms Higgins are a similar age and became friends and stayed in contact when Ms Higgins moved to Canberra (O'Connor, [4]-[12]: CB1090).
649. Mr O'Connor gave evidence of his regular contact with Ms Higgins and of her having spoken to him at length about the incident at Parliament House before she went public with her story. Mr O'Connor said that Ms Higgins first alluded to something having happened in her text messages to him on 29 March 2019 and again on 19 April 2019 (O'Connor, [13]-[16]: CB1090). Copies of those messages became Exhibit #R876 (CB70) and are set out at [17], [18] of Mr O'Connor's affidavit.

#### **E.7 30 - 31 March 2019**

##### ***E.7.1 Visit to Canberra by Matthew Higgins and Kellie Jago – 30 March 2019***

650. In March 2019, Matthew Higgins, Ms Higgins' father, and his partner, Kellie Jago, visited Ms Higgins in Canberra. Ms Jago has known Ms Higgins since she was a child and got to know her better after she and Mr Higgins started dating (Jago, [5], [6]: CB1086). Ms Jago's evidence was that she observed Ms Higgins to be a happy-go-lucky young woman. When Ms Higgins first moved to Canberra, everything seemed good. She understood from talking to Ms Higgins at that time that she was enthusiastic about her career (Jago, [7]: CB1086).
651. Mr Higgins' observations of his daughter at that time were that she was bubbly and happy and always talking about Parliament House. She was loving life and he was proud of her. They would keep in touch regularly via text messages and calls (Higgins, [4]-[8]: CB1087).
652. Ms Jago said that she and Mr Higgins visited Ms Higgins on a Saturday (which was most likely Saturday 30 March 2019). The purpose of the trip was to visit Ms Higgins (T1458.19-47, T1467.27-42). Mr Higgins and Ms Jago were in Canberra for the weekend (T1459.8-9).

653. Mr Higgins gave evidence that his daughter did not collect them when they arrived in Canberra, which he thought was very unlike her. She was late to meet them the next day (T1468.38-43). When the incident referred to in her text message of 26 March 2019 was raised, Ms Higgins told her father that she did not want to elaborate on it (T1468.42-43).
654. Ms Higgins' evidence was that she told her father that something bad had happened at work, that it involved her boss and that it was serious. She told him that she did not want to talk about it (T660.14-19).
655. Ms Jago's observations of Ms Higgins were that she seemed stressed about her car, a little bit absent and fidgety. She described Ms Higgins as "*just not herself*" (T1459.20-22). Mr Higgins said that he could not recognise her daughter. He said that she was usually a "*really positive, happy, vivacious sort of young girl, always trying to do stuff and was smart*". He described her during the visit as "*absolutely quiet, quiet and withdrawn*" the whole time she was with them (T1469.9-15).
656. Those observations are consistent with Ms Higgins' account of having been sexually assaulted on 23 March 2019. They are not consistent with Mr Lehrmann's case theory that she fabricated an allegation of rape to save her job. According to Fiona Brown's evidence, her job was never at risk, and was certainly not at risk by the weekend of 30-31 March 2019.
657. Mr Higgins, Ms Jago and Ms Higgins went for a tour of Parliament House on the Saturday (T1462.15-16). On the Sunday, Mr Higgins and Ms Jago received a message from Ms Higgins in the morning to the effect that she didn't feel well and had to work. Ms Jago thought it was "*very strange*" having regard to her observations that Ms Higgins was usually "*very happy, fun, very social person...*" (T1459.31-34). In cross-examination, Ms Jago accepted that Ms Higgins may not have communicated that she was feeling ill, but said that she was very different to her usual bubbly self (T1464.11-13).

#### ***E.7.2 WhatsApp messages between Ms Brown and Ms Higgins – 31 March 2019***

658. On Sunday, 31 March 2019, Ms Brown sent two WhatsApp messages to Ms Higgins. At 2:50pm she wrote: "*Hi Brittany, hope you've had a nice weekend with your dad, I'm not sure how long he's down for but if you'd like to bring him with you to talk to Linda in the morning let me know and no worries if not! Kind regards Fiona*". At 4:06pm she

wrote: “*Me again, just clarifying because I didn’t want you to misunderstand anything, it’s as we discussed Friday. Linda just wants to catch up with you to see how you are as you’ve not caught up, look forward to seeing you, a busy week ahead!!! Best, Fiona*” (Exhibit #R6: CB332, p 3350). The reference to a discussion on Friday was to the conversation referred to at paragraph [143] above.

659. Ms Higgins recalled receiving the message from Ms Brown over the weekend (T660.40-45). She took from the words “*Linda just wants to catch up with you to see how you are, as you’ve not caught up*” as a reference, in a very roundabout way, to her saying that Senator Reynolds wanted to see her after the rape but did not want to put that in writing (T661.31-34).
660. Ms Higgins replied at 4:59pm: “*Hello Fiona, No problems at all. I will see you both in the morning. Yes – very busy indeed! Kind Regards, Brittany*” (Exhibit #R6: CB332, p 3350).

## **E.8 1 April 2019**

### ***E.8.1 Conversations with Mr Dillaway***

661. Mr Dillaway returned to Canberra for budget week, which commenced on 1 April 2019. Mr Dillaway recalled speaking to Ms Higgins and her continuing to tell him that she was not doing well. He had a distinct memory of Ms Higgins telling him that there was a severe, possibly six-month, wait for counselling services. Mr Dillaway suggested to Ms Higgins that he could help by talking discreetly to the Prime Minister’s Office to try to get assistance. He said that at first Ms Higgins was not keen because she did not want anyone to know what had happened. During budget week, Ms Higgins also told Mr Dillaway that she had spent time crying in one of the bathrooms in Parliament House (T1227.36-46; T1229.30-44). In addition, Ms Higgins told Mr Dillaway that she was having panic attacks and confining herself into a bathroom. It was at this point that she accepted Mr Dillaway’s offer for him to contact someone from the Prime Minister’s Office (T1229.41-1230.9).
662. Mr Dillaway’s evidence about his observations of Ms Higgins’ demeanour during budget week was that Ms Higgins was in one sense trying to get on with her job and putting on a “*happy face*” and going about her business as usual, but that privately she was expressing to him how she was not coping well (T1237.1-5).

663. Mr Dillaway sent Ms Higgins a text message at 9:19am on 1 April 2019 which said: “*Good luck this morning. Let me know if you want to catch up afterwards for a talk, coffee or to just give you a hug*” (Exhibit #R99: CB15, p 764). His recollection was that his message related to either a meeting Ms Higgins had with her COS that morning or a meeting with the AFP, but he was aware that it related to the incident on 23 March 2019 (T1229.9-122). That day, Ms Higgins met with Senator Reynolds and Ms Brown in the morning and FA Cleaves and FA Thelning around midday (see E.10 below).

#### **E.9 1 April 2019 – Meeting with Senator Reynolds and Fiona Brown**

664. On 1 April 2019, Ms Higgins attended a meeting with Senator Reynolds and Ms Brown. The meeting was held in Senator Reynolds’ office in the Ministerial Suite (T662.26-32). The meeting was held first thing in the morning (T662.34-35).
665. Ms Higgins’ evidence was that she felt okay coming into work after spending some time with her father. However, she said that once she realised that the meeting was going to be held in Senator Reynolds’ office, she “*completely disassociated. I was a mess*” (T662.37-40). It was the first time she had been back in the room since the assault and it had a real impact (T662.42-44). Ms Higgins did not complain, despite it being obvious to her that the venue of the meeting was glaringly inappropriate having regard to the fact they were talking about an assault that had happened in the same room (T662.46-663.5).
666. Ms Higgins, Senator Reynolds and Ms Brown sat at the round table (T663.7-8). They exchanged greetings and Senator Reynolds and Ms Brown asked Ms Higgins how she was, and how her weekend was (T663.28-29).
667. Ms Higgins was not asked to give an account of what had happened to her (T663.41-42). Her evidence was that Senator Reynolds said: “*I’m sorry*” and “*these are things that women go through*”. She also said: “*if you go to the police, please keep us informed*” and she said: “*I didn’t think he was capable of this*”. Ms Higgins understood that Senator Reynolds was talking about Mr Lehrmann (T663.15-21). These were distinct statements that Ms Higgins could recall (T663.44-664.2). Ms Higgins’ recollection is that Ms Brown barely spoke in the meeting, and was just taking notes.
668. In cross-examination, it was put to Ms Higgins that her notes of the meeting, as recorded in the timeline document (Exhibit #R11), of Senator Reynolds saying that she felt “*physically ill*” and that she was “*shocked and appalled*” were completely different to

the evidence she had given (T836.29-33). Ms Higgins disagreed, and in fact those comments are not inconsistent with her evidence, particularly her evidence about Senator Reynolds apologising, saying it was the kind of thing that women go through, referring to police and commenting that she didn't think Mr Lehrmann was capable of it. Similarly, there was nothing inconsistent with Ms Higgins' evidence about what Senator Reynolds had said about asking to be kept informed if she went to police and what Ms Higgins recorded in the timeline document that if she chose to report it, they would be supportive (T835.40-836.25).

669. Ms Higgins felt so traumatised to be back in the room in which she was assaulted that she barely spoke. The meeting consisted mostly of Senator Reynolds talking at Ms Higgins (T664.4-11). Ms Higgins said that her distress was visible because she was crying (T664.13-15).
670. Ms Higgins agreed to keep Senator Reynolds informed if she did go to the police (T664.19-22). There was no discussion at the meeting about Ms Higgins' employment (T664.31).
671. Ms Higgins said that she felt that the meeting lasted about an hour. After the meeting she tried to collect herself, but ended up having a mild panic attack. It was the first of a number of panic attacks that week (T664.35-38). She would hyperventilate, cry and feel as if she was having a heart attack. She would lock herself into a changing room to be in a small, enclosed space, which helped (T664.40-45). In cross-examination, Ms Higgins described the meeting as "*adversarial*" in the sense that it had been hosted in the same room as the assault had occurred, and Senator Reynolds comment about "*these are things that women go through*" made her feel like she was trying to minimise what had occurred (T783.38-46). Ms Higgins also attributed the things that followed that meeting as causing her to think that it had been adversarial (T784.3-11).
672. After the meeting, in the afternoon, Ms Brown and Ms Higgins went downstairs in the basement of Parliament House to see two police officers. Ms Brown left Ms Higgins with the two police officers (T665.39-666.30). Those officers were FA Thelning and FA Cleaves. Ms Brown's evidence was that, at some point, either at the end of the meeting or after Ms Higgins had thought about it and come back to her, she organised a meeting for Ms Higgins to meet with the AFP (T2136.28-47). Ms Brown said the police came up to the Ministerial Suite, she asked if she could walk down to see them,

and she collected Ms Higgins and walked down with her. Ms Higgins said that she did not want Ms Brown to stay with her for her meeting with the AFP (T2136.1-12).

**E.10 1 April 2019 – Meeting with Australian Federal Police / Following Steps**

673. On 1 April 2019, Ms Higgins met with Federal Agent Rebecca Cleaves and Federal Agent Katie Thelning. FA Cleaves held the rank of Federal Agent in 2019 and was attached to the protection liaison team assigned to Parliament House (T1385.6-22). FA Thelning held the rank of Federal Agent in April 2019 and continues to hold that rank (T1404.15-19).
674. FA Cleaves called Ms Higgins at around 12pm and made arrangements for her to come down to the basement of Parliament House (T1386.16-43). FA Cleaves and FA Thelning attended the meeting with Ms Higgins.
675. Ms Higgins' recollection was that FA Cleaves and FA Thelning explained what a 'meet and greet' (being an informal sit-down) was and she told them what happened. Her recollection was that the conversation was fairly high-level, and that she told them that she had been out drinking with colleagues, she ended up back at Parliament House and that she had been raped (or assaulted) by a colleague (T666.38-47). Her recollection is that the officers said they would refer the matter to the Sexual Assault and Child Abuse Team (SACAT) (T667.1-7). Ms Higgins subsequently received a referral to SACAT (T667.9 – Exhibit #R7, CB73).
676. Ms Higgins needed urgent rape counselling assistance, and the assistance of police who specialise in dealing with trauma victims, not a meeting with the AFP protection liaison team assigned to Parliament House. This was not the appropriate means of managing a vulnerable person in Ms Higgins' position. It borders on the unfathomable that the matter was managed in such a cack-handed manner, but fortunately it appears that FA Cleaves and FA Thelning quickly recognised that Ms Higgins needed specialised assistance.
677. FA Cleaves and FA Thelning recorded the information provided by Ms Higgins during that meeting in their official diaries (Exhibit #73: CB72 – FA Cleaves; Exhibit #77: CB71 – FA Thelning). The information provided by Ms Higgins during the meeting was recounted in court by reference to the relevant parts of their diary notes: T1387.45-1391.8 (FA Cleaves) and T1404.46-1406.35 (FA Thelning).

678. In particular, FA Thelning recorded that Ms Higgins had said that when she was at the venue after The Dock (88mph), Mr Lehrmann “*got quite “handsy”, but that she didn’t really mind*” (T1405.36).
679. In cross-examination, Ms Higgins was asked about the record of her having drunk four gin and tonics. She could not remember much of the detail of the conversation, but thought that a mistake may have been made in recording that she had gin and tonic because she did not drink tonic water because it has calories in it (T776.24-28). That evidence was inherently believable. In any event, nothing turns on it: the alcohol content of gin and vodka is not materially different.
680. During the meeting, FA Cleaves observed that Ms Higgins appeared understandably nervous (T1391.14-17). FA Thelning observed that she was also nervous and was crying. FA Thelning’s evidence was that Ms Higgins apologised for being upset while speaking to them (T1406.40-44). FA Thelning then had a conversation with Ms Higgins about a wraparound referral and sent her an email (T1408.3-16; Exhibit #R7: CB73). At the end of the meeting, Ms Higgins said that she was aware that the matter would be referred to the Sexual Assault and Child Abuse Team (SACAT) and knew that the complaint was going forward in that sense (T788.33-789.10), despite what she may have told FA Cleaves and FA Thelning about her desire to proceed.
681. On 2 April 2019, FA Thelning spoke to an officer from SACAT and inquired about available support services. FA Thelning then contacted the Canberra Rape Crisis Centre (T1407.1-47).
682. On 3 April 2019, FA Cleaves made a request to the Department of Parliamentary Services (DPS) for access to the relevant CCTV footage (T1391.40-1393.5) (Exhibit R74: CB76). FA Cleaves explained that her role as protection liaison did not involve the actual investigation into a particular offence, so she contacted SACAT to arrange a “meet and greet” between Ms Higgins and members of that team (T1393.31-40). FA Cleaves also had a conversation with Ms Brown (T1393.42-1394.19).
683. On 4 April 2019, FA Cleaves followed up an outstanding security report from the DPS (T1394.24). On 5 April 2019, she received further information about the incident, which she recorded in her diary (T1394.27-1396). FA Cleaves explained that it took a long time to get the DPS report and the matter had to be escalated to her OIC to get the

documents (T1396.15-21). On 8 April 2019, FA Cleaves reviewed the DPS report (T1396.24-29).

684. On 15 April 2019, FA Cleaves left a message to make arrangements to view the CCTV footage and recorded a conversation she had with the SACAT that Ms Higgins did not want to proceed with a formal evidence in chief interview at the time and had not called them back, and that she had not called the Canberra Rape Crisis Centre (T1397.19-32).
685. On 16 April 2019, almost two weeks after it had been requested, and three days after Ms Higgins had notified her that she did not wish to proceed with a complaint, FA Cleaves finally viewed the CCTV footage that had been requested. She explained that they were not allowed to take a copy of the CCTV, but were able to view it in the security room and make notes (T1396.31-36). FA Cleaves watched CCTV footage from two different angles and took notes (T1397.39-1398.40). FA Cleaves explained that she wanted a copy of the CCTV but she was not provided with a copy (T1398.45-46). The reason she was given was because at the time there was no active investigation progressing and there was hesitation about providing a copy without an investigative purpose (T1399.1-3). FA Cleaves explained that generally she was able to get CCTV quickly, but that this request seemed to take longer and she was concerned about the time it took. She referred to quite a few phone calls being made at a higher level to ensure the CCTV could be viewed (T1399.1-19).
686. The bundle of documents that became Exhibit #60 (CB78) records the original request to quarantine and view the relevant CCTV from Parliament House. Those documents also record the frustrations of AFP officers in obtaining that material, and disclose that they had not been updated and were unaware for some time after the material had been quarantined so as to be viewed. In Network Ten's submissions, this reflects the frustrations of Detective Harman that she had never encountered such pushback on obtaining CCTV before (T1303.41-43). Notable documents within that bundle of material include (a) the letter to Detective Harman from Mr Stefanic (Secretary, Department of Parliamentary Services) dated 3 December 2019 referring to the media enquiry from the Canberra Times on 17 October 2019 (p2415) and (b) Matthew Reynolds letter to Mr Stefanic dated 9 April 2020 requesting that the CCTV be retained, notwithstanding that, at that stage, the matter was not being investigated. In that letter Mr Reynolds observes that victims of sexual assault can often change their minds and in Ms Higgins' case, she had changed her mind a number of times and he was



“conscience of securing the footage should the matter proceed” (p 2420). The AFP’s frustrations were further revealed in a letter from Commissioner Andrew Colvin to Mr Stefanic dated 13 September 2019 (Exhibit #R94) in which complaints were made about the AFP not being informed about the incident. That letter records that *“there are significant discrepancies between the response to this incident and the existing agreements that our agencies share”* (p 1/2). Complaint was also made about the AFP not being notified at the time of the incident (described as “unacceptable”) and the length of time it took DPS to share the Parliamentary Security Service incident report with the AFP.

#### **E.11 Conversation between Major Irvine and Senator Reynolds / Jesse Wotton**

687. During the week commencing Monday, 1 April 2019, Major Irvine had a conversation with Senator Reynolds. Major Irvine recollected that the conversation occurred while they were sitting in a plane waiting on the tarmac (T1202.37-40). Major Irvine said: *“Look, Brittany has told me what has happened and I’ve just offered to talk to her and make sure she’s okay”*. Major Irvine said that Senator Reynolds’ response was *“Yes, this makes me feel sick. Nothing like this has ever happened to me before”* (T1182.31-1183.2).

#### **E.12 3 April 2019**

688. Major Irvine said that she spoke to Ms Higgins three times after her initial disclosure (see E.4.1 above). She did not make notes of those conversations because it was private to Ms Higgins. She said that the conversations happened after she had spoken to Ms Brown and Senator Reynolds (T1183.4-20).

689. Major Irvine gave evidence that she spoke to Ms Higgins about a week after Ms Higgins had told her about the incident (which would have been 3 April 2019) while they were walking to the café in Parliament House. She said that she asked Ms Higgins how she was going, and Ms Higgins said *“okay”*. At that stage, Major Irvine was aware that Ms Higgins had spoken to the police (T1183.24-28).

##### ***E.12.1 The bruise photograph***

690. Ms Higgins was asked about the origin of the bruise photograph (T670). She said that she took it the day after the budget on 3 April 2019 after things started getting weird in the office. She went into the bathroom and took the photograph. She said she did so because she felt like she needed proof to validate or help corroborate her experience

(T670.27-34). Exhibit #R8 (CB986, 987) are copies of two photographs of a bruise taken by Ms Higgins on 3 April 2019 in a bathroom stall in the bathroom closest to the Ministerial Suite.

691. Ms Higgins' evidence was that she took the bruise photograph after the conversation with Ms Brown (T671.28-31). The first photograph of Exhibit #R8 (p 5294) is of Ms Higgins' leg with the contrast turned up to make the bruise clearer (T672.8-9). The second photograph of Exhibit #R8 (p 5295) is the reverse cropped version of the same photograph (T672.15-16). Ms Higgins thought the bruise had either been caused by the assault or tripping up the stairs in 88mph. She wasn't sure, but she thought it might help.
692. Ms Higgins' evidence was that she took the bruise photograph and sent it to herself on WhatsApp (T672.25). She did so because she wanted the photograph to be stored on WhatsApp rather than on the actual device (T672.38-40).

***Conversation with Ms Brown about the election***

693. Ms Higgins described that from around 3 April 2019 her conversations with Ms Brown started getting "*more tense*". Ms Brown started to ask Ms Higgins about the election. Ms Higgins said that Ms Brown said: "*During the election, where would you want to be? You can go to the WA or you can go home to the Gold Coast*". Ms Higgins said: "*Well, I would obviously want to be near my family. That would be great*". Ms Brown said that Ms Higgins would just get paid out to go the Gold Coast, but she would not be working. Ms Higgins said that would be fine, but how would she come back, and Ms Brown said: "*Well, you wouldn't*" (T671.4-18; T839.25-29). In cross-examination, it was suggested to Ms Higgins that there was a difference between what she recalled Ms Brown saying to her about the consequences of going to the Gold Coast and what she had recorded her as saying in the timeline document (that it would likely impact my ability to reapply for a job in the future: T838.21-839.32). In fact there was no substantive difference between those two statements and Ms Higgins made clear that she was softening the language because the timeline document was partially prepared to give to police and this interaction with Ms Brown was not important to the central allegation of rape (T839.34-46).
694. Ms Higgins described the conversation as "*pivotal*" because it became clear to her that things were getting tense and that she either had to go to WA and continue with the

team, or she would be paid out, go home and that would be the end. It became a pivotal choice for Ms Higgins and she felt that Ms Brown wanted her to make that choice as she (Ms Brown) was shortly ceasing to be the acting COS (T671.20-26).

#### ***E.12.2 Ms Higgins' Panic Attack***

695. Major Irvine gave evidence about inviting Ms Higgins to dinner one night. It was apparent that Major Irvine may have conflated a dinner in Perth with her being in Canberra at the relevant time, but in cross-examination she accepted that she was in Canberra on the day she exchanged the relevant messages with Ms Higgins on 3 April 2019 (T1199.25-41).
696. In any event, she identified the series of WhatsApp messages between her and Ms Higgins that became Exhibit #R71 (CB74).
697. At 6:35pm on 3 April 2019, Major Irvine messaged Ms Higgins: *"Hey Brittany are you coming to this thing at 7:30?"*.
698. Ms Higgins replied at 7:31pm: *"Hey, sorry I didn't get back to you Nikita. I had this weird panic attack this afternoon and have been a little out of sorts. Hope the event was good."* (p 2350).

#### ***E.12.3 Mr Dillaway contacts the Prime Minister's Office***

699. On 3 April 2019 at 8:30am, Mr Dillaway sent a text message to Ms Higgins saying: *"And just checking before I do, if you want me to reach out to PMO"* (Exhibit #R99: CB15, p 813). Mr Dillaway explained that he wanted to check with Ms Higgins that she was absolutely sure she was happy for him to proceed before reaching out to the Prime Minister's Office. He said that his contact in the office was Julian Leembruggen (T1234.30-42; T1261.19-27). Ms Higgins replied at 9:51am to say: *"yeah, that would be potentially helpful, if you wouldn't mind having a conversation"* (Exhibit #R99: CB15, p 813) (T674.1-6).
700. Mr Dillaway reached out to Mr Leembruggen by text message. He said that he had something pretty serious to discuss with him, and Mr Leembruggen offered for Mr Dillaway to meet with him in his office. Mr Dillaway then sent Ms Higgins a text message of what he had taken from his conversation with Mr Leembruggen (T1235.1-37). That message is at p 814 of Exhibit #R99 (CB15): *"Spoke to PMO. He was mortified to hear about it and how things have been handled. He's going to discuss with*

*COS – no one else. I flagged need for councillor and desire to be close to home during election*”. Ms Higgins’ evidence was that she understood from that message that Mr Dillaway had spoken to Mr Leembruggen and that Mr Leembruggen was going to discuss it with Dr Kunkel, that he had flagged the fact that Ms Higgins could not get to see a psychologist, which was something she was having an issue with, and that she wanted to work closer to home during the election (T674.21-26).

701. Ms Higgins then sent a message to Mr Dillaway: *“Thank you for doing that. Honestly, I really appreciate it. The help is beyond welcome, I wouldn’t say it had been handled poorly; just a difficult situation to manage. Seriously, Fiona is great. I just think there has been a lot of competing things going on”* (Exhibit #R99: CB15, p 814). Ms Higgins explained that her thoughts at that time were that Ms Brown was a middle manager being advised by others and she was trying to convey that Ms Brown was not necessarily a bad person, but that she was being directed to handle things in a certain way that Ms Higgins considered was not sufficient (T675.1-5).
702. Mr Dillaway explained that he thought if he reached out to someone at the Prime Minister’s Office it could speed things up in terms of getting Ms Higgins some counselling. He thought the office would see it as important having regard to the fact that it concerned someone who was in *“pain and suffering and needed help”* but also because they would seek the *“political imperative of it”* if Ms Higgins went public during the election (T1235.39-1236.4). Ultimately, nothing came from Mr Dillaway’s contact with Mr Leembruggen (T1235.39-40).
703. This evidence showed that by no later than 3 April 2019, Ms Higgins’ allegations had been escalated to the Prime Minister’s office. Instead of being handled as would be expected in any other workplace, Ms Higgins was offered no further support.

## **E.13 4 April 2019**

### ***E.13.1 Letter from Senator Reynolds to Mr Lehrmann***

704. On 4 April 2019, Senator Reynolds sent a letter to Mr Lehrmann asking him to refer to the matter raised in that letter and to show cause why he should not be terminated (Exhibit #23: CB80). This is the letter referred to at [86] above.
705. Extraordinarily—and we submit inexcusably—no reference was made to Ms Higgins, the fact that she had been found naked and passed out after Mr Lehrmann had left the Ministerial Suite on 23 March 2019, or to the allegation that Mr Lehrmann had sexually

assaulted Ms Higgins. It is beyond imagination that an allegation of this seriousness would be mismanaged so badly in any ordinary workplace. In response to questioning from the Court, Ms Brown agreed that she understood the importance of ensuring procedural fairness by providing Mr Lehrmann with an opportunity to comment on the basis on which it was proposed to take adverse steps relating to his employment (T2139.32-34).

706. In those circumstances, one of the bizarre aspects of this matter, going to its very disturbing mismanagement by Ms Brown and Senator Reynolds, was that it appears that Mr Lehrmann was terminated for serious misconduct without ever being confronted with or given the opportunity to respond to the allegation that he had sexually assaulted Ms Higgins in Senator Reynolds' office.

***E.13.2 Minister Ciobo Valedictory – 4 April 2019***

707. Ms Higgins gave evidence about attending the valedictory speech given by Minister Ciobo on 4 April 2019 (T676). She initially said that she missed the start because she had a panic attack. Ms Higgins explained that she had attended drinks and lunch with Minister Ciobo, his wife, Mr Dillaway, her former COS and a couple of other former members of Minister Ciobo's team. She described that seeing her old team and having regard to her present situation caused her to have a "*bit of a breakdown*".
708. Ms Higgins ended up locking herself in the bathroom for a period of time. She accepted that she had got confused about this topic in the criminal trial, but that she did have a panic attack that day and missed the start of the speech, and caused her to miss out on sitting on a seat on the floor (T676.16-28). In cross-examination, it became apparent that the sequence of events on this day was likely not as Ms Higgins had described them. She remained steadfast, however, that the events of the day occurred even though she was not certain of the sequence (see [116] above).
709. Ms Higgins explained that this was not the first panic attack she had had, and referred to the one she had experienced after meeting with Senator Reynolds (T676.30-31).

## **E.14 5 April 2019**

### ***E.14.1 Email from Mr Lehrmann to Senator Reynolds***

710. Mr Lehrmann sent an email purporting to respond to Senator Reynolds' letter dated 5 April 2019 at 9:28am on 5 April 2019 (Exhibit #24: CB83). This is the email referred to at [83] above. The response was wholly inadequate.

### ***E.14.2 First Letter from Senator Reynolds to Mr Lehrmann – 5 April 2019***

711. On 5 April 2019, Senator Reynolds sent Mr Lehrmann a letter responding to his email of earlier that day (referred to in the preceding paragraph). The letter noted that Mr Lehrmann had only partially addressed the matters raised in Senator Reynolds' letter of 4 April 2019 and directed him to arrange a time before 4pm that day to speak to Ms Brown (Exhibit #25: CB84).

### ***E.14.3 Reginald Chamberlain***

712. Mr Reginald Chamberlain gave evidence about first hearing about the incident at Parliament House and his involvement in subsequent events (Chamberlain, [1]-[23]: CB1080). Mr Chamberlain is a business consultant. Between June 2019 and June 2022, Mr Chamberlain was a senior advisor in the office of the Prime Minister. Between September 2018 and May 2019, he was the COS to Special Minister of State, Alex Hawke (Chamberlain, [2]-[5]: CB1080). In about late March or early April 2019, Mr Chamberlain was told by a person from the Department of Finance that, in substance, two staffers had entered Parliament House at an obscure hour of the night and that they were looking into it and speaking with Senator Reynolds' office. Mr Chamberlain considered it to be strange for two staffers to be in Parliament House very late at night or early in the morning (Chamberlain, [6]-[7]: CB1080).
713. After becoming aware of the incident, Mr Chamberlain contacted Ms Brown by text or WhatsApp and offered to help her. Ms Brown responded and accepted Mr Chamberlain's offer of help (Chamberlain, [8]-[9]: CB1080). Ms Brown asked Mr Chamberlain, in substance, if he would witness a call with her and Mr Lehrmann. At the time of her request, Mr Chamberlain understood Mr Lehrmann to be one of the people who had entered Parliament House late at night. Either before or after his subsequent call with Mr Lehrmann (see paragraphs [714] to [718] below), Ms Brown informed Mr Chamberlain that Mr Lehrmann had already been reprimanded for mishandling sensitive documents in their office some weeks or months prior and that

had given rise to grounds to terminate his employment (Chamberlain, [10]-[12]: CB1080).

***E.14.4 Conversation between Mr Lehrmann, Fiona Brown, Reg Chamberlain - 5 April 2019***

714. Following receipt of Senator Reynolds' letter dated 5 April 2019 and her direction for Mr Lehrmann to speak to Ms Brown, Mr Lehrmann had a telephone conversation with Ms Brown on 5 April 2019. Ms Brown prepared notes of that meeting (Exhibit #R87: CB64). Ms Brown agreed that she had been told by Senator Reynolds on 4 April 2019 that Assistant AFP Commissioner Leanne Close had told Senator Reynolds that day that a sexual assault had been reported to the AFP by Ms Higgins (T2145.12-15). Notwithstanding that knowledge, the matter does not appear to have been raised with Mr Lehrmann during the telephone call. This, again, is indicative of very serious mismanagement of a complaint that demanded much more sensitive and careful treatment by Ms Brown and Senator Reynolds.
715. In cross-examination, Mr Lehrmann's evidence was that he did not have a clear recollection of what was discussed during the conversation (T403-407), although he denied telling Ms Brown and Mr Chamberlain that when he left the Ministerial suite on 23 March 2019, Brittany "*was happy*" (Exhibit #R87: CB64, p 2307) (T407.5-21).
716. Mr Chamberlain was present during the telephone conversation between Mr Lehrmann and Ms Brown. His recollection is that the call happened in his office, using his landline. The conversation was on speaker so that he could hear it (Chamberlain, [13]: CB1080). Mr Chamberlain heard Ms Brown ask Mr Lehrmann: "*What was your purpose for attending Parliament House?*" and Mr Lehrmann reply: "*To drink whiskey*" (Chamberlain, [14]: CB1080). Mr Chamberlain recalls Ms Brown asking a series of questions during the call and Ms Brown taking notes. After the call, Ms Brown read out her notes and Mr Chamberlain thought that they accurately recorded the conversation (Chamberlain, [16]-[18]: CB1080). Mr Chamberlain's impression of what Mr Lehrmann had said was that the situation sounded unprofessional (Chamberlain, [19]: CB1080).
717. Mr Chamberlain recalls that around the time he was dealing with Ms Brown, she asked him how to contact the AFP, and he sent her details of the AFP officers in Parliament House (Chamberlain, [20]-[22]: CB1080).

718. This conduct, again, is just bizarre. At the time of the call, Ms Brown knew that Mr Lehrmann was accused of having raped Ms Higgins and of leaving her naked and passed out in the office of a Minister of the Crown, and knew Ms Higgins had reported it to the AFP, yet it appears none of the relevant allegations were put to Mr Lehrmann. The matter was managed as if it involved nothing more than unauthorised after-hours access to the Ministerial Suite.

***E.14.5 Second Letter from Senator Reynolds to Mr Lehrmann – 5 April 2019***

719. Later that day, Senator Reynolds sent Mr Lehrmann a second letter formally terminating his employment for serious misconduct (Exhibit #26: CB85). He subsequently received a termination of employment form (T408.15) (Exhibit #R35: CB86).
720. This, again, is just inexcusable. Mr Lehrmann was moved on by a Minister of the Crown on the pretext of security breaches, when the true position was that he had been accused of raping a fellow staffer in the Minister's office.

**E.15 8 April 2019 – The 'Meet and Greet' with SACAT and Kathryn Cripps**

721. Detective Senior Constable Sarah Harman gave evidence about a 'meet and greet' meeting with Ms Higgins on 8 April 2019. Between 17 April 2017 and May 2023, Detective Harman was attached to SACAT. She explained that the role of SACAT is to investigate matters of adult sexual assault and child abuse matters. Her work included meeting with complainants, taking statements and investigating matters by collecting evidence (T1288.16-39).
722. Detective Harman gave evidence by reference to her contemporaneous diary records (Exhibit #R72: CB82). On 4 April 2019, Detective Harman was allocated the investigation into the alleged sexual assault of Ms Higgins by Mr Lehrmann in Parliament House (T1288.41-1289.19). Detective Harman had been informed that Ms Higgins did not want to proceed with an investigation at that stage, but she did want further information about her options (T1289.17-19). She made inquiries for the purposes of securing the CCTV footage at The Dock (T1290.39-1291.10).
723. On 8 April 2019, Detective Harman had a conversation with FA Cleaves (T1289.21-35, T1291.12-37) and then with Ms Higgins (T1292.27-1293.2). Detective Harman, and her colleague Detective Anderson, collected Ms Higgins from Parliament House and took her to the Winchester Police Centre in Belconnen. When they arrived at the



centre, they met with Kathryn Cripps from the Canberra Rape Crisis Centre (T1293.4-10). Detective Harman explained that the purpose of a ‘meet and greet’ was to explain available support services and to discuss what an investigation would involve, including conducting an evidence in chief interview, speaking to witnesses and collecting evidence (T1293.16-44).

724. Detective Harman set out what Ms Higgins told her during the meet and greet session (T1294.1-1298.19).
725. Ms Higgins also gave evidence about her meeting with the officers from SACAT. She said that the two officers explained what a ‘meet and greet’ was and asked her to recount the details of the night. She described the experience as being a lot more granular this time round (T677.26). Ms Higgins said she did not know the name of the second venue at that point and so she said they went to a club or second bar in Canberra (T677.28).
726. In cross-examination, she agreed that she had told Detective Harman that she would find out the name of the second venue she had attended, but did not do so after she discontinued the police complaint (T778.20-28). As noted above, Mr Lehrmann’s apparent theory that there is some significance in this lacks coherence. In light of the obviously truthful evidence given by Ms Gain, any CCTV footage from 88mph was much more likely to support Ms Higgins’ version of events than Mr Lehrmann’s.
727. Ms Higgins was pleased when she was told that CCTV footage had been obtained from The Dock (T677.36-37). She said that, at that stage, she was not ready to go on the record and make a formal statement (T678.5). Ms Higgins said that: *“The officer said words to the effect to me...that she was having difficulty getting the CCTV from Parliament House. That concerned me”* (T670.1-4; T677.45-47). In cross-examination, she said that she was told by female sergeant who was probably Detective Harman, that they had got footage from The Dock, but that they were having trouble getting the CCTV footage from Parliament House (T812.11-28). Ms Higgins said that she did not get any further information between 8 April 2019 and 7 February 2021 (when she met with Senior Constable Frizzell) about the status of the CCTV from Parliament House (T812.26-47). As far as Ms Higgins was aware, the Parliament House CCTV had not been obtained as at 8 April 2019 and the police were experiencing difficulty obtaining it.

728. Detective Harman described Ms Higgins' demeanour in the meeting as upset, but said that she was articulate and coherent (T1298.21-28).

#### ***E15.1 Kathryn Cripps***

729. Kathryn Cripps gave evidence about the meet and greet. Ms Cripps has worked as a crisis counsellor/advocate and counsellor at the Canberra Rape Crisis Centre (**CRCC**) for over 18 years (Cripps, [3]: CB1085). CRCC is a non-government, not for profit organisation working to eliminate sexual violence against women. It provides a 24-hour call out service to police and medical services, a crisis counselling telephone support service, counselling and support services to survivors of sexual assault and education, training and professional consultation (Cripps, [4]-[8]: CB1085). CRCC has a memorandum of understanding with the AFP and SACAT. Under the memorandum, where a person makes an allegation of sexual assault to an officer of SACAT, the team will contact CRCC and organise for a staff member to support the complainant. The support provided by CRCC to complainants who report a sexual assault to SACAT is an advocacy role, rather than a counselling role. The relevant CRCC staff member supports the complainant and monitors and advocates for their welfare during the complainant's contact with SACAT (Cripps, [10]-[11]: CB1085).

730. Ms Cripps gave evidence about her work as a crisis counsellor, the importance of confidentiality to CRCC and her observations as to people who disclose a sexual assault (Cripps, [12]-[17]: CB1085).

731. Ms Cripps gave evidence about the circumstances in which she attended the 'meet and greet' with Ms Higgins on 8 April 2019 and the purpose of a 'meet and greet' with SACAT more generally (Cripps, [18]-[23]: CB1085 and T1328.32-35).

732. Ms Cripps arranged with Ms Higgins to speak privately together after the meet and greet with Detectives Harman and Anderson (T1328.40-43). Ms Cripps observed that during the 'meet and greet' there was a lot of distress on Ms Higgins' part. She was very tearful, but tried to remain composed. Ms Cripps described Ms Higgins being in great distress and her tears flowed intensely (T1329.28-24). In particular, Ms Cripps observed that Ms Higgins became tearful when Detective Harman mentioned the rights of the alleged perpetrator (T1329.43-1330.10). Ms Cripps said that Ms Higgins was also in floods of tears when she was asked if she wanted to go ahead and make a formal report (T1330.14-25).

733. Ms Cripps and Ms Higgins had a discussion after the ‘meet and greet’ where Ms Cripps was trying to calm her distress (T1330.37-1331.9).
734. Ms Cripps and Ms Higgins subsequently had a number of counselling sessions in person and by telephone (T1331.23-1334.16 and Cripps, [37]-[38]: CB1085). Ms Higgins confirmed that she had a lot of counselling with Ms Cripps (T686).
735. Ms Cripps’ evidence was that in the face to face counselling sessions that occurred after the meet and greet, Ms Higgins exhibited distress about a “tug-of-war” between desperately wanting to report the incident and wanting to keep her job (T1333.12-30). It was a topic that came up on more than one occasion over a few months.
736. Ms Cripps said: *“each time I saw her, it was about her distress at wanting two different things and they weren’t congruent. She had only been in ACT six months. She came for this what she called and I quote here – and it stands out in my memory because it was unusual in counselling. She called it her dream job. And she was here for six months only. This was her dream job and she wanted her career in this area”* (T1334.6-11). Ms Cripps explained that Ms Higgins told her *“that she knew, if she brought this to anyone’s attention, that she would lose her job. She was clear about that”* (T1334.14-16). Ms Cripps’ evidence was that Ms Higgins also told her that others at Parliament House had seen footage of her on the relevant night and that no one would let her see it. Ms Cripps’ observations were that Ms Higgins became distressed when she told her that (Cripps, [40]-[41]: CB1085).
737. Ms Higgins’ conduct as observed by Ms Cripps is not consistent with Mr Lehrmann’s theory that Ms Higgins fabricated the rape allegation in order to save her job. Ms Higgins’ job was not in peril. A person who had fabricated a rape allegation would hardly continue in rape counselling over months, exhibiting such distress, while wrestling with the potential implications of pursuing a formal complaint.
738. Detective Harman’s evidence was that the day after the ‘meet and greet’, she made some inquiries in relation to available medical services and tried to call Ms Higgins, including to see if she wanted to participate in an evidence in chief interview (T1298.35-45). Detective Harman tried to call Ms Higgins the next day (10 April 2019) (T1299.28-32). She also spoke to FA Cleaves who told her that she was still following up the CCTV from Parliament House (T1299.34-42).

739. On 13 April 2019, Detective Harman received an email from Ms Higgins in which she informed Detective Harman that she did not wish to proceed with an investigation (Exhibit #R9: CB94). Detective Harman responded by email on 15 April 2019 (Exhibit #R10: CB95). That same day, Detective Harman had another conversation with FA Cleaves about her continuing attempts to retrieve the CCTV from Parliament House (T1301.21-25). Notwithstanding Ms Higgins' email, Detective Harman continued to follow up the Parliament House CCTV footage (T1302.1-2, 35-47) and she was aware that a colleague had called Ms Higgins to ensure that no pressure had been placed upon her (T1302.8-31). Detective Harman received a summary of the CCTV footage that FA Cleaves viewed (T1303.1-7).
740. Detective Harman described the process of seeking to obtain the CCTV from Parliament House as "*incredibly frustrating*". She had never encountered such pushback obtaining CCTV footage before and she was required to escalate things through her management (T1303.27-43).

***Ms Higgins' decision not to pursue a police complaint***

741. Ms Higgins' evidence was that she was facing a choice of where to go for the election, and for her the choice of where to go became tied up with the choice to go forward with a police complaint or not. She said that the day the election was called on 11 April 2019 was the trigger point for her to make a decision about proceeding with a formal complaint (T678.24-37). Ms Higgins said that no help had come from the Prime Minister's Office and she considered that Ms Brown was getting annoyed that she had not made a choice about what she wanted to do for the election. She considered that her only options were to go home and get paid out or go to WA. She ultimately decided to go to WA (T678.39-45). Ms Higgins then sent the email to Detective Harman referred to above (Exhibit #R9: CB94).

**E.16 9 April 2019**

742. At 5:43pm on 9 April 2019, Mr Dillaway sent a text message to Ms Higgins: "*How's your day been?*". Ms Higgins replied at 5:46pm to say: "*Actually pretty great. Mostly just planned out my workcation in Perth hahah. Yesterday was full on meeting with the AFP and stuff. I do feel a whole lot better today after it all though*" (Exhibit #R99: CB15, p 922). Ms Higgins' reference to a meeting with the AFP was clearly the 'meet and greet' she had attended with Detective Harman and Ms Cripps the previous day.

743. Ms Higgins had mentioned to Mr Dillaway that she was speaking to the AFP. He said that she told him that they wanted to speak to her and that she did not wish to pursue the matter with the AFP (T1238.9-17). Mr Dillaway recalled that he and Ms Higgins had had a number of conversations on the topic of speaking to police and that Ms Higgins had maintained to him that she did not want to pursue legal action (T1238.23-30).
744. At 6:16pm on 9 April 2019, Ms Higgins sent Mr Dillaway a text message: *“It’s all super weird the way things have sort transpired (sic). The people who I spoke to had already requested the CCTV from the venues we’d been to based on the info passed on from Parliament”* (Exhibit #R99: CB15 p 923).
745. Mr Dillaway replied at 6:21pm: *“Like the AFP had already got CCTV from dock etc?”*.
746. Mr Dillaway sent a response at 6:23pm: *“Guess they have to be prepared and have evidence in case you wanted to pursue”* (Exhibit #R99: CB15 p 924).
747. Ms Higgins replied at 6:25pm: *“Yep, that’s the general tone of it all. They said pursuing it through the legal system usually takes around two years start to finish and is pretty involved”* (Exhibit #R99: CB15 p 925).
748. Almost immediately, Ms Higgins sent Mr Dillaway a further message at 6:25pm: *“Honestly would rather just move on. Seems way too taxing”* (Exhibit #R99: CB15 p 925).
749. Mr Dillaway recalled that during his discussions with Ms Higgins *“her main thing was that she did not want the world to know about it. She did not wish to pursue that avenue. She wanted to ...get on with her life and try...bury this”* (T1239.41-45; see also T1263.1-9). He said that Ms Higgins told him that she was not coping well, feeling stressed and felt that it could affect her job and her career (T1239.45-46).

#### **E.17 Mid-April 2019 - Conversation between Major Irvine and Ms Higgins**

750. Major Irvine gave evidence about a further conversation she had with Ms Higgins about a week after the conversation on 3 April 2019 (T1183.28-34).
751. During this conversation, Major Irvine asked Ms Higgins how she was. Major Irvine had a distinct memory of Ms Higgins telling her that she was no longer pursuing the police complaint.

752. Her evidence was that Ms Higgins told her that the police had informed her that it would “*take a really long time to get to court*”, that it would be very “*emotionally taxing*” and it would be very difficult for her and it would be difficult to obtain a conviction (T1183.36-46). The information provided by Ms Higgins to Major Irvine reflects the information that Detective Harman said that she provided to her at the 8 April 2019 ‘meet and greet’ and the substance of her messages with Mr Dillaway. It is consistent with Ms Higgins’ evidence about determining not to pursue the complaint at that stage.

#### **E.18 19 April 2019**

On 19 April 2019, Mr O’Connor had a text exchange with Ms Higgins (O’Connor, [19]-[21]: CB1090). Ms Higgins asked for his opinion on the “*incident that went down*”. Mr O’Connor called Ms Higgins as he was driving home.

753. Mr O’Connor said that the substance of what Ms Higgins told him during the call was that there had been an incident in March 2019, when she had going on a date in Canberra. She had said she had gone out to drink with some fellow staffers. She mentioned Mr Wenke and another staffer. She mentioned that the other staffer had worked for George Brandis and was from Toowoomba. Mr O’Connor said that Ms Higgins did not tell him the name of the staffer at that stage (T1929.35). Ms Higgins told Mr O’Connor that the staffer had taken her back to Parliament House and that he had raped her (T1921.24-35).
754. Mr O’Connor said he had an absolute memory of Ms Higgins using the word “rape” and that she had said that the staffer had taken her back to Parliament House. She had said it was under the guise of having to drop in there. It struck Mr O’Connor as unusual to be in Parliament House at that particular time on an early Saturday morning (T1921.37-44).
755. Mr O’Connor had subsequent conversations with Ms Higgins on the same subject. He described many conversations over the period of around 12 months (T1922.5-6). Mr O’Connor’s recollection was that he sent a text message to Ms Higgins the next day, checking in on her (T1922.13-14).

#### **E.19 Observations made by Kelly Higgins – March/April 2019**

756. Kelly Higgins, Ms Higgins’ mother, gave evidence about Ms Higgins’ move to Canberra in late 2018. She described Ms Higgins as a “*vivacious personality*” at the time and described how she was loving her life and was very independent and capable.

They stayed in touch mostly through social media. Kelly Higgins had the sense that her daughter was “*delighted*” and “*engrossed in the opportunities*”. She said that Ms Higgins was “*loving learning about...the culture of Parliament House, how things worked. She was extremely happy*” (T1439.9-35).

757. Kelly Higgins gave evidence about her observations of a change in her daughter’s outlook. She first noticed the change towards the end of March and early April 2019. She said that her daughter “*became very withdrawn. She wasn’t communicating as frequently. She seemed extremely detached*”. Kelly Higgins observed a lack of enthusiasm and joy when she communicated with her daughter. She recalled that all forms of communication with her daughter started to drop off (T1439.37-1440.6).
758. Kelly Higgins recalled a conversation before her daughter went to Western Australia in which she asked Ms Higgins if there was anything wrong. Ms Higgins told her mother that there was an incident that happened inside Parliament House, but that she did not want to talk about it at that time (T1440.8-31).

## **E.20 Perth**

759. Ms Higgins’ evidence was that she went to Western Australia on 13 or 14 April 2019 (T814.39-40). She said that her official job there was assistant media, but in reality she was walking the streets handing out ‘how-to-votes’ or was on “pre-poll”. Ms Higgins said that Senator Reynolds actively avoided her during this period, and would avoid talking to her (T682.1-24).
760. Ms Higgins described that she was “*really suicidal*” at the time. She was alone and did not know anyone. She said that: “*...all the people that I was working with, day in, day out, were all Bruce’s former colleagues – I had only known them three weeks – and they knew the reason that he was fired was in relation to me, so it was this weird thing where, like, people were treating me kind of weirdly and weren’t overly nice. So I was just completely by myself*” (T682.26-32). In cross-examination, she repeated that she was suicidal at this time and was not thinking clearly about the future (T995.1-11).
761. Major Irvine held concerns about Ms Higgins’ welfare. She was aware that Senator Reynolds and her staff were planning a trip to Perth to campaign in the lead-up to the federal election. She asked Ms Brown whether Ms Higgins should come to Perth - “*does she go to Perth now?*” - and Ms Brown said she could go to Perth if that’s what she wanted to do (T1203.25-1204.6).

### ***E.20.1 Observations of Ms Hamer***

762. Ms Hamer worked in Senator Reynolds' Perth electorate office in the lead up to the 2019 Federal election. Her recollection is that the staff from Canberra came over to Perth approximately 3-4 weeks before the election, and that they included Ms Higgins. Ms Hamer was less busy with work associated with her role as an assistant media advisor, but she did a lot of campaigning during that period of time (T1063.26-28). She agreed that there wasn't a lot of media work for Ms Higgins to do, but instead she was engaged in campaigning like Ms Hamer (T1063.30-33).
763. During the election campaign, Ms Hamer observed that Ms Higgins took quite a few days off sick while she was in Perth. When Ms Hamer asked others about Ms Higgins having time off, she was told that Ms Higgins was unwell (Hamer, [46]-[49]: CB1083).
764. Ms Hamer noticed that Ms Higgins would sometimes go down to the river for lunch and be gone for over an hour. She found this unusual as people were very busy in the lead up to the election so it was odd that Ms Higgins was allowed to eat her lunch out of the office for over an hour (Hamer, [50]: CB1083).

### ***E.20.2 Communications with Mr O'Connor***

765. Mr O'Connor gave evidence of talking to Ms Higgins after she had gone over to WA. He thought it was around a month or two after she had gone and the election campaign was kicking off. He said that the conversation was mostly around how she felt and she said that she was sort of "*punted over there*". Mr O'Connor's recollection is that Ms Higgins said she felt away from the action in Canberra. She said that she did not want to go public with what had happened to her in the lead-up to the election. She said that random people were checking up on her, and also mentioned the name Yaron which Mr O'Connor understood to be a reference to Yaron Finkelstein (T1922.16-37). Mr O'Connor's recollection was that Ms Higgins spoke about the publicity that would be generated in her making contact with police and that it would define her (T1923.5-12). In cross-examination, Mr O'Connor said that he understood Ms Higgins to be saying that there was a feeling that she was a problem and that an eye was being kept on her (T1931.1-5). He understood that Ms Higgins did not want to be in Perth (T1931.18-19).

### ***E.20.3 Communications between Ms Higgins and Mr Dillaway / Major Irvine***

766. On 3 May 2019, Ms Higgins sent Mr Dillaway two text messages in which she said: "*I had a weird call from the station chief of police in Canberra*" and "*He asked me if the*



*party/COS was pressuring me not to come forward*” (Exhibit #R99: CB15, pp 1341-1342).

767. Major Irvine recalled a conversation with Ms Higgins while she was in Perth in which she asked Ms Higgins how she was feeling about everything. Major Irvine said that Ms Higgins said *“I’ve made my decision. I just need to move on with it [or I just need to be comfortable with it]”* and made a gesture with her hands that Major Irvine understood to mean she needed to back off (T1184.8-27).
768. Mr Dillaway learned that Ms Higgins was going to Perth for the election campaign through his discussions with her. Mr Dillaway suggested to her that she could try to seek to work on the campaign in Queensland where she could be closer to family and friends (T1237.11-16). Ms Higgins told Mr Dillaway that *“there was no option for her to go to Queensland to work in the campaign headquarters, which is where that was based in Brisbane, and if she was to continue working for Senator Reynolds, the option was to go to Perth where the office would largely be based and work there”* (T1237.29-33).
769. During the time Ms Higgins was in Perth, Mr Dillaway was working in Brisbane. He did not see her during that period, but communicated most days via text message (T1240.14-22) (Exhibit #R99: CB15). He was aware that Ms Higgins was not coping well, and he would check in on her and send her flowers (T1264.1-3). Mr Dillaway also said that Ms Higgins told him that she was not sleeping and that *“she was anxious and just not doing well”* (T1264.5-7).
770. In cross-examination, a series of messages sent by Ms Higgins to Mr Dillaway were shown to Mr Dillaway and it was put to him that those messages recorded that Ms Higgins was doing incredible or fun things (T1269.24-26). Mr Dillaway explained that he and Ms Higgins chatted while she was in Perth and his recollection was that her demeanour was up and down (T1271.34-40). When challenged in cross-examination, Mr Dillaway was firm in his recollection of his dealings with Ms Higgins while she was in Perth that she was up and down during that period (T1272.21-25).
771. He recalled one message where Ms Higgins had told him she was struggling to sleep and anxious (T1269.14-17). Certainly, on 11 April 2019, just before Ms Higgins departed for Perth, he and Ms Higgins had the following exchange in which she sent him a message to that effect (Exhibit #R99: CB15, pp 940-944):

Mr Dillaway: *“PMO person checked with me to see how you’re doing and if you need anything etc.”*

Ms Higgins: *“Honestly, I’ve kind of hit a bit of a wall. Fuck the PMO person. All I wanted was help through this and essentially I’ve been kind of left to my own devices. I have an AFP person harassing me to press charges and on the parliamentary side of thing (sic) I’m still on a waiting list to talk to someone.”*

Ms Higgins: *“I just keep holding out for this help that I think is coming and evidently it’s not. I can’t sleep, I’m anxious all the time and it’s just really freaking hard”.*

772. On 3 May 2019, Ms Higgins sent Mr Dillaway two text messages in which she said: *“I had a weird call from the station chief of police in Canberra”* and *“He asked me if the party/COS was pressuring me not to come forward”* (Exhibit #R99: CB15, pp 1341-1342).
773. Major Irvine recalled a conversation with Ms Higgins while she was in Perth in which she asked Ms Higgins how she was feeling about everything. Major Irvine said that Ms Higgins said *“I’ve made my decision. I just need to move on with it [or I just need to be comfortable with it]”* and made a gesture with her hands that Major Irvine understood to mean she needed to back off (T1184.8-27).
774. On 6 May 2019, Ms Higgins and Mr Dillaway had a message exchange about *“the Ken Wyatt staffer story”* (T683.40) (Exhibit #R99: CB15, p 1420). Mr Dillaway’s evidence was that the message related to a story in the media about a member of Minister Wyatt’s office and an allegation of bullying (T1241.4-8).
775. Ms Higgins explained that she perceived that everyone in her office was being sympathetic to the alleged bully in the story and saying that it was horrendous that people would speak out about it, and the comments *“struck a nerve and it really hurt, because I felt pretty abandoned and I just saw myself in that story”* (T684.39-44). At 7:25pm, Ms Higgins sent a message to Mr Dillaway: *“It just sort of reminds me of my situation, I guess. How it can be turned into a story and everyone is basically just empathising with the perpetrator of the harassment”* (Exhibit #R99: CB15, p 1424).
776. At 8:33pm, Mr Dillaway asked Ms Higgins how her evening was. At 9:23pm, she replied to Mr Dillaway: *“Kinda shitty. I’m not sure why, but I just feel super angry at*

*the moment. It's probably misdirected and should be aimed at Bruce, but I feel so pissed at the people in the party"* (Exhibit #R99: CB15, p 1428). Ms Higgins said that at that time she felt hurt and abandoned (T685.7-12).

777. Mr Dillaway asked if there was anything he could do. At 9:44pm on 6 May 2019, Ms Higgins sent Mr Dillaway a text message: *"No, not really. It's just beyond shitty hearing Linda offering this obviously horrible Wyatt staffer all this support in the wake of the story and I'm like ??? I was literally assaulted in your office and I collectively maybe took 4 days off/was offered jack shit in terms of help"* (Exhibit #R99: CB15 p 1429). Ms Higgins confirmed that that was how she felt at the time (T685.29).
778. At 10:05pm on 6 May 2019, Ms Higgins sent Mr Dillaway a further text message: *"If I want to maintain a job, I can't talk about it but I'm still getting follow up calls from the AFP to this dah (sic) and I'm just at the end of my rope with it"* (Exhibit #R99: CB15, p 1431). Mr Dillaway explained that he understood from the message that Ms Higgins was concerned for her job and (consistent with what she had previously told him) she considered that pursuing the police avenue would be detrimental to her job and career (T1241.10-31).
779. In cross-examination, Mr Dillaway said that while Ms Higgins was in Perth she told him that she was generally up and down. She said that some days she seemed really good and happy and was enjoying herself, and other days she was not doing well (T1264.9-19).

#### ***E.20.4 Observations of Alex Humphreys***

780. Alex Humphreys first met Ms Higgins when she moved in to live with her and her housemate at their share house in Woden, Canberra in early 2019. After Ms Higgins moved in, Ms Humphreys organised occasional dinners and social gatherings after work and on weekends, sometimes individually with Ms Higgins and sometimes with Ms Higgins and a group of friends. Ms Humphreys and Ms Higgins quickly became friends (Humphreys, [14]: CB1067).
781. Prior to Ms Higgins leaving to go to Western Australia, Ms Humphreys recalled standing near Ms Higgins at their share house when Ms Higgins received a call. Ms Humphreys' evidence was that Ms Higgins told her that the call was from the police in relation to something that had occurred at work (T1132.3-36). This struck Ms Humphreys as odd (Humphreys, [17]: CB1067).

782. In cross-examination, Ms Humphreys said that Ms Higgins was “*really stressed*” leading up to her going to Western Australia (T1132.42)
783. Ms Humphreys had made plans to catch up with Ms Higgins while they were both in Perth, however those plans did not eventuate because Ms Higgins cancelled them once they were there (Humphreys, [18]: CB1067).

#### **E.21 16 May 2019 – Senator Reynolds’ Birthday Party**

784. Towards the end of the election campaign, there was a team dinner to celebrate Senator Reynolds’ birthday. It was held at the Pan Pacific Hotel in Perth. Exhibit #40 was a photograph of attendees at the dinner.
785. Ms Higgins’ evidence was that she had put the white dress she had worn on 22-23 March 2019 in a bag under her bed for a period of time. She said that it was under her bed for about six weeks until she wore it one more time. The single occasion she wore the dress after 23 March 2019 was for Senator Reynolds’ birthday, and she never wore it again afterwards (T686.39-47). She explained (T816.8-14):

*“It was my favourite dress. I used to wear it all the time, and I guess I was trying to reclaim it. I had done that with, like, a lot of even my court clothes, for example. You – sometimes, you can kind of shake off the association from an article and try and make it yours again, and in this instance, I thought I could – I couldn’t, and so I never wore it after this event. But it was my favourite dress, and I – I – I thought maybe I could disassociate it from the rape, but I never could.”*

786. In cross-examination, Ms Higgins explained that she had taken almost her entire wardrobe with her to Perth and that she had washed the dress herself at some point prior to wearing it to Senator Reynolds’ birthday dinner (T814.45-37).
787. Ms Higgins was shown a photograph of people around a table at Senator Reynolds’ birthday dinner (Exhibit #40). In answer to a question from the Court, Ms Higgins said that she was one of the last people seated at the table and the seat next to Senator Reynolds was one of the last seats so she accidentally ended up next to her (T816.25-30). In cross-examination, she denied seeking out to sit next to and speak with Senator Reynolds (T816.34-35). Ms Higgins said that she felt awkward and did not want to socialise so she went to the bathroom to take selfies (T816.37-818.3; Exhibit #41). Ms Higgins explained that when she sent the selfies to Mr Dillaway she did not tell him

about the significance of her seeking to reclaim the dress she was wearing because “*we didn’t have that sort of relationship*” and would not express to him her “*internal monologues about the nuanced issue of reclaiming clothing from the night I was assaulted*”. That was the kind of topic she would speak to Ms Cripps about (T818.19-32). That evidence was, we submit, inherently believable.

788. Ms Hamer’s evidence was that she could not recall that nobody wanted to sit next to Senator Reynolds (T1067.20-24). Mr Wotton sat next to Senator Reynolds and said that he would not have been aware if people did not want to sit next to her (T1094.8-11). It was not put to Ms Higgins that she sat next to Senator Reynolds because nobody else wanted to. That was not her evidence. Her evidence was that it was one of the last seats available when she arrived at the dinner.
789. On 16 May 2019, Ms Higgins sent Mr Dillaway some messages about attending Senator Reynolds’ birthday (Exhibit #R99: CB15, p1592).

## **E.22 After the Election**

790. The 2019 federal election was held on 18 May 2019.
791. Mr Dillaway gave evidence about exchanging messages with Ms Higgins after the election about whether she should stay with Senator Reynolds or go to another office. He had conversations with Ms Higgins and the impression he received was that she did not hold Senator Reynolds in the highest regard and that was why she was seeking employment opportunities in other Ministers’ offices after the election (T1274.41-1275.35).
792. Ms Higgins gave evidence that after the government was returned at the election, she got a new job with Michaelia Cash (T685.31-686.14). Ms Higgins joined Senator Cash in a media advisor role (T693). She did not feel that there was a place for her on Senator Reynolds’ team, based on how she had been treated during the election and expressed that to Mr Dillaway in their correspondence (T997.29-46)
793. She did not want to be rude to Senator Reynolds, but knew things were bad but bought her and Ms Brown a bottle of champagne to smooth things over as much as possible before leaving (T686.16-24). In fact, it appears the champagne was bought for Chris Payne, not Ms Brown (T2033.15-2034.7).

794. Mr O'Connor recalled exchanging WhatsApp messages with Ms Higgins after the election. He recalled that Ms Higgins was trying to figure out her next role and that she expressed a desire to return to the Gold Coast, Mr O'Connor was aware that she subsequently took a job with Senator Cash (T1923.24-36).

### **E.23 Observations of Ms Humphreys after Ms Higgins returned from Perth**

795. Ms Humphreys' evidence was that she observed a change in Ms Higgins' behaviour after she had returned to their share house following her trip to Western Australia. Ms Humphreys noticed that Ms Higgins stayed in her bedroom a lot, rather than spending time with her and their housemate in the common area. She noticed that Ms Higgins was becoming quite messy in her bedroom and in the kitchen, whereas she had not previously been that way (Humphreys, [19]: CB1067).
796. Ms Humphreys continued to invite Ms Higgins to occasional social events with her and her friends, but she could not recall Ms Higgins attending any events with her in the period after she returned from Perth until she moved out in late 2019. During this period, Ms Humphreys considered that something was amiss with Ms Higgins, but at the time she attributed it to work stress (Humphreys, [19]: CB1067).

### **E.24 20 October 2019 – The Media Inquiry/Senate Estimates**

797. Ms Higgins' evidence was that she had a conversation with Senator Cash in October 2019 (T693.45). She referred to the media enquiry coming through either Senator Reynolds' office or the AFP. She said the media enquiry concerned a sexual assault in Senator Reynolds' office on the night in question (T694.1-4). Mr O'Connor gave evidence about having a discussion at this time with Ms Higgins in which she mentioned the media enquiry (T1923.38-1924.2).

#### ***E.24.1 Meeting with Daniel Try***

798. Ms Higgins said that she was called into a meeting with Senator Cash's COS, Daniel Try. The meeting occurred in his office. Ms Higgins' recollection is that the meeting occurred on or about 18 October 2019 (T694.15-26). Ms Higgins said that Mr Try called her into his office and said he had received a call from Senator Reynolds' office about an alleged sexual assault that happened in her office on 22 March 2019. He said that there was a media inquiry about it. He said that someone from Senator Reynolds' office was going to come and speak to them. Mr Try told Ms Higgins: "*God, I'm really sorry*" (T694-695).

#### ***E.24.2 Meeting with Daniel Try and Christie Pearson***

799. Ms Higgins was immediately upset at the thought of the incident getting out. She sat down in a chair and Mr Try offered her tissues. They waited for a staffer from Senator Reynolds' office to come and meet with them (T695.10-24). Ms Higgins identified the staffer from Senator Reynolds office as someone called Christie (T695.28). She said that: "[Christie] sat down. She said: 'I've got some distressing news to tell you, that there has been a media inquiry about an alleged sexual assault that occurred in Senator Reynolds' office on 22 March 2019 and we're considering how to respond'". In cross-examination, it was put to Ms Higgins that the staffer was "Christie Pearson" but Ms Higgins said she only knew her first name (T848.6-7; see also T849). Ms Higgins said that she told Christie and Mr Try about the sexual assault (T852.1-9).
800. Ms Higgins said that at that point she was really upset and said that she had not told anyone and she did not know how they had found out (T695.36-42). Mr Try asked questions about how they could publish without Ms Higgins' consent (T695.43-45). He talked about trying to "squash" the story or make it go away (T849.25-29).

#### ***E24.3 Meeting with Daniel Try and Senator Cash***

801. At the end of the meeting, Ms Higgins said that Mr Try asked her if she would like to "tell the boss" or whether she wanted him to tell her. Ms Higgins understood "the boss" to be Senator Cash (T696.1-13). Mr Try immediately walked into Senator Cash's office and closed the door. They were speaking for around 15 minutes and then Ms Higgins was invited into the Minister's office.
802. Ms Higgins said that Senator Cash immediately embraced her in a hug. Ms Higgins was unable to recall what was said, but she said words to the effect that everything would be okay, and they would handle it (T696.15-31).

#### ***E24.4 Detective Harman's call***

803. Detective Harman gave evidence about being approached by her acting sergeant at the time to advise that her Commander had received a media inquiry and wanted Detective Harman to make contact with Ms Higgins (T1304.4-11). Detective Harman explained that she was informed there had been a media inquiry and the matter of Ms Higgins' sexual assault at Parliament House may be raised at Senate Estimates that week (T1304.15-46).

804. Detective Harman called Ms Higgins and advised her of what she had been told. Ms Higgins' was "*hysterical*". Detective Harman said that she was very difficult to hear and was clearly crying. Ms Higgins hung up abruptly after telling Detective Harman that she would call her back (T1305.1-1308.14). Detective Harman called Ms Higgins back and had a conversation with Ms Higgins (T1308.16-1309.4).
805. Ms Higgins gave evidence about receiving the call from Detective Harman referred to in the preceding paragraphs (T697). She said she received the call over the weekend of 19-20 October 2019 informing her about the media inquiry and that it would be put in the AFP Commissioner's Senate estimates pack (T697.12-18). Ms Higgins said that she immediately called Mr Try to let him know. She told him about the call, and said that she was really upset and scared. Ms Higgins said that Mr Try thanked her for letting him know and said that he would handle it (T697.26-27).
806. Ms Higgins said that receiving the call from the AFP changed her view about the AFP in the sense that she was scared about the relationship between the AFP and Parliament House and in particular the level of information that appeared to pass so readily between ministerial offices related to Home Affairs and the AFP. She was scared that if she re-enlivened her complaint, that the Liberal Party would know pretty quickly (T821.32-822.10). In cross-examination, Ms Higgins said that she never received any assurance that if questions were asked in Senate estimates about the incident, she would not be identified (T823.6-824.3).

***E24.5 Voice messages from Senator Cash and Daniel Try***

807. After the call from Detective Harman, Ms Higgins received a voice message from Senator Cash, which became Exhibit #R12 (CB108). Ms Higgins understood that message to mean that everything was under control with the AFP Senate estimates issue, and she inferred that it was about the media inquiry and the Senate estimates coming up and that everything was in hand and that she had squashed the media inquiry (T698.6-14). In the message, Senator Cash told Ms Higgins to remember that "*we are with you every step of the way, OK*".
808. Ms Higgins also received a voice message from Mr Try, which became Exhibit #R13.
809. Those messages are only explicable by accepting Ms Higgins' evidence that Senator Cash and Mr Try knew about the alleged sexual assault by October 2019. It is nonsensical that a Senator and her COS would be assuring a junior media adviser that



they had some unrelated sexual assault allegation that might arise in Senate estimates under control, and telling Ms Higgins that they were with her “*every step of the way*”. Plainly, they were communicating with Ms Higgins because they knew the media inquiry concerning the alleged sexual assault in Senator Reynolds’ office related to Ms Higgins.

810. This is important evidence in relation to Ms Higgins’ credibility. It is corroborated by the subsequently recorded call between Ms Higgins and Mr Try in early 2021, in which it is clear that Mr Try was well familiar with the assault allegation. An attempt was made to discredit Ms Higgins on the basis of the call she recorded between herself, Senator Cash and Mr Try on 5 February 2021 in which, on one interpretation, Senator Cash professed to know nothing about the assault. The interpretation contended for by Mr Lehrmann obviously cannot be right, in light of these messages; if it is, then Ms Higgins is correct that Senator Cash was not being candid in that call.
811. Ms Higgins gave evidence about attending a Master Builders Association event on the Monday with Senator Cash and Mr Try which was off site and during the AFP Commissioner’s session in the Senate (T699.13-31). After the event, Ms Higgins attended a meeting with Mr Try. He assured Ms Higgins that the sexual assault had not come up at senate estimates, and that Ms Higgins was okay to go back to work (T701.23-34).
812. In cross-examination, Ms Higgins explained that she now considers calls she received from Senator Cash and Mr Try over the weekend to be “*nefarious*” on the basis that they testified in the criminal proceedings to having no knowledge of a sexual assault (T850.35-43). Ms Higgins said that at the time she thought they were supportive calls, but that with the benefit of hindsight she considers that they were potentially checking in. Ms Higgins is plainly correct.
813. It was put to Ms Higgins that she had not disclosed the incident that had occurred in Senator Reynolds office’ to Senator Cash or Mr Try until her conversation with Senator Cash on 5 February 2021, which she had covertly recorded (T853.39-41). She rejected that proposition, and insisted that she had told Senator Cash and Mr Try earlier, including in 2020 (T1001.46) and in October 2019 when the media enquiry and call from Detective Harman had come in.

814. The recording of Ms Higgins' conversation with Senator Cash and Mr Try on 5 February 2021 became Exhibit #64 (CB247) and an earlier conversation between Ms Higgins and Mr Try on 28 January 2021 became Exhibit #63 (CB325) (*Lehrmann v Network Ten Pty Ltd (Covert Recording)* [2023] FCA 1586). A transcript of Exhibit #63 is at CB326. A transcript of Exhibit #64 is MFI51 (CB328).
815. In those recordings, representations are made by Senator Cash and Mr Try. Neither were called to give evidence, even though it was apparent that they were in Mr Lehrmann's camp. Two matters follow from that: first, a limitation was made under s 136 that the use of the evidence be limited such that the recordings are not evidence of the underlying truth of the representations made by Senator Cash and Mr Try. Secondly, a *Jones v Dunkel* inference is available that the evidence of Senator Cash and Mr Try would not have assisted Mr Lehrmann in relation to the issue of whether they in fact were informed of the sexual assault earlier than 5 February 2021 by Ms Higgins.
816. Ms Higgins was unequivocal about having told Senator Cash and Mr Try about the assault prior to 5 February 2021 (T1001-1005). In Network Ten's submission, it is clear when regard is had to the recording of the conversation between Ms Higgins and Mr Try on 28 January 2021 that Mr Try was well aware of the allegations and the events in October 2019. As noted above, the voicemail messages from 20 October 2019 are nonsensical unless Senator Cash and Mr Try each knew of the allegations.
817. In any event, the logical interpretation of the recorded conversation between Ms Higgins, Senator Cash and Mr Try on 5 February 2021 is that Senator Cash, while aware of the nature of the allegation, was not aware of the *details* of the allegation as outlined by Ms Higgins in that call. Senator Cash's questions appear to be directed to particular aspects of what had occurred and are indicative of someone who knows about the central allegation and is seeking information around that allegation, for example:
- (a) When Senator Cash asks what happened, her enquiry is directed to the activities of security rather than more generally (MFI51, p 3267). There is further discussion about the actions of the security guards.
  - (b) Senator Cash alludes to having spoken to Ms Higgins about the matter previously. She says: "*Did you have a pass – you said to me the other day you didn't have a pass?*" They must have spoken about the matter "the other day" (MFI51, p 3267).

- (c) Senator Cash volunteers that the person Ms Higgins entered Parliament House with was “a staffer” (MFI51, p 3267).
- (d) Senator Cash’s reference to “*we didn’t know anything, no one told us*” appears to be directed to what Ms Higgins says immediately beforehand about the aftermath of the sexual assault and its handling, rather than the fact of the sexual assault itself (MFI51, p 3269).

818. In the absence of any evidence to the contrary, and having regard to Ms Higgins’ evidence and the content of the recordings, in Network Ten’s submission, the Court would accept Ms Higgins’ evidence that she had informed Senator Cash and Mr Try of the sexual assault at an earlier date, and by no later than October 2019. At the very least, these matters could not adversely affect the assessment of Ms Higgins’ credit as a witness in all the circumstances.

#### **E.25 21 November 2019 – Ms Higgins’ disclosure to her mother**

819. Kelly Higgins gave evidence of a conversation with her daughter when she was visiting Queensland (T1440.45). Kelly Higgins and her daughter went to a restaurant called Hellenika with her then partner, Mr Genc, on 21 November 2019. She said that she was able to recall the date because she had posted a photograph of the three of them at the restaurant. Those photographs became Exhibit #62. The substance of what Kelly Higgins said about what her daughter told her on 21 November 2019 is set out at T1441-1444 and included:

- (a) That Ms Higgins had gone out for drinks with a larger group after work.
- (b) The group had split and some of the group went to a second venue.
- (c) Ms Higgins had been drinking heavily and she tripped over a step. She identified that she needed to go home.
- (d) There were discussions about sharing transport and splitting a cab as Mr Lehrmann was heading in the same direction as Ms Higgins.
- (e) Ms Higgins understood that she was going home, but in the course of the journey she realised that she was on her way to Parliament House.
- (f) Ms Higgins arrived at Parliament House and rather than sit in the taxi she went inside the building.

- (g) Ms Higgins went inside the Minister's suite and said that she recalled being happy and marvelling about where she was.
  - (h) Ms Higgins was extremely intoxicated and felt unwell.
  - (i) The next thing Ms Higgins remembered was being on the lounge. She believed she had passed out. She awoke to pressure and pain on her leg. Mr Lehrmann was on top of her, raping her. In response to a question from the Court, Kelly Higgins confirmed that her daughter had used the words "he was raping me" (T1442.6).
  - (j) Ms Higgins told Mr Lehrman "no".
  - (k) Mr Lehrmann looked at her blankly and continued to rape her. He finished and left.
  - (l) Ms Higgins passed out. She woke up and felt the need to cover herself. She found a jacket and covered herself up for some dignity. She found some chocolates and ate them.
  - (m) Ms Higgins said that it felt like she was there forever and she had to organise her own transport.
  - (n) Kelly Higgins asked her daughter why nobody helped her, and Ms Higgins told her that there was no-one to help her.
  - (o) Kelly Higgins asked her daughter for the name of the man, and Ms Higgins did not tell her and said that it was irrelevant and did not matter.
820. Kelly Higgins described her daughter's demeanour during the conversation as *"emotional, but you can see that she had contained this"*. She described observing that her daughter had tried to *"push this down and push this away"* and that after the dinner she seemed quite relieved to have shared the incident in detail (T1443.11-14). Ms Higgins described the conversation with her daughter as *"a mother's worst nightmare"*. She also described her observations of her daughter after *The Project* aired. She said that Ms Higgins' joy and personal happiness was gone (T1443.11-24).
821. Kelly Higgins was a credible witness who gave her best account of the conversation with her daughter. She was understandably emotional when she did so. Her evidence about the frequency of communications with her daughter was consistent, even when challenged in cross-examination with a particular exchange of messages between mother and daughter in April 2021 (Exhibit #61). Kelly Higgins' evidence of the timing

of her conversation with Ms Higgins on 21 November 2019 was also consistent with the Instagram posts that became Exhibit #62.

#### **E.26 Late 2019 - Observations made by Ms Jago**

822. Ms Jago gave evidence about Ms Higgins coming to Brisbane in November or December 2019 (T1460). Ms Higgins stayed at Ms Jago's house. Ms Jago observed that Ms Higgins was hiding in her room and she observed her "*bawling her eyes out*" (T1460.10-14).
823. Ms Jago's evidence was that prior to the publication of the allegations concerning the incident, she and Mr Higgins had tried on a number of occasions to find out what had happened, but Ms Higgins would not discuss the matter and would "*usually burst into tears*" (1461.12-26). In cross-examination, Ms Jago explained that it was in the period between Ms Higgins' partner telling her about the sexual assault in January 2021 and before the matter went public that she and Mr Higgins had tried to speak to Ms Higgins about the incident (T1461.36-44).

#### **E.27 Ms Higgins' disclosure to her father**

824. Mr Higgins gave evidence that after the trip to Canberra at the end of March 2019, his communications with his daughter became less regular. He felt something was wrong, although he did not know what (T1469.41047). It was apparent that when Mr Higgins gave evidence about his observations of his daughter at this time and their subsequent conversation in February 2020, he was overwhelmed with emotion and became upset.
825. On 2 February 2020, Ms Higgins sent her father a message that said: "*When you are free this week, we probably need to have a chat. So much has gone on in the past year, and I haven't fully kept you in the loop. You have to keep your cool, though, and back me up*" (Exhibit #48: CB21, p 1939). Mr Higgins and his daughter subsequently had a call at that time (his evidence was that it was around a year after the Canberra trip in March 2019: T1476.32-33) during which Ms Higgins told him that "*the inappropriate [thing] that had happened at Parliament House was that she had been raped...*" (T1470.35-36). Ms Higgins told her father to keep cool. Mr Higgins said after hearing those words he "*pretty well shut down*" (T1470.38-45).

## **E.28 January 2021**

826. Mr O'Connor was asked about his observations about Ms Higgins' demeanour in the period before March 2019 and the period after she had revealed what had happened to her in March 2019 (T1924). He said that in the period before March 2019, Ms Higgins was a "*real go-getter*" and she was excited to be working in her dream job (T1924.12-16). Since she had revealed what had happened to her, on her occasional visits to the Gold Coast, Mr O'Connor observed that she was "*absolutely*" different. He observed that she was a bit testier and they would get into arguments about small things (T1924.18-28).
827. Mr O'Connor gave evidence about a conversation with Ms Higgins in around mid-to-late January 2021. He was driving to Brisbane and Ms Higgins disclosed to him that she was going public with her allegations about what had happened to her (T1925.5-10). Mr O'Connor's recollection was that she spoke about a desire for change to the culture of Parliament. He thought it was unusual because every conversation they had had up until that point was about her not wanting to go public. He felt that she was telling him rather than asking for advice. He did not hear anything further until he saw the reporting some weeks later (T1925.12-31). That evidence is consistent with Ms Higgins' own account of her reasons for deciding to speak publicly.

### ***E.28.1 Ms Higgins' conversation with Ms Humphreys***

828. Ms Humphreys gave evidence that in late 2019 Ms Higgins had moved out of their share house. At around that time, she left a group chat that Ms Humphreys had added her to when Ms Higgins moved in. Ms Humphreys recalled that Ms Higgins had lost weight and had left her bedroom in a very messy state at the time she moved out (Humphreys, [20]: CB1067). After Ms Higgins moved out, Ms Humphreys attended a few one on one catch ups with her. Her evidence was that their catch ups were not as frequent as she had planned or wanted them to be because Ms Higgins would often cancel the plans (Humphreys, [21]: CB1067). Ms Humphreys could recall only two occasions in the period after Ms Higgins had moved out when Ms Higgins attended social events that Ms Humphreys had organised (Humphreys, [22]: CB1067).
829. On 16 January 2021, Ms Humphreys attended Ms Higgins' apartment. Ms Humphreys' evidence was that she went to see Ms Higgins because Ms Higgins had cancelled her attendance at a prearranged social event. Ms Humphreys opted to go and see Ms

Higgins instead because she had not been seeing her on a regular basis and she was concerned about her. When Ms Humphreys was at Ms Higgins' apartment, they had a conversation during which Ms Higgins told her that she had been raped and that it had happened at Parliament House. Ms Higgins and Ms Humphreys cried during the conversation (Humphreys, [23]: CB1067).

830. On 29 January 2021, Ms Higgins sent a letter to Mr Try, giving formal notice of her resignation (Exhibit #R14: CB288). In that letter, she referred to "*ongoing matters pertaining to my role in the former Minister for Defence Industry's office*". Those matters would have been apparent to Mr Try and Senator Cash given Ms Higgins' previous conversations with them about what had occurred.

#### **E.29 4 February 2021**

831. On 4 February 2021, FA Cleaves and FA Thelning received emails from Ms Higgins seeking access to the police file and stating that she was considering her options in progressing a formal complaint.
832. FA Cleaves got in touch with her superintendent and emailed Ms Higgins back on 5 February 2021 (T1399.32-1400.26) (Exhibit #R75: CB406).
833. FA Thelning spoke to her sergeant and was informed that the superintendent had been briefed about Ms Higgins' email. FA Thelning sent an email to Ms Higgins in response (Exhibit #R78: CB404, 407). After sending her email, FA Thelning spoke to someone from SACAT and was advised that they had already been in contact with Ms Higgins (T1409.39-44).

#### **E.30 11 February 2021**

834. After the night of 22 March 2019, Ms Higgins and Ms Gain exchanged a few messages, but nothing about the events of that night (Gain, [61]: CB1088; Exhibit #R60: CB 113).
835. On 10 February 2021, Ms Gain received a Telegram message from Ms Higgins in which Ms Higgins disclosed what had occurred to her in Parliament House:

*"Hey Lauren*

*Don't feel like you have to respond to this at all. This is mostly just a cathartic thing for me to get it off my chest. I was so ashamed for so long and I've finally moved beyond it.*

*I don't know if you'd even remember but that night we all went out to the dock and then 88mph ahead of the 2019 election Bruce ended up taking me back to Parliament House. I passed out in the office and when I woke up he was sexually assaulting me. He left at some point during the night and the next day the ministerial security team found me.*

*I'm okay now but it really messed with me for the longest time. I've ended up resigning from PH and have since moved back to QLD.*

*Sorry for the random message. It was just something I had to do to finally close the book and process this whole ordeal."*

836. That message was entirely consistent with the account that Ms Higgins gave in evidence. Ms Gain replied to that message, and there was a brief exchange of further messages (Gain, [62], CB1088; Exhibit #46: CB576). Ms Gain knew nothing about the incident until receiving Ms Higgins' message (Gain, [63]-[66]: CB1088).



## **F THE PROJECT PROGRAM**

837. A significant amount of work was undertaken by the respondents in the preparation of the Publications over the course of almost four weeks from the conception of the Publications until they were published on 15 February 2021. The highly experienced and competent production team collaborated throughout the production process, and exercised a high degree of diligence in obtaining and independently verifying information, making considered and ethical decisions about the contents of the Publications, and sending out detailed requests for comment over 76 hours prior to publication. As at the time of publication, the Executive Producer of *The Project* Chris Bendall was satisfied that "*all reasonable journalistic steps had been taken in terms of verifying the story, ensuring it was accurate and issuing requests for comment*" (Bendall, [112]: CB1072).
838. The production team consisted of: Angus Llewellyn, who had worked as a producer for *The Project* since around June 2019, and had extensive prior experience as a producer of current affairs television (Llewellyn, [8]-[11]: CB1079); Lisa Wilkinson, a journalist and presenter with over 40 years' experience who was at that time a co-host of *The Project* (Wilkinson, [5]-[9]: CB1075); Mr Bendall, who at the time had 16 years' experience in television production (Bendall, [7]-[10]: CB1072); Craig Campbell, an Executive Producer with over 40 years' experience in the television industry (Campbell, [6]: CB1091); Laura Binnie, the then supervising producer of *The Project* who at the time had 13 years' experience as a television journalist (Binnie, [7]: CB1074); Sarah Thornton, the Network Executive Producer who, at the time had over 20 years' experience as a journalist and television producer (Thornton, [6]: CB1093); Peter Meakin, an Editorial Consultant with over 60 years' experience as a journalist (Meakin, [8]: CB1077); and senior inhouse lawyers Tasha Smithies and Myles Farley.
839. Ms Thornton's evidence was unchallenged by Mr Lehrmann and should be accepted in full. Mr Campbell and Ms Binnie were not cross-examined by Mr Lehrmann. Mr Meakin and Mr Bendall were only cross-examined briefly. To a large extent, those cross-examinations were predicated on a misconception as to the supervisory nature of their roles in providing checks and balances to the production team.
840. Mr Llewellyn was the member of the production team who was entrenched in the detail. His affidavit evidence was lengthy and most aspects of it were not challenged. Because

Mr Llewellyn's evidence-in-chief was not adduced orally, the Court did not have the benefit of hearing, first-hand, of the extensive and impressive investigation undertaken by him, or to observe his demeanour when explaining what he did in a linear narrative in answer to open-ended questions. We urge the Court to review that affidavit in full, as well as the documents referred to in the affidavit, in order to put the cross-examination, which focused on a small portion of that investigation, in its proper context. An annotated version of Mr Llewellyn's affidavit which contains court book references for each of the documents referred to was sent to the Court on 11 December 2023.

841. The cross-examination of Mr Llewellyn was focused on discrete issues arising from the Publications, which have only become apparent with the benefit of hindsight and with the scrutiny of lawyers who have the luxury of months to prepare, armed with information that no journalist would ever have and that Mr Llewellyn did not have. None of those issues demonstrated that the journalism undertaken was unreasonable nor that the Publications should not have been published. Mr Llewellyn's work cannot be analysed with the benefit of all that is known by Mr Lehrmann and the general public now, after almost three years, with all that has been learned through the subsequent media coverage, the criminal trial (including the issue of warrants and subpoenas), the ACT Board of Inquiry and the three or so weeks of this trial that had occurred by the time he entered the witness box. Mr Llewellyn's conduct must only be viewed against what was, or could reasonably have been, known at the time of publication on 15 February 2021.

### **F.1 Conception**

842. On 18 January 2021, Ms Wilkinson received an email from David Sharaz regarding a sensitive story about a woman who was sexually assaulted at Parliament House and was pressured not to pursue it (Exhibit #R105: CB122). He said: *"She'll only get one pull (sic) of the trigger before they try to discredit and shut the story down. My experience in politics and sky (sic) sadly gives me that insight."* Ms Wilkinson exchanged some further emails and phone calls with Mr Sharaz, who she had met years before as a work experience student (Wilkinson, [14]: CB1075), to obtain further details about the story (Exhibits #R106: CB123; #R107: CB124; #R108: CB125; #R109: CB126; #R111: CB128; #R112: CB129; #R113: CB130).

843. On 19 January 2021, Mr Sharaz emailed Ms Wilkinson a timeline document which set out extensive details of Ms Higgins' allegations and a screenshot from the ACT Policing website which showed a report of sexual assault at Parliament House had been made between April and June 2019 (Exhibit #R115: CB132). That report immediately provided a degree of comfort that Ms Higgins had not recently invented an allegation of assault. Ms Higgins gave evidence that she started preparing the timeline document at the end of 2020 because she had personally buried the details in the time since the incident and needed to put it all together (T688). Initially, she intended the document would be for herself and for the police (T688, T819, T824, T829.19-21, T838.40), and she also asked her partner Mr Sharaz to send it to *The Project* and news.com.au on her behalf (T825). Ms Higgins gave evidence that it was *her* idea to go to the media with her allegations (T1000.16). Mr Sharaz contacted Ms Wilkinson because he knew her as a result of having done a few days' work experience at the *Today* show: Wilkinson, [14]: CB1075. Ms Wilkinson enjoyed mentoring young people who wanted to break into journalism and had sporadically been updated by Mr Sharaz as to the progress of his career in the succeeding years: Wilkinson, [14]: CB1075. There was nothing unusual or nefarious about that contact that ought to have given rise to a suspicion that Ms Higgins was in some way being manipulated by, or was a puppet of, Mr Sharaz.
844. Ms Wilkinson spoke to Mr Campbell, Ms Thornton (Exhibit #R114: CB131) and Mr Meakin about the story, each of whom confirmed Ms Wilkinson's initial view that the story was potentially an issue of great public interest and should be pursued (Wilkinson, [22]-[32]: CB1075; Campbell, [14]-[27]: CB1091; Thornton, [27]-[30]: CB1093; Meakin, [26]-[30]: CB1077). Ms Wilkinson determined that Mr Llewellyn should be the producer of the story given his respected reputation and her experience of him as a "*principled, sensitive and tenacious investigative journalist*" (Wilkinson, [33]: CB1075). Over the next few weeks, Ms Wilkinson and Mr Llewellyn exchanged a significant volume of text messages, emails and phone calls (Exhibits #R117: CB135; #R118: CB136; #R203: CB225; R#237: CB262) and had in-person meetings (Llewellyn, [98]: CB1079). Ms Wilkinson sent an email attaching the timeline document to the production team (Exhibit #R124: CB142; #R125: CB143).

## **F.2 Preparation and Research**

845. Given the serious and sensitive nature of the subject matter, a decision was made at an early stage of the process to keep the details confidential and confined to the small

production team and lawyers (Llewellyn, [86]-[87]: CB1079; Campbell, [65]-[67]: CB1091; Bendall, [47]- [50]: CB1072; Binnie, [83]-[84]: CB1074). The story was given a code name "ENVIRO" (Exhibit #R431: CB473; Campbell, [66]: CB1091) and documents, scripts, recordings and edited videos were kept off the shared server (Exhibit #R431:CB473; Campbell, [66]: CB1091; Llewellyn, [197]: CB1079). Appreciating the legal risk involved in the story, Mr Llewellyn involved Network Ten's inhouse lawyers from the beginning of the production process (Llewellyn, [93]-[95]: CB1079).

846. Network Ten relies on the fact that Mr Llewellyn involved inhouse lawyers, but does not waive privilege over the contents of that advice. It is accepted that this goes to weight, because the Court is deprived of assessing for itself the correctness or otherwise of the legal advice that informed the state of mind of Mr Llewellyn and the other members of the production team.
- 846A. Contrary to Mr Lehrmann's submissions at [453]-[456] of the ACS, the maintenance of privilege over the relevant legal advice does not mean that the defence of qualified privilege should fail. That is a submission that considerably overstates the correct analysis. Further, there is no requirement for Network Ten to specify "*the reasons for the absence of any waiver*" as appears to be suggested by Mr Lehrmann at [456] of the ACS. Network Ten's reliance on the legal advice provided by Ms Smithies and Mr Farley is relevant in a number of ways and should be taken into account in assessing the reasonableness of its conduct.
847. *First*, the evidence shows that legal advice was constantly sought, obtained and considered by Mr Llewellyn and other members of the production team as the Publications were being prepared. This was not a case in which the journalists displayed a cavalier disregard towards the potential legal issues involved in the program. *Secondly*, the production team was highly experienced, senior and professional, from which it can be inferred that they were alive from the outset to the legal issues and acted appropriately in seeking, conscientiously considering and making changes to the program as it evolved having regard to that advice. *Thirdly*, it is obvious from the face of the program that legal advice in respect of particular issues was obtained and taken into account, including in relation to important matters such as whether or not to name Mr Lehrmann, and Ms Wilkinson's care, throughout the program, to refer to Ms Higgins' allegations as such, and not as proven facts. *Fourthly*, the final decision to go

ahead was that of the team who have given evidence, informed by the legal advice they had received. The final decision was not that of the lawyers. *Fifthly*, for unexplained reasons, no attempt was made at any point by Mr Lehrmann to contend that there had been a waiver in respect of particular advice. *Sixthly*, no adverse inference as to the content of legal advice can be drawn from a party's decision to maintain the sanctity of the privilege.

848. *Seventhly*, and perhaps critically, in respect of the rape allegation, on a proper analysis the content of the legal advice appears to be irrelevant. That is because:

- (a) The decision not to name Mr Lehrmann was the conservative one to adopt. It manifestly had the effect of reducing the legal risk. The content of the legal advice would have been much more relevant had a decision been made to name Mr Lehrmann, despite not having succeeded in obtaining his side of the story and despite knowing that the broadcast was likely to convey imputations to the effect sued on in these proceedings.
- (b) Network Ten gave Mr Lehrmann a fair opportunity to give his side of the story, and provided him with very detailed questions which went to the heart of the allegations levelled against him. No criticism can fairly be directed at those questions. The content of the legal advice would have been much more relevant had the questions in some way been deficient.
- (c) The decision to broadcast the rape allegation ultimately turned on Network Ten's confidence that Ms Higgins was, on that topic, telling the truth. That was quintessentially a decision for the production team, not the lawyers, although there was unchallenged evidence that Ms Smithies, who was present during the 2 February 2021 interview, also found Ms Higgins' account "*credible*": Wilkinson, [102]: CB1075.

849. *Finally*, as the evidence shows, lawyers were involved throughout the investigation leading to the broadcast of the program. Their involvement was typically by telephone, email or in-person, and obviously involved the provision of snippets of advice at particular points-in-time. The nature of the involvement of in-house lawyers in the preparation of a program of this sort makes waiver in respect of advice particularly difficult. Much of the advice will have been provided in relation to issues that were overtaken by subsequent events, or in circumstances where the context in which it was

given is not apparent from the form in which it was recorded. It would be one thing if there were something in the nature of a considered silk's advice, prepared in relation to the final broadcast before it went to air; but that is not the way in which the broadcast television industry works (much to the detriment of the members of the inner bar).

850. Ms Wilkinson came into direct contact with Ms Higgins from 21 January 2021 via text message, WhatsApp, phone conversations and in person (Wilkinson, [54], [57]: CB1075, Exhibits #R136: CB154; #R137: CB155; #R138: CB156 and #R139: CB157). Mr Llewellyn also engaged with Ms Higgins initially by phone on 26 January 2021 (Llewellyn, [102]: CB1079), and then during in-person meetings and WhatsApp messages (Exhibits #291: CB391; #292: CB392; #R650: CB697). Mr Llewellyn also communicated with Ms Higgins through her partner Mr Sharaz (Exhibits #R214: CB236; R#251: CB276).

#### ***F.2.1 The First Interview***

851. Mr Llewellyn and Ms Wilkinson first met in person with Ms Higgins on 27 January 2021 at The Darling Hotel in Sydney over an almost five-hour period (Llewellyn, [103]-[147]: CB1079; Wilkinson, [65]-[74]: CB1075; Exhibit #36: CB242(a)-(c), 1114) (the **First Meeting**). The purpose of the First Meeting was for Ms Higgins to tell her story so Mr Llewellyn and Ms Wilkinson could determine whether it was worth pursuing, to assess Ms Higgins' reliability and credibility as a source, and to build rapport with Ms Higgins so that she felt comfortable working with them (Llewellyn, [108]: CB1079). Mr Sharaz also attended the First Meeting as Ms Higgins' supportive partner, however he left the room when she recounted the rape (Llewellyn, [113], [124]: CB1079; Exhibit #36 at 1:11:17.8, p 6249: CB242a-c, 1114).
852. The information obtained during the First Meeting was used by Mr Llewellyn to come up with themes to cover in the draft questions for the filmed interview with Ms Higgins (Llewellyn, [119]: CB1079) and as a starting point for conducting further investigations (T1508.28-29). Mr Llewellyn gave evidence that he approaches all stories with a "*degree of scepticism*" and assesses the reliability of claims before using them, taking all information that is given to him as something he needs to investigate (Llewellyn, [12(b)]: CB1079; T1501.37-38). While Mr Llewellyn listened back to the audio recording of the First Meeting in preparing his questions, the transcript was not prepared until after the Publications were published on 15 February 2021 (Exhibit #36: CB242a-

c, 1114). The transcripts were created by Network Ten for the purposes of the criminal proceedings in 2022 (T1710.9-15). Having regard to the purpose of the First Meeting, that does not indicate any absence of care on Mr Llewellyn's part. There was a distinct artificiality about asking Mr Llewellyn in cross-examination to parse fleeting aspects of that transcript, and then criticising him for not following up those aspects, in circumstances where, in late January and early February 2021, all he had was a recording of an informal meeting prepared for the purposes identified above. An example was the cross-examination in relation to Mr Higgins' reference to the existence of a "*different*" photograph of the bruise (Exhibit #36 at 1:25:04.3: CB242a-c, 1114). Mr Llewellyn's frank evidence ought to be accepted: "*Yes, look, I – I see that there, but I don't recall that conversation about there being a different one*": T1512.30-31.

853. During the First Meeting, Mr Llewellyn considered it was important to raise with Ms Higgins that they would need to go to her alleged perpetrator to seek his side of the story. He understood this might be upsetting for Ms Higgins, so used humour to make her feel at ease (Llewellyn, [126]: CB 1079; T1643.21-26).
854. During the First Meeting, Ms Higgins speculated about whether her phone might have been remotely wiped (Exhibit #36: CB242a-c), but Mr Llewellyn gave evidence that he took that suggestion with a "*massive grain of salt*" and that he thought it sounded fanciful (T1514.13-3). He thought that the absence of material on Ms Higgins' phone was "*more like operator error*" (Llewellyn, [131]: CB1079) and "*a stuff up, not a hack*" (T1515.7). In cross-examination, Mr Llewellyn explained that, in the context of the long conversation where Ms Higgins was disclosing details about how her rape allegation had been handled, it did not occur to him to wonder why certain material was available and some was unavailable (T1516.9-33). He explained that what he was told by Ms Higgins did not hang on the problems that Ms Higgins had expressed about her phone (T1516.20-24; 1517.17-25). After taking a long time to look at the claim and make an assessment, he decided it should be left out of the story (T1505.12-14) given there was no proof of phone hacking (T1505.25-26). This was a responsible decision for Mr Llewellyn to make. Mr Llewellyn should not have been expected to apply a degree of scrutiny to the credibility of Ms Higgins' claims akin to that which has since been applied at the criminal trial and in this proceeding. Phone problems, including the operator errors and loss of data, are everyday occurrences. There would scarcely be a person in Australia who had not experienced them. It is to Mr Llewellyn's credit that

he discounted a conspiratorial explanation for the phone problems, and to Network Ten's credit that they were not ventilated in the program. It is that conspiracy theory which Mr Llewellyn was, we submit plainly, referring to when he said, very early on in the investigation, *"my gut feeling is to avoid the topic as it raises unanswerable questions and weakens rather than strengthens her very strong claims by adding in unnecessary doubt where there currently isn't any"* (Exhibit #R203: CB225, p 2958, 31 January 2021 at 3:09:29pm). The *"unanswerable questions"* were whether the government had some capacity to remotely wipe phones of staffers; the *"unnecessary doubt"* was whether the government might have in fact remotely wiped a phone remotely. Mr Llewellyn's explanation at T1519.4-25 ought to be accepted.

854A. At [408]-[410] of the ACS, Mr Lehrmann refers to the explanation as to the loss of data on Ms Higgins' phone being caused by the transfer between multiple mobile phones as having no basis because there is no note or email or contemporaneous document of any kind to back it up. In fact, the evidence of Mr Reid in the criminal trial (Exhibit #67 – see T661 from the criminal trial transcript) was that Ms Higgins had provided multiple mobile phones to the AFP for analysis.

855. By the end of the First Meeting, Mr Llewellyn and Ms Wilkinson had formed the view that Ms Higgins was traumatised, raw and emotional, clearly hurt by the government ministers she had respected, believable, honest and scared (Llewellyn, [127]: CB1079; Wilkinson, [74]: CB1075). They believed her when she said she did not pursue her police complaint due to difficulties encountered by the AFP in obtaining CCTV footage from Parliament House, concerns she had about losing her job and pressure she felt to go to Western Australia to help campaign for the Federal election. Mr Llewellyn observed that Ms Higgins wanted to speak out about her experience to create change, to prevent it from happening to anyone else and to help others, and did not consider she had a vendetta (Llewellyn, [179]: CB1079). Mr Llewellyn was concerned about Ms Higgins' welfare and took active steps throughout the production process to provide her with support from a mental health perspective (Llewellyn, [132]-[133]: CB1079).

856. Mr Llewellyn's evidence at [135]-[141] of his affidavit is of particular importance. It was not shaken in cross-examination. It showed him conscientiously considering the motives of Ms Higgins and Mr Sharaz. He turned his mind to whether either had an axe to grind that undermined the reliability of what he was being told or the public interest in the story. That evidence should be accepted.



### ***F.2.2 Bruise Photograph***

857. Towards the end of the First Meeting, Ms Higgins mentioned that she had a photograph on her phone of a bruise on her leg which she suspected was caused during the rape (Exhibit #36 at 1:23:37.6, p 6261: CB242a-c, 1114). Ms Higgins initially told Mr Llewellyn and Ms Wilkinson that the photograph was taken a "[c]ouple of days after" the rape (Exhibit #36 at 1:24:34.8, p 6261: CB242a-c, 1114).
858. Both Ms Higgins and Mr Llewellyn gave evidence that she AirDropped the photograph to Mr Llewellyn that day (Llewellyn, [143]: CB1079; T864.8-9, T867, T1708.27). The photograph that Ms Higgins sent to Mr Llewellyn is Exhibit #R222: CB245. Mr Llewellyn believed the photograph he received from Ms Higgins was the original (T1510.23).
859. Mr Llewellyn did not think it was odd that the bruise photo had survived when Ms Higgins lost data from her phone (Llewellyn, [152]: CB1079). He thought that the references to her phone being "*destroyed*" was a bit of a hyperbole (T1519:24). He said in cross-examination that Ms Higgins had other screenshots of WhatsApp messages, photos and contacts that she was able to provide to him, so it did not occur to him to ask how she still had the bruise photo (T1508.31-1508.4). He had no reason to think anything other than what Ms Higgins was telling him: that it was a contemporaneous photo. At the time he received the bruise photograph from Ms Higgins, Mr Llewellyn did not look at the photograph's metadata and continued on with the First Meeting (T1509.33-39).
860. Mr Llewellyn subsequently looked at the metadata of the bruise photograph (T1511.4). When looking at this photograph, Mr Llewellyn identified that the photograph bore the timestamp 8.45am on 27 January 2021. Despite this, Mr Llewellyn felt he had no reason to disbelieve Ms Higgins when she said she photograph was from a "[c]ouple of days" after the rape because he was aware that Ms Higgins had had problems with her phone and with pictures disappearing (Llewellyn, [152]: CB1079, T1509.43-45, T1511.6-10).
861. On 31 January 2021, Ms Wilkinson and Mr Llewellyn exchanged the following messages on WhatsApp about the bruise photograph (Exhibit #R203: CB225):

*"[31/1/2021, 2:24:16 pm] Lisa Wilkinson: I want to zero in a little on this whole phone thing. 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 alarm bells with her do you think you can ask her today or first thing tomorrow? It's a crucial point when it comes to further blocking of her being able to gather evidence.*

*[31/1/2021, 3:09:29 pm] Angus Llewellyn: No worries. Thanks. I'll talk to her. With no proof of my own though I suspect a stuff up more than anything else. My gut feeling is there's no covert monitoring or wiping of phones going on at all, it's just a stuff up. And my gut feeling is to avoid the topic as it raises unanswerable questions and weakens rather than strengthens her very strong claims by adding in unnecessary doubt where there currently isn't any."*

862. We have addressed this exchange above. On a fair reading, it does not bear the sinister meaning contended for by Mr Lehrmann.
863. Following this exchange, Mr Llewellyn made a further attempt to verify the date of the bruise photograph with Ms Higgins. At 1.18pm on 8 February 2021, he sent a message to Mr Sharaz that said (Exhibit #R214: CB236):

*"Hi mate*

*A couple of non urgent questions for B. I don't want her having to wince when she sees a message from me so can I leave this up to you to find a good time to ask?*

*1. Any idea what date the photo of the bruise was taken?*

*2. Any idea if the EAP provider was Assure Programs? First question is more important.*

*3. When she's free I just wanted to talk through another legal assurance thing to look after everyone."*

864. At 2.49pm on 8 February 2021, Mr Sharaz forwarded the message from Mr Llewellyn to a separate WhatsApp group which included himself, Mr Llewellyn and Ms Higgins. Mr Sharaz also sent the following message to this group (Exhibit #R292: CB320):

*"Hey Britt, just forwarding the following from Angus. Angus let us know when you're free and we can conference call? I'm in CBR Britt is on the sunny Gold Coast"*

865. At 3.14pm on 8 February 2021, Ms Higgins responded to the message originally sent by Mr Llewellyn and said (Exhibit #R292: CB320):

*"Hi Angus,*

*1. Any idea what date the photo of the bruise was taken? I'm not sure on the exact date but it was taken in Parliament House during budget week (1st - 5th of April).*

*2. Any idea if the EAP provider was Assure Programs? The EAP provider was JLT Assure Programs.*

*3. Legal assurance discussion Free anytime and welcome to opportunity to discuss further."*

866. Early on in the First Meeting, Ms Higgins disclosed to Mr Llewellyn and Ms Wilkinson that she had fallen over at 88mph (Exhibit #36 at 0:31:42:9: CB242a-c, 1114). In cross-examination, Mr Llewellyn said it did not occur to him that the bruise in the photograph could have been caused by the fall since it had been referred to earlier in the conversation in the context of discussing the rape (T1511.44-46). He said it also did not occur to him that it was unlikely that the type of bruise pictured would have been caused by one leg pinning down another in an assault (T1512.7-8). During the First Meeting when he first saw the photo, he observed that he could "*see the line there*" (Exhibit #36 at p 6263: CB242a-c, 1114).

867. During the First Meeting, Ms Higgins told Mr Llewellyn and Ms Wilkinson that she had a "*different*" photograph of the bruise (Exhibit #36 at 1:25:04.3, CB242a-c, 1114). Mr Llewellyn could not recall Ms Higgins referring to a different photograph of the bruise in the First Meeting (T1512.10-38; T1514.7-11) which, as explained above, is reasonable in circumstances where he did not have the benefit of a transcript.

868. On 10 February 2021, Ms Higgins signed a statutory declaration which confirmed the photograph was taken on her iPhone on 3 April 2019 (Exhibit #R532: CB574). Mr Llewellyn said that he was content to broadcast the bruise photograph after he had obtained a statutory declaration from Ms Higgins. He said that without the statutory

declaration, he would not have used the photograph in the broadcast (T1517.29-35). In cross-examination, Mr Llewellyn accepted that Ms Higgins' explanation about the death of her phone and the retention of the bruise photograph was inconsistent and that this was why Network Ten obtained a statutory declaration from Ms Higgins (T1519.4-8). He rejected a suggestion that the date on which Ms Higgins said she took the bruise photo "*shifted*", saying she knew it was in budget week which would have been a busy week for her (T1525:8-10). It was reasonable to think that Ms Higgins would have given further consideration to when in that week the photograph was taken before providing her statutory declaration.

869. Ms Higgins provided the bruise photograph to the AFP in 2021. She told the AFP the bruise displayed in the photograph was from the rape (T864.41-46). The bruise photo was adduced into evidence in Mr Lehrmann's criminal trial. Peter Reid, a digital forensic examiner with the AFP, gave evidence that he extracted the bruise photograph from Ms Higgins' Google account on 27 July 2021 (Exhibit #R8: CB986, 987; Exhibit #67 at T661.14). As the photograph was stored on Google Drive, which removes the metadata from the photograph, there was no metadata available to Mr Reid that indicated the date and time that the bruise photograph was taken (Exhibit #67 at T661.35-39). The earliest version of the photograph available to the parties, which was provided by the ACT Director of Public Prosecutions under subpoena, is dated 19 January 2021 (Exhibit #R883). This disproves any theory that Ms Higgins took the photograph on 27 February 2021 for the purpose of providing it later that day to Network Ten.
870. For the purposes of preparing his affidavit in this proceeding, Mr Llewellyn took a screenshot of the bruise photograph as it appears in the camera roll of his iPhone (Llewellyn, [143]: CB1079; Exhibit #R221: CB244). Mr Llewellyn gave evidence in re-examination that the images displayed at the bottom of the screenshot were from his photo reel, being "*a beer that's recommended to me, a few shots of holidays, and some bills and a nice car I saw*" (T1708).
871. The following are agreed facts between the parties for the purposes of this proceeding (Exhibit #67):
- (a) When photographs are uploaded or shared on third party platforms, including WhatsApp, iCloud or Google Drive, the metadata for such photographs

(including the date and time that the photograph was taken) may be removed by that platform.

- (b) When the photograph in question was examined by the forensic expert retained for the criminal trial, Peter Reid, he found "there was no metadata that indicated the date and time that that photograph was taken."
- (c) The photograph in the photo reel in Angus Llewellyn's phone has no metadata attached to it.
- (d) The time and date on which the original photograph in question was taken cannot be ascertained from the digital version of the photograph in Mr Llewellyn's phone.
- (e) The time and date on the digital version of the photograph in Mr Llewellyn's phone is not the time it was received by him.

871A. Mr Lehrmann's submission at [372] of the ACS that the "objective evidence in this matter is that that photo was in existence at the earliest on 19 January 2021" is misleading. As set out above, it is contrary to the evidence of Mr Reid that there was no metadata to show the date the photograph was taken.

872. Ultimately Network Ten submits Mr Llewellyn was correct in rejecting the suggestions made in cross-examination that he failed in his obligation to check the credibility of Ms Higgins and her evidence in respect of the bruise photo and that his conduct in putting the photo to air was unreasonable (T1527:43-1528.3). Contrary to the submissions made by Mr Lehrmann at [211] and [413] of the ACS, that Mr Llewellyn's conduct in this regard involved a "very poor process" and was "quite disgraceful" behaviour, his conduct was reasonable and consistent with responsible journalistic practice.

873. Mr Llewellyn's conduct in relation to the bruise photograph was reasonable. He appropriately tested Ms Higgins in relation to it, including by pressing her as to the date on which it was taken and obtaining a statutory declaration. He rightly rejected any conspiracy theory in relation to the wiping of the phone and drew the ordinary conclusion one would expect from everyday experience, namely that the problems Ms Higgins had in relation to her phone were likely the due to operator error. There was no metadata on the phone to suggest that it was a recent invention.

### ***Decision not to name Mr Lehrmann***

874. On 29 January 2021 a "*field debrief*" was held. In attendance were Mr Campbell, Ms Wilkinson, Mr Llewellyn, Mr Meakin, Ms Binnie, Ms Smithies and Mr Farley (CB1093 [41]). During this meeting a decision was made by the production team not to name Mr Lehrmann in the Publications (Binnie, [49]: CB1074; Llewellyn, [167]: CB1079; Campbell, [35]: CB1091; Thornton, [41]: CB1093).
875. The production team sought to strike a balance between not identifying Mr Lehrmann and not inadvertently identifying the wrong person as the alleged perpetrator, and came up with terms to use to refer to him which they considered struck that balance (Binnie, [49]: CB1074; Llewellyn, [167]: CB1079).
876. In the broadcast Mr Lehrmann was referred to in the following terms: "*one of the senior male advisors to Minister Reynolds*", "*senior male colleague*", "*senior staffer*", "*senior colleague*", "*senior advisor*" and "*alleged rapist*" (Exhibit #1: CB909).
877. In deciding how to refer to Mr Lehrmann, the production team felt it was important to describe the perceived power imbalance between Ms Higgins and Mr Lehrmann as at March 2019 in Minister Reynolds' office (Binnie, [49]: CB1074; Wilkinson, [74]: CB1075; Llewellyn, [167]: CB1079; T1655.25-44; T1656.18-21).
878. Mr Bendall learned of, and agreed with, the decision that had been made not to name Mr Lehrmann once he became involved in late January or early February (Bendall, [37]-[40]: CB1072).
879. On 8 February 2021, Mr Llewellyn received confirmation that Ms Maiden was not going to name Mr Lehrmann (Llewellyn, [270]: CB1079).
880. This was a reasonable decision in the circumstances. It was the conservative approach, and inconsistent with any hypothesis that Network Ten had a motive of inflicting maximum damage on Mr Lehrmann.

### ***Research and fact checking***

- 880A. It is unfair and incorrect to assert, as Mr Lehrmann does at [162], [163] of the ACS and elsewhere, that Mr Llewellyn and Ms Wilkinson proceeded on the basis that the rape allegation was true and had been made by Ms Higgins at the relevant time, in effect, without ever checking or researching those matters. Mr Llewellyn and Ms Wilkinson are experienced journalists. They took steps to investigate the relevant allegations to an

extent that was reasonable in the circumstances, as set out in these submissions and in extensive detail in Mr Llewellyn's affidavit. There is a distinct unreality about Mr Lehrmann's submissions in respect of the reasonableness of Network Ten's conduct, which tend to suggest that Mr Llewellyn and Ms Wilkinson were required to interrogate Ms Higgins in a manner akin to cross-examination. Of course, they had to test and give critical consideration to what they had been told – and they did so. But on the question of reasonableness, a real world expectation must be applied to the conduct of those involved in the research and preparation of the program, including the steps that were reasonably available and pursued in checking the information provided by Ms Higgins.

881. Mr Llewellyn took extensive steps to verify the information contained in the timeline document and provided by Ms Higgins during the First Meeting and the Second Interview (Llewellyn, [81], [156], [173]-[182], [187]-[189], [191]-[196]: CB1079).
882. In respect of the rape allegation, those steps were necessarily limited. At the end of the day, the rape allegation involved two people in a Minister's office. However, it was possible to seek to identify whether others had observed Ms Higgins' demeanour in the period after the alleged incident, and to seek confirmation as to whether the incident had been reported and investigated in March and April 2019. Those are the matters upon Mr Llewellyn focused.
883. Mr Llewellyn conducted internet research on how Parliament House operated internally in relation to security and the human resources structure (Llewellyn, [156], [173(b)]: CB1079; Exhibit #R231: CB256). He looked up Mr Lehrmann online and on social media (Llewellyn, [173(a)]: CB1079; Exhibit #R297: CB330; #R201: CB223). He confirmed that the people Ms Higgins had mentioned during the First Meeting and in the timeline document were who she said they were (Llewellyn, [173(c)]-[174]: CB1079).
884. In addition to his research into the internal structures of Parliament House, Mr Llewellyn reached out to constitutional experts: Professor Anne Twomey (Llewellyn, [187]-[189]: CB1079), Dr Rosemary Laing (Llewellyn, [191]-[193]: CB1079) and Professor George Williams (Llewellyn, [285]-[286]: CB1079).
885. Mr Llewellyn also spoke to:
- (a) Kathryn Cripps from the Canberra Rape Crisis Centre, who confirmed that Ms Higgins was her client (Llewellyn, [177]-[180]: CB1079). That was an important

piece of confirmation, that showed that Ms Higgins had received rape counselling services.

- (b) Alex Humphreys who was Ms Higgins' flatmate at the time of the rape, who confirmed that Ms Higgins' mood had changed following the incident and that Ms Humphreys had not seen a lot her afterwards (Llewellyn, [181]-[182]: CB1079). That too was an important piece of confirmation, suggestive of something serious having happened at the time Ms Higgins alleged she was assaulted.

886. Mr Llewellyn asked Ms Higgins to send him any documents or contact information she had (Llewellyn, [144]: CB1079), which she did, including via Mr Sharaz, throughout the production process, namely:

- (a) Exhibit #R222: CB245 (discussed above);
- (b) Exhibits #63: CB247; #R24: CB269 on 28 January 2021 (Llewellyn, [157]: CB1079);
- (c) Exhibits #R252: CB277; #R253: CB278; #R254: CB279; #R261: CB286; #R255: CB280; #R256: CB281 and #R257: CB282 on 29 January 2021 (Llewellyn, [161]: CB1079);
- (d) Exhibit #R280: CB308 on 30 January 2021 (Llewellyn, [169]: CB1079);
- (e) Exhibit #R326: CB361 on 2 February 2021 (Llewellyn, [229]: CB1079);
- (f) Exhibits #R369: CB410; #R370: CB411; #R371: CB412; #R372: CB413 on 5 February 2021 (Llewellyn, [255]: CB1079);
- (g) Exhibit #R384: CB425 on 5 February 2021 (Llewellyn, [257]: CB1079);
- (h) Exhibit #R398: CB440 on 8 February 2021 (Llewellyn, [263]: CB1079);
- (i) Exhibits #R422: CB464; #R423: CB465 on 8 February 2021 (Llewellyn, [266]: CB1079);
- (j) Exhibit #R582: CB626 on 11 February 2021 (Llewellyn, [310]-[309]: CB1079);
- (k) Exhibit #R644: CB690 on 12 February 2021 (Llewellyn, [333]: CB1079); and
- (l) Exhibits #R706: CB753; #R707: CB754; #R708: CB755, #R709: CB756 on 14 February 2021 (Llewellyn, [351]: CB1079).



887. Ms Higgins' ability to provide documents to Mr Llewellyn (either herself or via Mr Sharaz), often in response to a specific request by Mr Llewellyn, further solidified his assessment of her as a credible and reliable source and helped to create a more solid foundation for the Publications (Llewellyn, [144]-[145]: CB1079).
888. Mr Llewellyn was conscious of his responsibilities in interacting with a highly traumatised and vulnerable person. A decision was made early on that he would be the primary point of contact for Ms Higgins (Exhibit #R202: CB224). Contacting Ms Higgins via Mr Sharaz from time to time was one tool Mr Llewellyn employed to limit the stress caused to Ms Higgins (Exhibit #R214: CB236).

***Drafting Questions for the Second Interview***

889. After the First Meeting, Mr Llewellyn began preparing the questions for Ms Wilkinson's interview with Ms Higgins on 2 February 2021 (**Second Interview**). He created a Google Document that Ms Wilkinson could access (Llewellyn, [200]: CB1079). He listened to the entire recording of the First Meeting (Llewellyn, [201]: CB1079). Together with Ms Wilkinson, Mr Llewellyn spent many hours across several days preparing the questions (Llewellyn, [201]: CB1079). Mr Meakin states that he probably would have provided his views to Mr Llewellyn on the draft of the questions for the Second Interview (Meakin, [50]: CB1077). While drafting the questions, Mr Llewellyn was conscious to ensure that Ms Higgins' allegations were framed as such (Llewellyn, [202]: CB1079).
890. The final list of questions for the Second Interview reflects Mr Llewellyn's focus on, and diligence with:
- (a) ensuring the details of Ms Higgins' alleged sexual assault were captured correctly;
  - (b) identifying the reasons behind Ms Higgins' premature termination of the police investigation into her allegation; and
  - (c) highlighting the absence of a human resources department in Parliament House and the "strange" alternative arrangement (Llewellyn, [211]-[212]: CB1079, Exhibit #R340: CB375).
891. Prior to the Second Interview, Mr Llewellyn obtained further legal advice and shared the results of some of his research with Ms Wilkinson (Llewellyn, [205]-[207]: CB1079).

## ***Second Interview – 2 February 2021***

892. The Second Interview took place on 2 February 2021. It reinforced Mr Llewellyn's assessment of Ms Higgins as a credible, honest and reliable source (Llewellyn, [215]-[217], [222]: CB1079). At this time, Mr Llewellyn also assessed Ms Higgins as being someone who felt she had no other choice but to speak out and who wished to speak publicly to help others (Llewellyn, [220]: CB1079).
893. Mr Llewellyn was alive to the fact that Ms Higgins' experience of how Senator Reynolds and Ms Brown handled her allegation of sexual assault was subjective and based on inferences she had drawn herself. Mr Llewellyn considered them to be reasonable assumptions for Ms Higgins to make (Llewellyn, [223]-[224]: CB1079).
894. Ms Smithies also attended the Second Interview and provided Mr Llewellyn with legal advice (Llewellyn, [225]: CB1079). Ms Smithies assessed Ms Higgins as “credible”: Wilkinson, [102]: CB1075.
895. During cross-examination, Mr Llewellyn was taken to a portion of the Second Interview in which Ms Higgins was questioned about the loss of WhatsApp messages (T1520.21-1521.26). It was put to Mr Llewellyn that no genuine inquiry had been made in the Second Interview as to what happened to Ms Higgins’ phone. Mr Llewellyn said that there was no solid evidence about what had occurred to allow him to pursue further questions about the phone (T1521.28-31).
- 895A. At [243] of the ACS, Mr Lehrmann refers to remarks made by Ms Higgins during the Second Interview about the availability of the CCTV footage. He observes that some of her remarks were broadcast, as well as Ms Higgins saying that it was a betrayal for Ms Brown to withhold the CCTV footage from her. Mr Lehrmann suggests that the notion of the COS having any sway over DPS decisions with respect to CCTV footage is an example of a “fanciful claim” by Ms Higgins. However, Exhibit #60: CB78 p2380 records that Ms Brown and Senator Reynolds were in fact consulted over the release of the footage to the AFP (T1338.33-36). In the circumstances, the notion of Ms Brown having “sway” over the decision is hardly fanciful.
896. On 3 February 2021, Ms Higgins signed an “*Adult Appearance Release*” (Exhibit #R350: CB387) in which she agreed to the following:
- "You warrant and represent to 7PM and 10 that any information contributed by you to the Program will be true and factually accurate, that you own or are*

*entitled to all right, title and interest (including copyright) in any materials (i.e. documents, pictures or videos) provided by you to 7PM or 10 for the purpose of inclusion in the Program and that such materials do not contain confidential information or otherwise breach a duty of confidence owed by You to a third party."*

***The paper edit***

897. Mr Llewellyn began working on the paper edit of the program on 4 February 2021. He arranged for a transcript of the Second Interview to be prepared (subject to a non-disclosure agreement) and began by watching the Second Interview back and highlighting the relevant parts of the transcript (Llewellyn, [243]-[244]: CB1079; Exhibit #R220: CB243). Mr Llewellyn's conception of the themes of program at that time spanned the inadequate workplace response as well as the unique security arrangements of Parliament House (Llewellyn, [247]: CB1079). At this juncture, Mr Llewellyn assessed what material had been verified and what needed to be verified before the program could go to air (Llewellyn, [245]: CB1079).
898. After completing his original paper edit (Exhibits #R862: CB914; #R862: CB915), Mr Llewellyn created a Google Document so that other members of the production team could provide their input into what was an iterative working document.
899. Mr Meakin worked on the paper edit with Mr Llewellyn (Llewellyn, [250]: CB1079; Meakin, [56]: CB1077). Mr Meakin reviewed the Google Document and made changes to it (Meakin, [56]: CB1077). In a subsequent email, Mr Meakin highlighted the limitations of the paper edit, noting *"I don't see the point of marking deletions in the script until we see the actual conversation. Something that doesn't appear very strong on paper could be pretty powerful on air"* (Exhibit #R385: CB426). In this same email, Mr Meakin raised the following issue: *"I did notice a small point about Linda Reynolds' reaction. Brittany says her initial words were kind and supportive, but a moment later we're told she was uncomfortable with her; is there any explanation of the change of heart?"* (Exhibit #R385: CB426). In cross-examination, Mr Meakin said he believed he had spoken to Mr Llewellyn about this perceived inconsistency in Senator Reynolds' reaction (T1947.8-13). Mr Llewellyn responded to Mr Meakin's email and said: *"Thanks, Peter. Yes, I reckon once you see the way Brittany says all this stuff, you will have a far better idea of the feel and the shifts in tone."* (Exhibit #R387: CB428). Mr

Llewellyn's evidence was that when he used the words "*all this stuff*", he was not talking about Senator Reynolds' reaction, but referring to the fact that Mr Meakin's view or impression of the story would change when he watched it (as opposed to reading the paper edit) (T1612.35-1613.9). Mr Llewellyn believes he would have spoken to Mr Meakin about Senator Reynolds with Mr Meakin in a number of telephone calls (T1613.19-35).

900. Mr Llewellyn's observation was correct. In the course of cross-examination, he asked for the relevant part of the interview footage to be played (Exhibit #37: CB376), in order to demonstrate the difference between the way in which it is perceived when viewed when compared with how it appeared on paper. The demonstration was dramatic. What appeared on one view to be differences on paper became questions of minor nuance when heard in context and with the benefit of hearing Ms Higgins' tone of voice and watching her demeanour. As Mr Llewellyn put it at T1602.9-13: "*After watching that, absolutely not. I mean, it is not contradictory at all. It's very clear from the implications, and it's not picked up in the written words, but it's very much on the audio-visual...*"
901. Ms Binnie also reviewed the paper edit (Binnie, [60]: CB1074). She was also concerned to ensure that any claims made in the program were ones that could be verified.
902. Mr Llewellyn sought legal advice in respect of the paper edit and provided Ms Smithies and Mr Farley with access to his materials (Llewellyn, [253], [262]: CB1079).
903. Mr Llewellyn's provision of his materials to Ms Smithies and Farley was a departure from Mr Llewellyn's usual practice and was borne out of Mr Llewellyn's desire to keep Network Ten's inhouse legal team abreast of the progress of the program so that fully informed legal advice could be provided.
904. The production team spent several days, and possibly up to a week, on the paper edit (Meakin, [58]: CB1077).
905. Ms Wilkinson was provided with the paper edit on 10 February 2021 for review (Llewellyn, [296]: CB1075; Exhibit #R493: CB535).
- 905A. Mr Lehrmann asserts at [254]-[258] of the ACS that it may be inferred that Mr Llewellyn somehow pressured Ms Higgins into reinstating her police complaint. The WhatsApp message exchange referred to at [255] of the ACS does not support that inference, and Mr Llewellyn denied that he told Ms Higgins to go the police (T1535.26-

28). The messages simply record Mr Sharaz confirming to Mr Llewellyn that Ms Higgins had gone to the police, as Mr Llewellyn understood she was intending to do – that was the effect of his evidence in cross-examination (T1539.9-11). He was hoping to get that confirmation before broadcast, but vehemently denied pressuring Ms Higgins into going to the police (T1539.13-16).

### ***Production details***

906. Mr Bendall made the decision to broadcast the program on 15 February 2021. It was a matter of some discussion both internally at Network Ten, and with Ms Maiden (Bendall, [90]-[91]: CB1072; Llewellyn, [236], [291]-[292]: CB1079; Exhibits #R352: CB389; #R353: CB390; #R459: CB501; #R462: CB504). While the production team's preference was for the program to be broadcast on Sunday 14 February 2021, they were conscious of Ms Higgins' desire to "*touch it once*" (Llewellyn, [128]: CB1079) and that two media organisations warring over a broadcast date would cause a vulnerable young woman unnecessary stress. On 30 January 2021, Mr Sharaz sent a WhatsApp message to Mr Llewellyn which stated: "*You and Sam will need to sort this air date stuff out pretty quick amongst yourselves. Britt is starting to feel a little like a commodity, when really .. her life is about to implode...the pressure has to be removed from Britt*" (Exhibit #R214: CB236). Mr Llewellyn's email of 10 February 2021 (Exhibit #R459: CB501) illustrates these concerns.
907. The program ran for nearly 30 minutes. Segments on *The Project* usually run for four to six minutes (Bendall, [76]: CB1072). Mr Bendall and Mr Campbell decided early on in the production process that to tell this story properly they would need to "*run it long*" (Bendall, [79]: CB1072). This perspective was shared by Mr Llewellyn (Llewellyn, [251]: CB1079), Ms Binnie (Binnie, [59]: CB1074) and Mr Meakin (Meakin, [70]: CB1077).

### ***Work-in-Progress Videos (WIPs)***

908. On 7 February 2021, Darryl Brown was assigned as the editor for the program and, with Mr Llewellyn, worked on preparing the WIPs (Llewellyn, [267]: CB1079). Between 8 February 2021 and 15 February 2021, various versions of the WIP and the scripts were circulated between the production team and feedback was shared as follows:
- (a) on 8 February 2021 from Mr Brown to Mr Meakin, Mr Llewellyn and Ms Binnie (Llewellyn, [273]: CB1079; Exhibit #R421: CB463);

- (b) on 9 February 2021:
  - (i) from Mr Llewellyn to Mr Meakin and Ms Binnie (Llewellyn, [275]: CB1079; Exhibit #426: CB468);
  - (ii) from Mr Llewellyn to Ms Binnie, Mr Meakin, Ms Smithies and Mr Farley (Exhibit #R429: CB471);
  - (iii) from Mr Brown to Ms Binnie, Mr Meakin, Mr Llewellyn and Mr Moncur (Llewellyn, [281]: CB1079; Binnie, [69]: CB1074; Exhibit #R433: CB475);
  - (iv) from Mr Llewellyn to Mr Campbell, Ms Thornton, Mr Bendall, Ms Binnie and Mr Meakin (Llewellyn, [283]: CB1079; Thornton, [72(a)]: CB1093; Campbell, [52]: CB1091; Exhibit #R436: CB478; Exhibit #R468: CB510); and
  - (v) from Mr Brown to Mr Llewellyn, Mr Meakin and Ms Binnie (Exhibit #R453: CB495);
- (c) on 10 February 2021 from Mr Brown to Mr Llewellyn, Mr Meakin and Ms Binnie (Llewellyn, [297]: CB1079; Binnie, [70]: CB1074; Exhibit R529: CB571);
- (d) on 11 February 2021:
  - (i) from Mr Llewellyn to Mr Campbell, Mr Bendall, Ms Thornton, Mr Farley and Ms Smithies (Llewellyn, [298]: CB1079; Thornton, [72(a)]: CB1093; Exhibit #R537: CB581); and
  - (ii) from Mr Brown to Mr Llewellyn, Mr Campbell, Mr Bendall, Ms Thornton, Ms Wilkinson, Mr Moncur, Mr Meakin, Ms Binnie, Mr Farley and Ms Smithies (Binnie, [77]: CB1074; Campbell, [57]: CB1091; Exhibit #R576: CB620);
- (e) on 13 February 2021 from Mr Brown to Mr Meakin, Ms Wilkinson, Mr Llewellyn, Mr Campbell, Mr Bendall, Ms Thornton, Mr Moncur, Ms Binnie, Mr Farley, Ms Smithies and Mr Heriot (Llewellyn, [335]: CB1079; Bendall, [99]: CB1072; Thornton, [72(f)]: CB1093; Exhibit #R651: CB698);
- (f) on 15 February 2021:

- (i) from Mr Llewellyn to Mr Farley, Ms Smithies, Mr Bendall, Mr Meakin, Ms Binnie, Ms Thornton and Ms Wilkinson (Llewellyn, [399]: CB1079; Bendall, [100]: CB1072; Binnie, [81]: CB1074; Exhibit #R818: CB866; Exhibit #R830: CB878); and
  - (ii) from Mr Llewellyn to Mr Farley, Mr Campbell, Ms Smithies, Mr Bendall, Mr Meakin, Ms Binnie, Ms Thornton and Ms Wilkinson (Bendall, [102]: CB1072; Thornton, [72(g)]: CB1093; Exhibit #R833: CB881).
909. Throughout this process, each of Mr Bendall (Llewellyn, [399]: CB1079; Bendall, [92]-[98]: CB1072), Mr Campbell (Llewellyn, [302]: CB1079; Campbell, [54]: CB1091; Exhibits #R550: CB594; #R552: CB596; #R553: CB597; #R555: CB599; #R659: CB706), Mr Meakin (Llewellyn, [399]: CB1079; Exhibit #R428: CB470), Mr Llewellyn (Llewellyn, [318], [335], [337]; Exhibits #R610: CB655; #R652: CB699; #R654: CB701), Ms Wilkinson (Llewellyn, [313], [314], [338]: CB1079; Exhibits #R584: CB628; #R589: CB634; #R590: CB635; #R592: CB637), Ms Binnie (Binnie, [71]: CB1074; Exhibit #R542: CB586) and Ms Thornton (Thornton, [72(a), (e)]: CB1093, [73]; Exhibit #R02: CB224) provided comments on the WIPs and scripts. Changes were made to the WIPs and the scripts accordingly.
910. The production team received legal advice in respect of the various iterations of the WIPs and scripts (Llewellyn, [262], [272], [312], [371], [391]: CB1079).
911. Right up to the broadcast, the production process was intense and involved. Mr Llewellyn, in addition to reviewing the WIPs and amending the scripts as set out above, facilitated the following elements of the program:
- (a) additional footage to be included in the program (Llewellyn, [282]: CB1079);
  - (b) a filmed interview with Professor George Williams which was incorporated into the program (Llewellyn, [285]-[286]: CB1079);
  - (c) the GFX build (Llewellyn, [307]: CB1079);
  - (d) the plasma presentation (Llewellyn, [332]: CB1079)
  - (e) Ms Wilkinson's piece to camera (PTC) in Canberra and the other Canberra location footage (Llewellyn, [304]-[305], [310], [340]-[342]: CB1079);
  - (f) voiceovers (Llewellyn, [345], [349], [384], [392]: CB1079);

- (g) provision of a clip to Ms Maiden (Llewellyn, [346], [350], [357]: CB1079);
- (h) intros and back announces (Llewellyn, [391], [407]: CB1079);
- (i) links (Llewellyn, [401]-[403], [406]: CB1079); and
- (j) incorporation of comments received into the program (see below at [947]).

912. Ms Binnie also contributed to the preparation of the intros and back announces (Binnie, [79]: CB1074; Exhibits #R780: CB828; #R819: CB867; #R828: CB876; #R835: CB883)

### ***Promotion of the program***

913. Network Ten was cautious about how the program was promoted. While a promo package was prepared, no final decision about its deployment was made until after Ms Maiden's article was published (Llewellyn, [258], [319], [347]-[349], [359], [360], [369], [370]: CB1079; Binnie, [78]-[79]: CB1074; Exhibit #R735: CB783). This was an issue in respect of which legal advice was sought (Llewellyn, [359], [369]: CB1079).
914. In addition, Network Ten took a conservative approach to promoting the program on social media, including by disabling third party comments (Llewellyn, [356], [379]-[380]: CB1079).

### ***Statutory Declaration***

915. Where a source comes to *The Project* with allegations that are or seem contentious, it is common for *The Project* to obtain statutory declarations before the allegations are broadcast (Bendall, [74]: CB1072; Binnie, [50]: CB1074; Campbell, [42]: CB1091).
916. Prior to 8 February 2021, Mr Llewellyn had discussed with Ms Higgins and Mr Sharaz the fact that *The Project* would require a statutory declaration from Ms Higgins. At 3.12pm and 3.13pm on 8 February 2021, Mr Sharaz sent WhatsApp messages to Mr Llewellyn which said (Exhibit #R214: CB235):

*"[8/2/2021, 3:12:39 pm] David Sharaz: Call Britt anytime*

*[8/2/2021, 3:13:01 pm] David Sharaz: She knows it's about the stat dec"*

917. At 11.07am on 9 February 2021, Mr Llewellyn sent Ms Higgins an email attaching a draft statutory declaration. Mr Llewellyn formed the view that the statutory declaration, if declared by Ms Higgins, would give him an additional layer of comfort that she had been truthful during the Second Interview (Llewellyn, [276]: CB1079).



918. During the evening of 9 February 2021, Mr Llewellyn realised the draft statutory declaration contained the wrong date. Mr Llewellyn subsequently sent a revised statutory declaration to Ms Higgins at 6.22pm on 9 February 2021 (Llewellyn, [284]: CB1079; Exhibit #R291: CB319).
919. At 1:28pm on 10 February 2021, Ms Higgins sent a signed copy of her statutory declaration to Mr Llewellyn (Exhibit #R463: CB505; #R532: CB574). The statutory declaration annexed the full transcript of the Second Interview and the bruise photo, and declared that everything she had said during the Second Interview was true and correct.
920. Mr Llewellyn subsequently informed other members of the production team, including Mr Bendall and Ms Binnie, that the statutory declaration had been signed by Ms Higgins and provided to *The Project*. Each of Mr Bendall and Ms Binnie formed the view that Ms Higgins' declaration added to her credibility (Bendall, [74]: CB1072; Binnie, [50]: CB1074).
921. This was not a mere tick-a-box step. The statutory declaration was detailed, requiring Ms Higgins to confirm the accuracy of what she had said by reference to a transcript of the Second Interview, and particularly in relation to the bruise photograph. The statutory declaration did not, however, of course, replace the independent judgment formed by the production team as to Ms Higgins' credibility.

***Duty of care to and concern for Ms Higgins***

922. From the outset, the production team was concerned about Ms Higgins' welfare. As set out above, Mr Llewellyn and Ms Wilkinson immediately identified her as a very vulnerable and traumatised individual. Mr Llewellyn described caring for Ms Higgins as part of his "duty of care" towards her (Llewellyn, [34]-[35], [115], [219]: CB1079; T1534.19-24, T1619.21-24).
923. Using Mr Sharaz as a buffer to minimise the stress caused by the production process to Ms Higgins was a strategy that Mr Llewellyn employed (Exhibit #R214: CB236).
924. On 1 February 2021, Mr Llewellyn sent an email to the production team confirming that Ms Higgins had been to the GP and had obtained a mental health plan and was also seeing a counsellor (Exhibit #R302: CB337).

925. On 5 February 2021, Mr Llewellyn said that, as a result of his dealings with Ms Higgins and Mr Sharaz, he understood Ms Higgins to be "*quite fragile at the moment*" (Exhibit #R376: CB417).
926. On 10 February 2021, Mr Llewellyn sent an email to the production team which referred to the duty of care owed to Ms Higgins and her desire to control the frenzy around her as much as possible (Exhibit #R459: CB501).
927. Network Ten's concerns for Ms Higgins extended beyond the 15 February 2021: see Llewellyn, [430]: CB1079; Exhibits #R866: CB918; #R868: CB920; #R870: CB942.

***Requests for comment***

928. Members of the production team gave evidence about the importance of always making efforts to seek comment from persons affected or potentially affected by a feature story, whether or not that person is to be named in the story (Bendall, [53]-[54]: CB1072; Binnie, [85]: CB1074; Llewellyn, [49], [321]: CB1079; Campbell, [49], [68]: CB1091).
929. After 2:30pm on Friday 12 February 2021, Mr Llewellyn sent requests for comment to the following persons:
- (a) Senator Scott Ryan, a Presiding Officer at Australian Parliament House, and the Hon, Tony Smith, a Presiding Officer at Australian Parliament House (Llewellyn, [328(a)]: CB1079; Exhibit #R619: CB664);
  - (b) Reece Kershaw, the Commissioner of the Australian Federal Police, Federal Agent Thelning and Federal Agent Cleaves (Llewellyn, [328(b)]: CB1079; Exhibit #R620: CB665);
  - (c) Senator Reynolds (Llewellyn, [328(c)], [329(a)]: CB1079; Exhibit #R621: CB666);
  - (d) Ms Brown (Llewellyn, [328(d)], [329(b)]: CB1079; Exhibit #R622: CB667);
  - (e) John Kunkel, the Prime Minister's Chief of Staff (Llewellyn, [328(e)], [329(c)]: CB1079; Exhibit #R623: CB668);
  - (f) Yaron Finkelstein, the Prime Minister's Principal Private Secretary (Llewellyn, [328(f)], [329(d)]: CB1079; Exhibit #R624: CB669);
  - (g) Senator Cash (Llewellyn, [328(g)]: CB1079, Exhibit #R625: CB670); and

- (h) Daniel Try, Senator Cash's Chief of Staff (Llewellyn, [328(h)], [329(e)]: CB1079, Exhibit #R626: CB671); and
  - (i) Mr Lehrmann (Llewellyn, [325], [373]: CB1079; Exhibit #R40: CB672; #R756: CB804).
930. Each of these requests were detailed and represented a genuine attempt by the respondents to obtain comment from the above persons, including Mr Lehrmann (Llewellyn, [324]: CB1079). They repay a careful review. They are nuanced and detailed, identifying with precision the allegations that had been made by Ms Higgins and that were to form the subject of the program.
931. Much of the criticism levelled during cross-examination concerned the adequacy of the program's treatment of Ms Brown. But Ms Brown had been asked a set of very detailed questions. She declined to respond to them, instead leaving the matter to Mr Carswell. Mr Carswell sent a general response on behalf of the government (and, by implication, Ms Brown) that did not respond to the detailed questions Mr Llewellyn had asked (Exhibit #R296 pp3312-3314: CB329; #R716: CB763).
932. In those circumstances, the criticisms of Network Ten in relation to its treatment of Ms Brown fall flat. The program incorporated the substance of what Mr Carswell had said, and the entirety of the government's response was made available to viewers.
933. Because neither Mr Carswell nor Ms Brown had responded to Mr Llewellyn's detailed questions, Network Ten was deprived of the ability of putting her responses so that they could be assessed by viewers alongside those of Ms Higgins. To that extent, Ms Brown was the architect of her own predicament.
934. This was a matter Mr Llewellyn referred to repeatedly in the course of being cross-examined. He said, for example:
- (a) *"I asked Ms Brown lots of questions. She – I just needed her to answer the questions"*: T1660.36-37;
  - (b) *"Which was why I was asking Ms Brown lots of questions"*: T1661.5-6;
  - (c) *"Yes, it's quite different having Mr Carswell tell me that than Ms Brown. So he would say that"*: T1661.20-21;
  - (d) *"the inquiries were with Ms Brown and Minister Reynolds and all those people. I was waiting for those inquiries to come back"*: T1662.39-40;

- (e) *“This is background information that’s not corroborated. The corroboration that I needed was from the Ministers”*: T1662.43-44;
  - (f) *“No, I just wanted to hear from Ms Brown”*: T1664.12-13;
  - (g) *“I was still waiting to hear from Ms Brown, not from Mr Carswell. Ms Brown was who I was asking questions of”*: T1677, 44-46.
935. Despite the fact that Mr Lehrmann was not identified in the program, Mr Llewellyn believed it was necessary to seek comment from him (Llewellyn, [323]: CB1079).
936. Mr Llewellyn obtained two potential email addresses and a mobile phone number for Mr Lehrmann from Mr Sharaz (Llewellyn, [190], [303]: CB1079; Exhibits #R214: CB236; #R296 p3298: CB329). Mr Llewellyn conducted independent searches to verify the mobile phone number Mr Sharaz gave him and as a result concluded it was not Mr Lehrmann's correct phone number but found a similar number online which he considered might be correct (Llewellyn, [194]-[196]: CB1079; Exhibit #R102: CB14). Mr Llewellyn used the phone number he located from his independent enquiries to attempt to contact Mr Lehrmann by calling and sending a text message to the number (Llewellyn, [325(b)], [373(a)]: CB1079; Exhibit #R102: CB14; #R632: CB678). Mr Llewellyn's evidence was that he had no reason to doubt the currency of the phone number he located (T1634.19-24). The line was still active and he did not receive any response to his text message to indicate that the number was owned by another person (Llewellyn, [373(a)]: CB1079; T1634.26-27).
937. In circumstances where Mr Llewellyn had Mr Lehrmann's correct Hotmail address and a phone number he reasonably believed was Mr Lehrmann's, Mr Llewellyn decided not to try and contact Mr Lehrmann through his LinkedIn account. Mr Llewellyn considered Mr Lehrmann's LinkedIn profile to be inactive and out of date (T1622.43-44, T1623.1-6, T1652.18-43). Similarly, Mr Llewellyn considered sending a message to Mr Lehrmann via Facebook Messenger, but when he reviewed Mr Lehrmann's Facebook profile he identified that Mr Lehrmann's privacy settings did not allow to send a direct message without first adding Mr Lehrmann as a 'friend' (Llewellyn, [374]: CB1079). Mr Llewellyn (correctly) regarded sending Mr Lehrmann a friend request accompanied by a request for an interview and/or response to the allegation that he had raped Ms Higgins as *"inappropriate"*. Mr Llewellyn's view was that these were allegations much more appropriately raised over email, especially in circumstances

where Mr Llewellyn had Mr Lehrmann's personal email address and believed he had Mr Lehrmann's phone number (T1627.13-26; Llewellyn, [325]: CB1079). Network Ten submits that the approach taken by Mr Llewellyn in this regard should be accepted as fair and reasonable.

938. Mr Llewellyn sent all requests for comment between 2:41pm and 3:01pm on Friday 12 February 2021. In each case, Mr Llewellyn requested a response by 10am on Monday 15 February 2021. The program was broadcast from 6:59pm on Monday 15 February 2021, so responses that were received after 10am that day were also incorporated (Llewellyn, [386], [388], [410]: CB1079).
939. All persons contacted by Mr Llewellyn besides Mr Lehrmann responded either directly or via a spokesperson prior to publication and provided a response to his request:
- (a) in relation to the request sent to Commissioner Kershaw, Federal Agent Thelning and Federal Agent Cleaves, via Julie Hope and Ellena Bisset (Llewellyn, [330], [331], [355], [361], [388], [404]: CB1079; Exhibits #R296 pp 3315, 3317: CB329; #R705: CB752; #R792: CB840);
  - (b) in relation the requests sent to Senator Reynolds, Ms Brown, Mr Kunkel and Mr Finkelstein, via Andrew Carswell (Llewellyn, [352], [354], [363], [365], [395]: CB1079; Exhibits #R296 pp3312-3314: CB329; #R716: CB763; #R810: CB858);
  - (c) in relation the request sent to Senator Cash and Mr Try, via Guy Creighton (Llewellyn, [382]: CB1079; Exhibit #R755: CB803); and
  - (d) in relation to the Presiding Officers, via Nick Edwards (Llewellyn, [386], [405], [410]: CB1079; Exhibits #R296 p 3318: CB329; Exhibits #R784: CB832; #R848: CB896).
940. The detailed matters put to Mr Lehrmann were all within his knowledge. They squarely and fairly put Ms Higgins' allegations and offered him an opportunity to respond.
941. Mr Lehrmann denies that he saw the two emails Mr Llewellyn sent to his personal Hotmail account prior to broadcast. Mr Lehrmann's evidence is that he saw the email sent at 2.46pm on 12 February 2021 the following week (T414.38-41, T475.3-5). In cross-examination, Mr Lehrmann accepted that:

- (a) he has, since at least 2019, kept and used the email address b.lehrmann@hotmail.com as his personal email address;
  - (b) he was sending and receiving emails from his personal email address in January and February 2021;
  - (c) his personal address was active as at 12 February 2021; and
  - (d) he had no reason to doubt that he received the email from Mr Llewellyn at 2.46pm on 12 February 2021 at or around the time it was sent (T413.23-T414.2).
942. Mr Lehrmann's evidence demonstrated that in the period between his meeting with his then employer, British American Tobacco Australia, at approximately 2pm on Monday 15 February 2021 (T160.46-161.5, T444.20-25, T445.33-34) and when the program was broadcast he was able to obtain advice from three separate people, the substance of which was not to reach out to *The Project*: Rick Korn (T434.8-34, T448.26-449.11, T450.9-23, T453.18-26), Tahlia Robertson (T434.8-30, T449.38-45, T451.20-453.16) and John McGowan (T434.8-19, T434.46-435.15, T449.38-45).
943. Mr Lehrmann was clearly able to respond quickly to difficult requests for comment. In April 2019, Mr Lehrmann provided an overnight response to Senator Reynolds to her show cause letter dated 4 April 2019 (Exhibits #23: CB80; #24: CB83), which he accepted was "*one of the most important letters that [he] needed to respond to in [his] entire professional life*" (T375.15-17).
944. At around lunchtime on 15 February 2021, Mr Lehrmann learned that Ms Higgins' allegations contained in Ms Maiden's article would feature on *The Project* that evening (T434.36-44). Mr Lehrmann's evidence was that he was considering contacting Network Ten ahead of the program (T435.8-29). Before doing so, he received advice from each of Mr McGowan (T435.14-15, T449.38-45, T453.13-14), Ms Robertson (T435.21-43, T453.13-14) and Mr Korn (T450.9-23) that if he provided comment or a denial to Network Ten, it was more likely that he would be named and identified in connection with the allegations. Mr Lehrmann does not recall anyone advising him to provide a statement or response to Network Ten prior to broadcast (T455.16-0-17). Mr Lehrmann accepted this advice: he decided not to contact Network Ten ahead of the program going to air. Later that evening, Mr Lehrmann sent a text message to Ms Robertson that said "*He was saying today thank God I responded to no one*". Mr

Lehrmann was relaying what Mr Korn had told him while they were in his office that evening (Exhibit #R36; T.467.6-11).

945. Despite Mr Lehrmann's denial that he did not see either of Mr Llewellyn's emails to him on 12 and 15 February 2021, once he learned Ms Higgins' allegations were to be broadcast by Network Ten, Mr Lehrmann gave evidence that he never intended to contact Network Ten (T474.44-46).
946. Had Mr Lehrmann provided comment or a response to Network Ten, the production team was willing and able to incorporate any response received to Mr Llewellyn's requests for comment into the program up to and including when it was broadcast (Llewellyn, [376], [413]: CB1079; T1651.11-25).
947. The following responses from others were inserted into the program:
- (a) Mr Carswell (Exhibit #1: CB909, CB2);
  - (b) Mr Creighton, (Exhibit #1: CB909, CB2); and
  - (c) Mr Edwards (Exhibit #1: CB909, CB2),
948. Viewers of the program were also directed to the full statements received from Ms Bisset, Mr Carswell, Mr Creighton and Mr Edwards which were, and remain, available on Network Ten's website (Exhibits #1: CB909, CB2; #R41: CB908).
949. Mr Carswell provided Mr Llewellyn with information "*for background*" (Exhibit #R810: CB858). When criticised in cross-examination for not using the information in the Publications, Mr Llewellyn's evidence was that "*he would never use something that someone just tells me on background*" (T1662.6-9). From the face of the document, it is information that could only have come from an internal government source. Mr Meakin gave evidence that information provided on background "*is not the most reliable source of information, in my view*" (T1960.12-13). That evidence should be accepted. Information provided on background is apt to be self-serving and unreliable. The very fact that the information is provided on background indicates that the provider of the information does not want it to be used in an attributable way.
- 949A. Mr Lehrmann submits at [230] of the ACS that the email from Ms Barons to Ms Brown attached to Mr Carswell's email "*clearly detailed that Ms Brown had communicated clear messages of support to Ms Higgins...*". However, the email was sent on 29 March 2019 at a time when Ms Brown maintains she was still unaware that Ms Higgins was

alleging that an assault had occurred (Brown, [90], [98]). There is no evidence that in fact any “clear message of support” was ever communicated to Ms Higgins after the 1 April 2019 meeting. There is significant evidence that in fact Ms Higgins felt abandoned (see [632] and [774]-[777] above).

**Mr Sharaz – No *Jones v Dunkel***

950. A *Jones v Dunkel* inference does not operate in a vacuum.
951. In appropriate circumstances, the rule in *Jones v Dunkel* permits the Court to draw an inference that a witness who could have been, but was not, called by a party would not have assisted the party’s case: (1959) 101 CLR 298, 308, 312, 320-1. The rule does not create any admission. It entitles the Court more confidently to draw an inference adverse to a party’s case if such an inference is otherwise available on the evidence, but it does not permit an inference that the witness, if called, would have damaged or been positively adverse to the party’s case: e.g. *Brandi v Mingot* (1976) 12 ALR 551, 559–60; *ASIC v Fortescue Metals Group Ltd (No 5)* (2009) 264 ALR 201, [102]; *ABCC v CFMEU* (2009) 187 FCR 293, [45]–[48]; *ASIC v Hellicar* (2012) 247 CLR 345, [232].
952. The rule does not require a party to call a witness for the purpose of giving merely cumulative evidence: *Cubillo v Commonwealth* (2000) 103 FCR 1, [360]; *ABCC v CFMEU* (2009) 187 FCR 293, [47].
953. Before there is any work for *Jones v Dunkel* to do, the inference that is sought needs to be articulated by reference to the evidence otherwise before the Court, so that an assessment can be made as to whether the absent witness could have shed relevant light upon whether the inference ought to be drawn, or whether in light of the evidence some explanation is called for. *Jones v Dunkel* inferences do not operate at large.
954. We are left to guess at what inferences might be said to flow from the failure to call Mr Sharaz, but we can make the following general submissions:
- (a) Ms Higgins did not start dating Mr Sharaz until about mid-2020. He was not on the scene in March and April 2019.
  - (b) Mr Sharaz could therefore not have given any evidence relevant to what occurred before or on 22-23 March 2019 or its aftermath. Critically, if the allegation is that Ms Higgins fabricated an allegation of rape, then that fabrication occurred by no later than 26 March 2019, when she started disclosing the relevant facts to people,



including Mr Dillaway, Mr Payne and (depending on the view taken of her evidence) Ms Brown. She had certainly consummated the fabrication, if one occurred, by no later than 1 April 2019 – more than a year before she met Mr Sharaz. It follows that no evidence Mr Sharaz could have given could have been used to more confidently draw an inference that Ms Higgins was engaged in a monstrous lie in March and April 2019.

- (c) On the truth case, Mr Sharaz’s evidence could only conceivably have gone to support an inference that Ms Higgins resolved, in about January 2021, to perpetuate the lie that she had already entrenched back in March and April 2019, by going to the media and reactivating her police complaint. But, one might ask rhetorically, how could Mr Sharaz’s evidence have gone, one way or the other, to supporting such an inference? Nothing relevant was put to Ms Higgins about Mr Sharaz’s alleged involvement in any such scheme. There is no explanation called for.
- (d) That leaves the qualified privilege defences, which turn on the reasonableness of the respondents’ conduct. Mr Sharaz was certainly a conduit for some of the communications with Network Ten and Ms Wilkinson, but at the end of the day it was Ms Higgins who told her story, at least twice, in the five-hour informal meeting on 27 January 2021 and then in the on-the-record interview on 2 February 2021. It cannot sensibly be suggested that she only did so because of pressure from Mr Sharaz, or that she concocted what she said because of something done by him. In any event, nothing remotely to that effect was ever put to Ms Higgins, such that there is nothing for an inference to attach to.
- (e) Two other remote possibilities arose: (a) that Ms Higgins’ motive to go public was to damage the Liberal Party, or alternatively she acted in furtherance of a motive on Mr Sharaz’s part to that effect, or (b) that Ms Higgins was somehow being manipulated by Mr Sharaz.
- (f) Ms Higgins rejected the first possible motive vigorously, telling the court that she loved the Liberal Party and was a lifelong Liberal. It was never put to her that she went public in order to further Mr Sharaz’s alleged motive to damage the Liberal Party.

- (g) The second possibility was never put to Ms Higgins. It is, to put it mildly, a patronising suggestion that would have had to be put squarely to Ms Higgins so that she could answer it. There was nothing about Ms Higgins' evidence to suggest that she was anything other than a strong and intelligent woman who was capable of making her own decisions.
- (h) In any event, however, for the purposes of the qualified privilege defences, is not Ms Higgins' motive, or Mr Sharaz's motive that matters; it is whether it was reasonable for Network Ten and Ms Wilkinson to move ahead with the program, even though Ms Higgins or Mr Sharaz may have had an axe to grind or Ms Higgins was somehow Mr Sharaz's puppet.
- (i) Mr Llewellyn's evidence on these questions was clear. He very carefully turned his mind to Ms Higgins' motives: see Llewellyn, [127]: CB1079. He was not cross-examined on the contents of that paragraph.
- (j) Mr Llewellyn also considered Mr Sharaz's motivations: Llewellyn, [140]–[141]: CB1079. Those paragraphs were not cross-examined on either.
- (k) If the suggestion is that Mr Llewellyn's beliefs as to Mr Sharaz or Ms Higgins' motives were unreasonable, that needed to be put to him.

### **F.3 Publication**

- 955. Ultimate responsibility for the decision to publish *The Project* rested with the Executive Producer (Bendall, [30]: CB1072). Mr Bendall, in his evidence, impressed as a skilled professional of high integrity.
- 956. At 18 January 2021, when Ms Wilkinson was first contacted by Mr Sharaz, Mr Campbell was the Executive Producer of *The Project* (Campbell, [9]: CB1091). Mr Campbell went on sick leave on 12 February 2021. As a result of this, Mr Bendall was in charge of finalising and ultimately approving the program for broadcast (Bendall, [28]–[30]: CB1072; Campbell, [13]: CB1091).
- 957. Ms Higgins wanted her allegations to be published across two mediums: print and television. Ms Higgins was speaking to Ms Maiden, a journalist at news.com.au, in parallel with her discussions with Mr Llewellyn and Ms Wilkinson (T795.19–20, T811.24–29, T958.37–38). It was commonly understood by the production team from 19 January 2021 that Ms Higgins wanted to do two interviews: one with Ms Maiden

for a 'print' publication and another with Ms Wilkinson for television (Bendall, [41]: CB1072; Binnie, [92]: CB1074; Wilkinson, [19]: CB1075; Meakin, [26]: CB1077; Llewellyn, [159]: CB1079; Thornton, [41]: CB1093).

958. At 8.00am on 15 February 2021, Ms Maiden's article titled "*Young staffer Brittany Higgins says she was raped at Parliament House*" was published by News Life Media Pty Ltd on its website, news.com.au (Exhibit #2: CB770).
959. Prior to the publication of this article, Network Ten and Ms Maiden had agreed that each would not publish Ms Higgins' allegations before 15 February 2021. The agreement was finalised by Mr Bendall and Ms Maiden on or around 10 February 2021 (Bendall, [90]-[91]: CB1072).
960. *The Project* went to air at 7pm on 15 February 2021. Prior to broadcast, Mr Bendall estimates that he reviewed the draft script or watched the WIP versions of the segment on at least six different occasions (Bendall, [67]: CB1072).
961. Mr Llewellyn was editing the story right up until broadcast. These edits included incorporating the comments of the Prime Minister which he made in the House of Representatives on 15 February 2021 and the comments received from Mr Carswell (on behalf of the Prime Minister's Office), Mr Creighton, the AFP, and the Presiding Officers at Australian Parliament House (Llewellyn, [413]: CB1079; T1658.23-27). A number of these edits, or proposed edits, were sent to Mr Bendall by email (Bendall, [103]-[107]: CB1072).
962. Shortly before it was broadcast, Mr Bendall reviewed the final version in an editing suite at *The Project's* set in Melbourne. Mr Bendall signed off on this version and made the decision that it should be broadcast (Bendall, [109]-[114]: CB1072). Based on his involvement in the production of the program, he was satisfied that all reasonable journalistic steps had been taken in terms of verifying the story, ensuring it was accurate and issuing requests for comment.
963. Mr Llewellyn was very confident in the end product and felt the production team had done everything needed from a journalistic perspective prior to broadcast (Llewellyn, [414]-[417]: CB1079). He was very happy with what was going to air. Prior to publication, Mr Llewellyn was satisfied that it was true that Mr Lehrmann had raped Ms Higgins (Llewellyn, [424]: CB1079).

964. As Network Executive Producer, Ms Thornton also had the ultimate say on whether or not the program should be broadcast (Thornton, [25]: CB1093). Ms Thornton kept Beverley McGarvey, the Executive Vice President and Chief Content Officer, of ViacomCBS Australia and New Zealand (Network Ten's parent company), briefed on the story and Ms McGarvey confirmed she was happy to proceed with it (Thornton, [64]-[69], [77]: CB 1093).

## **G      EVENTS FOLLOWING PUBLICATION OF THE PROJECT PROGRAM**

965. The impact of The Project program the subject of this proceeding cannot be understated. That impact can be divided into two categories.
966. *First*, that the inadequacies of Parliament House as a workplace were laid bare for the Australian public to see.
967. On 16 February 2021, the then Prime Minister Scott Morrison held a press conference in relation to Ms Higgins' allegations and the changes that the government would be making to Parliament House as a workplace (Llewellyn, [428]; CB1079).
968. On 5 March 2021, the Australian Government established the Independent Review into Commonwealth Parliamentary Workplaces, led by Sex Discrimination Commissioner Kate Jenkins (Llewellyn, [432]; CB1079 p5653, Exhibit #R872).
969. On 30 November 2021, Sex Discrimination Commissioner Jenkins published the resulting report (Exhibit #R54). The Commissioner's Foreword states:

*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. I commend our Parliament for commissioning this Review, and urge it to promptly consider and implement the sensible, interconnected, evidence-based recommendations contained within this Report.*

970. *Second*, Ms Higgins' allegation of sexual assault was investigated by the Australian Federal Police and, on 6 August 2021, Mr Lehrmann was charged with one count of sexual intercourse without consent.
971. Until Ms Maiden's telephone call on 6 August 2021 (Exhibit #R97), Ms Higgins had assumed Mr Lehrmann, if ever questioned about the incident, would assert that they had had consensual sex, and it would have been difficult for her to prove otherwise. Ms Higgins' surprise and relief in response to the news that Mr Lehrmann was denying that any sexual contact had occurred is palpable in the recorded phone call. It is clear that in Ms Higgins' mind, it was never a possibility until that moment that Mr Lehrmann could contend that they did not have any sexual contact and the issue of consent had been playing on her mind since 23 March 2019.

972. On 3 October 2022, Mr Lehrmann's criminal trial commenced. After 4 days of deliberation, the jury was discharged on 26 October 2022 due to juror misconduct.
973. On 2 December 2022, the ACT Director of Public Prosecution, Shane Drumgold SC, withdrew the charge against the Applicant, citing an unacceptable risk to Ms Higgins' life.

## **H      EVENTS OF RELEVANCE TO DAMAGES**

974. Network Ten relies upon the facts, matters and circumstances set out in Parts I and M below. The most significant events of relevance to damages are the extremely limited class of viewer (consisting of parliamentary staffers and similar people who had worked at Parliament House at the relevant time) who were reasonably able to identify Mr Lehrmann, the fact that viewers in such a class likely knew of the allegations/fact of Mr Lehrmann's termination prior to watching the broadcast and/or identified Mr Lehrmann having read the news.com.au article beforehand (e.g. Ms Abbott and Ms Quinn), and the disgraceful conduct engaged in by Mr Lehrmann that constituted an exceptional form of abuse of process. These events are developed further below.

## **I IDENTIFICATION**

975. Identification is an essential element of the cause of action for defamation and a matter in respect of which Mr Lehrmann bears the onus of proof.

### **I.1 Relevant Principles**

976. The onus is on Mr Lehrmann to establish that the Publications were of and concerning, or about, him: *Knupffer v London Express Newspapers Ltd* [1944] AC 116.
977. Because he was not named in the Publications, Mr Lehrmann must establish that persons viewing the Publications reasonably understood them to be about him: e.g. *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL), 1246, 1254-5, 1269-70; *David Syme & Co v Canavan* (1918) 25 CLR 234; *Burston v Hanson* [2022] FCA 1235, [106]-[110], citing the principles as to identification referred to in *Plymouth Brethren (Exclusive Brethren) Christian Church v The Age Company Ltd* [2018] 97 NSWLR 739, [58]ff and *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845, [35]-[36].

### **I.2 Whether the Applicant was Reasonably Identified**

978. In his opening address, Senior Counsel for Mr Lehrmann submitted that he was reasonably identified by the Publications by three categories of viewer.
979. *First*, it was submitted that there is a class of viewer constituting people who either worked in Senator Reynolds' office, or had regular dealings with that office and knew certain matters included in the Publications. Those matters were said to be that: (a) the assailant had previously worked with Senator Reynolds in Home Affairs, (b) he had moved with Senator Reynolds to the Defence Industry portfolio where he was still an advisor, (c) that he had been out at drinks with Ms Higgins and many others on the Friday night before the alleged assault, (d) that he had left the building and been seen packing up his things after a meeting with Ms Brown three days later on 26 March 2019, and (e) that by February 2021 he was working in Sydney.
980. Network Ten's position is that any class of viewer with such specialised knowledge would necessarily be extremely limited and, in any event, likely to have known about the fact and circumstances of Mr Lehrmann's termination in March 2019 at or around that time. The category does not appear to have been pursued by Mr Lehrmann in the course of the trial; no evidence was adduced of any person with knowledge of those



characteristics who was not already aware of the fact and circumstances of Mr Lehrmann's termination, and there is no proper basis for inferring the existence of any such persons. That category thus goes nowhere.

981. *Secondly*, it was submitted that unspecified people working in Parliament, adjacent to Senator Reynolds' office or in parts of the public service that dealt with that office (including other people in other Ministers' offices) could have easily discovered the identity of the perpetrator. No such person gave evidence in this proceeding or was otherwise identified by Mr Lehrmann. We address the evidence in fact adduced on identification from persons working in Parliament below.
982. *Thirdly*, it was submitted that beyond these necessarily small groups of viewers, Mr Lehrmann was identifiable by unspecified people who had learned of his identity through the 'rumour mill'.
983. It was submitted by Senior Counsel for Mr Lehrmann that it is a matter of plain inference that Mr Lehrmann was identified by many people from a combination of the particular references within the Publications and what happened following publication. For the reasons developed below, however, the evidence adduced at trial does not support any such inference. At best, it appears that the class of person who might have learned that *The Project* was about Mr Lehrmann was confined to a very small group of people; a group that was likely to have already known Mr Lehrmann was the subject of the allegations as a result of having heard the grind of the 'rumour mill' after the earlier publication of Ms Higgins' allegations in the news.com.au article authored by Samantha Maiden.

#### ***L.2.1 The pleaded case***

984. In Mr Lehrmann's pleaded case on identification, he relied on a class of viewers who knew five matters that caused them to identify him. His case now appears to be that that class of viewer did not need to know all five matters but was able to identify him from one or more for those matters. As is apparent from the evidence given by Ms Abbott and Ms Quinn, summarised below, any such person who identified Mr Lehrmann in this way likely already knew the circumstances of his termination from 2019, and from the news.com.au article published earlier on 15 February 2021. *The Project* broadcast could not have caused any further harm to Mr Lehrmann as a result of publication to those people, as it repeated allegations already known to them.

985. As to the second class of viewer said to have identified Mr Lehrmann in the statement of claim, Mr Lehrmann appears to have abandoned or at least substantially narrowed his reliance on that class consisting of: (i) Commonwealth politicians, political assistants and staffers, journalists and other persons who worked at Parliament House, (ii) family, friends and acquaintances. The only witnesses called to give evidence by Mr Lehrmann in respect of his case on identification were two former staffers and one family friend. He did not call evidence from any politicians, political assistants, journalists, family members, or friends and acquaintances. There is no sound basis to infer that such groups of people knew the quite specific facts set out in the Publications such as to enable them to identify Mr Lehrmann.
986. The third class of persons referred to in the statement of claim also appears to have been abandoned, that is people who read social media posts and online articles that named Mr Lehrmann as the person accused by Ms Higgins of sexually assaulting her. There was no evidence of any person having viewed the Publications and identifying Mr Lehrmann by reason of having read publications on [www.kangarocourtsofaustralia.com](http://www.kangarocourtsofaustralia.com) (Exhibits #4: CB927; #5: CB931; #6: CB935) or the website of *True Crime News Weekly* (Exhibit #3: CB925). In the absence of evidence, the Court would not reasonably infer the existence of a class of such viewers cf *Raul Amon International Pty Ltd v Telstra Corp Ltd* [1998] 4 VR 798. Nor would the Court conclude that any supposed identification as a result of a person reading speculation in an obscure publication of dubious repute or reliability was reasonable, as required by the authorities cited in [977] above.

### ***L.2.2 Submissions***

987. In his outline of opening submissions, Mr Lehrmann sought to draw support for his identification case from the decision in *Fairfax Media Publications Pty Ltd v Pedavoli* (2015) 91 NSWLR 485 (**Pedavoli**), and in particular the observations of Simpson JA at [78]. There is no comparison between this case and the circumstances that gave rise to the identification of the plaintiff in *Pedavoli*.
988. *Pedavoli's* case concerned an allegation that a female teacher, who was in her late 20s and taught drama and English at St Aloysius College, had engaged in sexual misconduct with Year 12 boys at the school. Identification was established because it was proved that some readers of the respondent's article had gone to the school's website. The

plaintiff was the only female teacher in her late 20s who taught drama and English at the school. There was evidence of a dramatic spike in visits to the school's website after the publication of the article.

989. *Pedavoli* is a world away from this case. The analogy would be if Mr Lehrmann alleged that after *The Project* went to air, viewers went to Senator Reynolds' website and identified the senior male advisors who worked there at the time of the alleged incident; and if it were alleged that Mr Lehrmann was the only person who fit the description given by Ms Higgins. But that is not, and could not be, Mr Lehrmann's allegation. If such evidence existed, Mr Lehrmann failed to adduce it; cf the evidence of Mr Wotton, summarised below.
990. There is simply no evidence in this case that any recipient of the broadcast sought or was capable of seeking information that led to the identification of Mr Lehrmann. As the court said in *Pedavoli*, the question of whether recipients identified the plaintiff is one of fact and degree (Simpson JA, McColl JA agreeing). In *Pedavoli*, recipients of the matter were able to go to the school's website and identify the plaintiff as the teacher concerned.
991. There was nothing in the nature of an invitation or encouragement by Network Ten for viewers to seek out identifying information: cf *Baltinos v Foreign Language Publications Pty Ltd* (1986) 6 NSWLR 85. There was nothing implicit in *The Project* broadcast that invited viewers to ascertain the identity of the alleged perpetrator.
992. Three things are apparent from the evidence led by Mr Lehrmann (summarised below):
- (a) *First*, persons with sufficient knowledge to identify him from the Publications constituted a very limited class of political staffers and others who had worked at Parliament House at the relevant time and had become aware at the time of the relevant features referred to in the Publications. Such a class of viewer would be minimal, possibly a handful, or perhaps measured in the tens.
  - (b) *Secondly*, members of that class likely already knew that Mr Lehrmann had been terminated and possibly something around the circumstances of his termination. In the case of Ms Abbott, her knowledge went even further because she had heard a rumour that Mr Lehrmann was involved in an incident of sexual assault against Ms Higgins.

(c) *Thirdly*, people who were able to identify Mr Lehrmann from the Publications were highly likely first to have identified him as a result of having read the news.com.au article on the morning of 15 February 2021, but the group of people able to do that was extremely small and was due to their prior knowledge. That was, for example, the case for Ms Abbott and Ms Quinn. Mr McDonald is the exception, but he was a close family friend of Mr Lehrmann's who knew particular details about Mr Lehrmann and his employment with Senator Reynolds that allowed him to speculate as to his identity – but even then Mr McDonald conceded it was absolutely possible that the person accused by Ms Higgins was someone other than Mr Lehrmann: T37.36-44. Even Mr Lehrmann's closest friends at the time did not identify him. Messages received by Mr Lehrmann on 15 February 2021 reveal that his friends did not know it was him that was being referred to (Exhibit #R36).

993. There is simply no evidence, beyond the tweet by the publisher of *True Crime News Weekly* (Exhibit #7: CB926), that anyone outside that very limited class of viewer identified Mr Lehrmann as the subject of the allegations made by Ms Higgins. Mr Lehrmann conceded that the author of that tweet must have conducted research in order to ascertain information not conveyed by *The Project* in order to identify him: T479.17-481.47.

994. On the authorities, Network Ten is not responsible for the identification of Mr Lehrmann by or from third party publications in the days following the Publications on the evening of 15 February 2021, including publications made by *True Crime News Weekly* or *Kangaroo Court of Australia*. That is particularly so in circumstances where those publications involved independent research undertaken by its authors going beyond the content of the Publications (T479.17–T485.33).

### ***L.2.3 The Evidence***

995. Mr Lehrmann called three witnesses on the topic of identification: Karly Abbott (T36-50), Kathleen Quinn (T111-117) and David McDonald (T54-58). Ms Abbott and Ms Quinn were former colleagues of Mr Lehrmann and Ms Higgins at Parliament House. Mr Lehrmann called no evidence from any friends (apart from Mr McDonald as to which see paragraph [1017]-[1018] below) or family members. He did not call any other former parliamentary colleagues. He did not call any current or other former colleagues

in any other area of his work life. He did not call evidence from anyone who did not have an association with him in March 2019.

#### ***L.2.4 Ms Abbott***

996. Ms Abbott worked as a political advisor to Minister Ciobo in March 2011, and became an advisor and then senior advisor when he was promoted to Minister for Trade, Tourism and Investment in March 2016 (Abbott, [4]: CB1070). She continued in the role of senior advisor when Minister Ciobo was appointed Minister for Defence Industry until his retirement in April 2019. In June 2019, Ms Abbott became a senior advisor to Senator Cash. She held that position until February 2020 when she established a business specialising in government relations and strategic communications with Ms Quinn (Abbott, [1], [5]: CB1070).
997. Ms Abbott first met Mr Lehrmann at Parliament House in or around 2016 when he was working for George Brandis, the then Attorney General. Since then she has got to know Mr Lehrmann well, and considers him a friend (Abbott, [6]: CB1070). Ms Abbott met Ms Higgins when she worked for Minister Ciobo in the period October 2019 to April 2019 and thereafter when Ms Abbott was worked for Senator Cash (Abbott, [7]: CB1070).
998. In cross-examination, Ms Abbott identified that, at the time she worked for Minister Ciobo when he was Minister for Defence Industry, there were approximately 17 people working in his office. She identified those people as: the Chief of Staff, policy advisors (of which she thought there had been five people in that role, holding senior to less senior positions), media advisors (of which she thought there had been two people in that role), Ms Higgins (who was a receptionist/assistant media advisor) and the balance of people consisted of one departmental liaison officer and one aide-de-camp, electorate staff and the Minister's personal assistant (T38-39). In cross-examination, Ms Abbott agreed that members of Minister Ciobo's staff transferred to Senator Reynolds' office when she became Minister for Defence Industry (T39.19-21). Ms Abbott knew the people from Minister Ciobo's office that were staying, and she knew that Mr Lehrmann worked for Senator Reynolds and that he was staying with her (T39.23-26). She assumed that Senator Reynolds' office was the same size as Minister Ciobo's office, in terms of having something in the order of 17 staff members (T39.32).

999. Ms Abbott did not consider Mr Lehrmann to be a senior advisor in light of her understanding as to the tiered classification structure for the advisor role, being (in order of seniority from lowest to highest) assistant advisor, advisor and senior advisor. She understood Mr Lehrmann to be in the middle category (T39.43-40.9).
1000. Prior to watching the television broadcast of *The Project* on 15 February 2021, Ms Abbott knew two things:
- (a) *First*, she had had a conversation with Drew Burland (an advisor who worked in Minister Ciobo's office and then in Senator Reynolds' office) in July 2019. They had been talking about the high turnover of staff and Mr Burland mentioned that there had been an incident involving Mr Lehrmann and Ms Higgins and that was why Mr Lehrmann had left. Ms Abbott knew at the time of the conversation that Mr Lehrmann's employment at Parliament House had ceased. During that conversation, Mr Burland alluded to Mr Lehrmann having been fired for a security breach (T40.14-41.10).
  - (b) *Secondly*, in October 2019, during Senate Estimates week, Ms Abbott observed Ms Higgins going back and forth between Senator Cash's office and checked in with her to make sure she was okay. She understood at that time that something was going on and that it possibly involved a story about Ms Higgins that was about to break. Ms Abbott understood that the story had something to do with what she had been told by Mr Burland in July. She had a brief discussion with Ms Higgins, but she was not told anything (T41.12-42).
1001. Ms Abbott's evidence was that at the time of these two things, she had heard a rumour that the incident involving Mr Lehrmann and Ms Higgins concerned a sexual assault (T45.10-24). Ms Higgins gave evidence that Ms Abbott knew what had happened and was very supportive at the time (T687: 31-46), although Ms Abbott claimed she only discussed with her "an incident" involving Ms Higgins and Mr Lehrmann and asked her if she was okay (T41.7-10). Ms Abbott conceded that in October 2019 she was aware there was a story about to break in the media concerning an alleged sexual assault in Parliament House which involved Ms Higgins (T41.16-33).
1002. Ms Abbott read the news.com.au article on 15 February 2021. It came to her attention when Mr Dillaway sent her a text message with a link to the article. She read the article at around 8.30am that day. Having read the article in its entirety she inferred what was

being reported was the matter that Mr Burland had raised with her in July 2019 (T41.44-43.31). The text message exchange between Ms Abbott and Mr Dillaway became Exhibit #R101: CB 1147. Ms Abbott replied to Mr Dillaway's message: "*what the fuck*" and Mr Dillaway responded: "*it was your mate*" (T44.28-37). Ms Abbott understood that the reference to "*your mate*" was to Mr Lehrmann (T44.44-45). Ms Abbott replied to Mr Dillaway that she had heard "*the rumour*" but that she was not sure she believed it. Ms Abbott confirmed that the rumour was a reference back to the two things she had become aware of from Mr Burland and from her observations in Senator Cash's office in October 2019 (T45.10-24).

1003. Ms Abbott's evidence was that she then had a telephone conversation with Mr Dillaway after receiving his text messages and reading the news.com.au article (T45.33-43). She clarified that that conversation had taken place on the morning of 15 February 2021, and it was in response to having read the news.com.au article and was not in response to having watched *The Project* broadcast (T37.1-5). She said that the conversation occurred at about 9am. Her recollection was that Mr Dillaway asked her whether she had read Samantha Maiden's article, to which she told him she had. Ms Abbott said they then had a conversation about the article being about Mr Lehrmann (T46.10-45).
1004. Ms Abbott's evidence was that she received text messages from other staffers referring to the news.com.au article, speculating about the subject of the news.com.au article, and people asking who the subject of the article was, without mentioning specific names (T47.19-47). She suggested that the news.com.au story became part of the rumour mill between a network of people who had worked as political staffers for politicians (T47.19-28).
1005. Ms Abbott described how she has a close relationship with her business partner, Ms Quinn, and that her recollection was that she discussed the news.com.au article with Ms Quinn on the morning of 15 February 2021 by an exchange of text messages (T48.7-26). Ms Abbott said that it was highly likely that she would have had a discussion with Ms Quinn to the effect that the subject of the news.com.au article was Mr Lehrmann (T48.31-38).
1006. Ms Abbott gave evidence about watching the television broadcast of *The Project* on 15 February 2021. She identified features of the program that caused her to identify Mr Lehrmann as the former colleague of Ms Higgins referred to in the broadcast (Abbott,

[8], [9]: CB1070). At the time she watched the broadcast, she knew it was going to feature an interview with Ms Higgins and that the subject of her allegations was Mr Lehrmann, because she had read the news.com.au article (T48.40-45) and as a result of her text exchange with Mr Dillaway (T49.7).

1007. In cross-examination, Ms Abbott confirmed that at the time she watched *The Project* broadcast, she understood that the allegations Ms Higgins was making, of having been raped in Parliament House, were allegations against Mr Lehrmann - the same allegations she understood to have been made in the news.com.au article (T49.29-32).
1008. Ms Abbott recalled having discussions with Canberra political staffers after *The Project* broadcast, although she could not recall the names of anyone she spoke to. Those discussions appear to have consisted of political staffers asking if Ms Abbott had seen the broadcast and whether she knew that it was about Mr Lehrmann (T37.7-20).
1009. Ms Abbott was in a peculiar position relative to that of the average member of the public watching *The Project* broadcast. She had worked at Parliament House at the relevant time, and through that work she had become acquainted with Mr Lehrmann and Ms Higgins. She had been told something by Mr Burland in July 2019 about the reasons for Mr Lehrmann's termination, and she had observed things about Ms Higgins in October 2019. She understood from those things that there was a rumour of an incident between Mr Lehrmann and Ms Higgins involving a sexual assault. She first identified Mr Lehrmann as the subject of an allegation of sexual assault by Ms Higgins by reading the news.com.au article, and corresponding with Mr Dillaway. It was that article, not the later broadcast on *The Project* which caused her to identify Mr Lehrmann and it is clear that she was only able to do so because of the special knowledge she had acquired from her previous employment at Parliament House and the matters she had learned through that employment.

#### ***L.2.5 Ms Quinn***

1010. Ms Quinn is Ms Abbott's business partner. In June 2015 she began work as a media advisor to Minister Ciobo. In June 2017 she was a ministerial advisor to Minister Ciobo, who was then the Minister for Trade, Tourism and Investment and later when he was the Minister for Defence Industry. Following Minister Ciobo's retirement in March 2019 she worked for around 12 months as a ministerial advisor to Minister Melissa Price (Quinn, [2]: CB 1073).



1011. Ms Quinn met Mr Lehrmann in around 2016 when they were both working as staffers at Parliament House. They became acquaintances and interacted in work and social settings over the years they both worked at Parliament House (Quinn, [3]: CB1073).
1012. In cross-examination, Ms Quinn confirmed that Ms Abbott had told her sometime before June 2020 about her conversation with Mr Burland concerning Mr Lehrmann's departure over a security incident in the office, and of observing Ms Higgins being upset in October 2019 at around the time of Senate Estimates and when Ms Higgins was working for Senator Cash (T113.11-114.32).
1013. As with Ms Abbott, Ms Quinn read the news.com.au article in the morning on 15 February 2021 (T114.34-42). She understood from reading that article that the allegations Ms Higgins was making concerned events in March 2019. Ms Quinn was sent a link to the news.com.au article by Ms Abbott. She then had a conversation with Ms Abbott. During that conversation, Ms Abbott told Ms Quinn that the article was about Mr Lehrmann (T115.1-18). The conversation occurred shortly after the news.com.au article had been published, at around 9am (T115.30). She understood from speaking to Ms Abbott that the allegations made by Ms Higgins in the article were about Mr Lehrmann (T115.35-36). Ms Quinn understood from reading the article that *The Project* broadcast was to occur that night, and that is how she came to watch the broadcast (T115.41-46).
1014. Ms Quinn watched the television broadcast of *The Project* on 15 February 2021. She identified the former colleague who was the subject of the allegations made by Ms Higgins in the broadcast to be Mr Lehrmann (Quinn, [6]: CB1073). She agreed that by the time she came to watch the broadcast she already knew the allegations being made by Ms Higgins were about Mr Lehrmann (T115.1-5). She understood that the phrase "*senior male advisor*" was not the correct title for Mr Lehrmann's position in Minister Reynolds' office as at early 2019, but that was something that affirmed her view that the allegations were about Mr Lehrmann because Ms Higgins was referring to him as "*senior to her*" (T117.24-26). The reference to "*senior advisor*" and the person "*working in Sydney*" were matters that affirmed her view that the allegations were about Mr Lehrmann.
1015. Ms Quinn said that she had conversations with "*mostly government staffers*" after having watched *The Project* broadcast in which the identity of the person alleged to

have assaulted Ms Higgins was mentioned (T112.8), but did not name any such staffers. She said that there were about a dozen conversations with such staffers across a couple of days after the broadcast. Ms Quinn recalled people saying during those conversations that Mr Lehrmann was the person who was the subject of *The Project* broadcast and that she was asked for her opinion of his character whether or not she had ever experienced anything untoward from him (T112.3-15).

1016. As with Ms Abbott, Ms Quinn has special knowledge derived from her background as a staffer and the information that Ms Abbott had told her that allowed her to identify Mr Lehrmann as the subject of the allegations in the news.com.au article. She already knew that Mr Lehrmann was the subject of those allegations because of those matters when she came to watch *The Project* broadcast.

#### ***L.2.6 Mr McDonald***

1017. Mr McDonald has known Mr Lehrmann since about 2008, at which time he went to the same school as Mr McDonald's children. Since that time they have become close friends and Mr McDonald has followed Mr Lehrmann's career. As at February 2021 Mr McDonald knew that Mr Lehrmann was working for Minister Reynolds in 2019. He understood that he was working in the Home Affairs portfolio (T56.45-57.20). Mr McDonald gave evidence that he watched *The Project* broadcast on the evening of 15 February 2021 (T56.1-2). He was told by a friend to watch *The Project* that evening because there was some issue about a politician jumping the fence (T56.9-11, 23-24). Mr McDonald thought that the broadcast could have referred to Mr Lehrmann, based on the description of the male advisor in the broadcast (T57.36-38). He accepted that when he watched the broadcast in February 2021, he could not exclude the possibility that there were other men working for Minister Reynolds at the relevant time who fell within that description (i.e. a male advisor) and the matters listed in paragraph 6 of his affidavit (McDonald, [6]: CB1069).
1018. Again Mr McDonald, like Ms Abbott and Ms Quinn, had special knowledge by reason of his personal relationship with Mr Lehrmann that allowed him to identify Mr Lehrmann as the subject of Ms Higgins' allegation in the broadcast. Even possessed of that special knowledge, Mr McDonald was not entirely sure that the allegations referred to Mr Lehrmann. His evidence was that while watching the broadcast, he speculated to his wife: "*that has to be about Bruce*" (McDonald, [7]: CB1069).

### ***L.2.7 Other witnesses***

1019. Mr Wotton first became aware of the allegations made by Ms Higgins by reading the news.com.au article and subsequently watching *The Project* broadcast (T1091.45). He could not recall any conversations about the identity of the subject of the allegations (T1092.14-15). He was concerned that people might think he was the subject of the allegations. He was a male senior advisor in Minister Reynolds' office (T1093.12-14), although he had never moved or worked in Sydney (T1092.45-46).
1020. Mr Wotton's evidence was that when he watched *The Project* program, his wife turned to him and jokingly said: "*Oh my goodness, that sounds like you*" (Wotton, [48]: CB1084). After the program, the number of views of his LinkedIn profile spiked, as recorded in Exhibit #R58 (CB922). On 17 February 2021, views of his profile had increased 925% compared to the previous week. On 18 February 2021, views of his profile had increased 2,650% compared to the previous week. There was no work-related reason for the spike to have occurred.
1021. Ms Hamer became aware in March 2019 or early April 2019 that Mr Lehrmann no longer worked for Senator Reynolds because of a security breach (Hamer, [43]-[45]: CB1083).
1022. Ms Hamer recalled receiving a media inquiry from Samantha Maiden about a week before the publication of the news.com.au article (T1069.1-4) asking about an alleged incident in the office that had occurred involving Ms Higgins and that she was going to run a story on it. Ms Hamer then reached out to the Minister (T1064.5-46). She had not heard about the allegation previously (T1065.1-3).
1023. Ms Hamer became aware of the news.com.au article as soon as it was published (T1068.42-45).
1024. Ms Hamer watched *The Project* broadcast in the office, and possibly on her own (T1065.5-14). She understood that Mr Lehrmann was the subject of Ms Higgins' allegations, possibly from the media inquiry she had earlier received (T1065.26-39). She recalled discussion amongst people at Parliament House and staffers about the upcoming program and that Mr Lehrmann was named in some of those discussions (T1065.41-45). She said that she identified Mr Lehrman as the subject of the allegations from information she already had and the information in the program (T1066.1-8). She could remember people talking about what had been alleged, but not specific

conversations (T1066.14-24). She recalled that Mr Lehrmann's name was thrown around in the chatter about the program (T1066.26-28). She said that she potentially heard other names, besides Mr Lehrmann's, being passed around (T1069.41).

1025. Mr Wenke read the news.com.au article when it came out (T1125.11-12) as it was hard to miss, and a prominent story (T1125.15). He said there was a bit of chatter within Parliament House about the story (T1125.21-22). He said there was enough information in the news.com.au article to remind him that it could have been about the evening at The Dock (T1125.30-33), and he understood the allegations in the article to refer to Mr Lehrmann (T1125.38-1126.5). He expressed the view that it was an open secret within Parliament House as to who was being referred to in the news.com.au article (T1126.21-22).
1026. Mr Wenke watched only part of *The Project* broadcast. It did not cause him to change his earlier view based on his reading of the news.com.au article that the allegations made by Ms Higgins were about Mr Lehrmann (T1126.7-12). He did not have any conversations with people about the broadcast. He did not recall being aware of any speculation as to the identity of the person accused by Ms Higgins (T1126.18-19).
1027. Ms Gain said she watched *The Project* broadcast after receiving the text messages from Ms Higgins referred to in paragraph [835] above (T1110.1-4). She became aware of *The Project* broadcast from media reporting earlier in the day (T1116.13-15). She knew the story was referring to Mr Lehrmann (1110.6-7). In cross-examination, she said that she was not aware at the time Minister Reynolds came to take over Minister Ciobo's portfolio that only Mr Lehrmann and one other male staffer came across to the new office. She did not have any memory of discussions with people at work about *The Project* broadcast (T1116.17-22).
1028. Major Irvine said she watched *The Project* broadcast. She got asked questions about it by military people, but did not want to talk about it and did not answer them (T1207.1-36). She knew from Ms Higgins' disclosure to her in March 2019 that the alleged perpetrator was Mr Lehrmann (T1207.35-36).
1029. Mr Dillaway said that he read the news.com.au article. He had been sent a copy by a journalist at *The Australian* newspaper, who was a friend. He immediately recognised that Mr Lehrmann was the person alleged to have sexually assaulted Ms Higgins based on her disclosure to him in March 2019. He said: "*what was in that story was consistent*

*with what she had told me previously*” (T1276.11-25). He vaguely remembered watching *The Project* broadcast (T1277.13).

1030. Other individuals. It is apparent from Mr Lehrmann’s messages extracted from his phone and included in the Cellebrite report (Exhibit #R36), that not even his former closest friends identified him as the subject of the allegations made by Ms Higgins in the news.com.au article. They subsequently came to know he was the subject of *The Project* broadcast because Mr Lehrmann told them that day. In relation to Mr Lehrmann’s communications with his former friends concerning the news.com.au article on 15 February 2021:

(a) At 10.29am, Mr Lehrmann had an exchange of messages with his former friend, Harry Hughes. Mr Hughes sent Mr Lehrmann a link to the news.com.au article and asked: “*who the guy was?*” (item 94545) to which Mr Lehrmann replied that he did not have the faintest idea, and that he had not been approached by anyone (item 94546).

(b) At 11.41am, Mr Lehrmann had an exchange of messages with his former friend, John McGowan. Mr McGowan asked Mr Lehrmann if he had any gossip on the identity of the “Canberra rape guy” (item 94574) (T437.11). Mr McGowan said that the story had referred to a “*rising star*” and so that ruled out their mates. Mr Lehrmann replied that he had no idea in the slightest (item 94576).

#### ***L.2.7 Witnesses who were available and not called to give evidence***

1031. In a letter from the solicitors for Network Ten dated 14 February 2023, further and better particulars were sought in relation to the particulars of identification in the statement of claim. A response to that letter was provided on 27 February 2023. That letter stated that “*to the extent there remains any formal requirement for our client to prove he was identified by a specific viewer of the matter complained of (which in our view cannot exist in these circumstances) we are instructed to advise that Mr Lyndon Biernoff of Toowoomba viewed the first matter complained of and identified our client*”. Notwithstanding that Mr Biernoff made an affidavit for the purposes of this proceeding (CB1076), he was not called by Mr Lehrmann. In cross-examination, Mr Lehrmann confirmed that Mr Biernoff was alive and well, had made an affidavit in the proceeding and he had intended for him to come and give evidence (T408.31-39). In the circumstances, Network Ten submits that a *Jones v Dunkel* inference is available that

the evidence of Mr Biernoff would not have assisted Mr Lehrmann's case on identification.

1032. Similarly, the letter dated 27 February 2023 from the solicitors for Mr Lehrmann identified that Mr Paul Farrell of Vacluse in Sydney had viewed the Website Publication (being the 'second matter complained of' or the publication on the 10 Play website referred to in [5] of the statement of claim). Mr Farrell was not called to give evidence and a *Jones v Dunkel* inference should be drawn that his evidence would not have assisted Mr Lehrmann's case on identification.
1033. However, there is a more fundamental problem for Mr Lehrmann. There is no evidence of anyone at all having viewed the Website Publication and identifying Mr Lehrmann. It is apparent from the evidence taken as a whole that the potential class of persons who watched the relevant publication and could have identified Mr Lehrmann was minuscule. In Network Ten's submission no inference can safely be drawn on the facts. Mr Lehrmann's case in respect of the Website Publication should fail on this basis.
1034. The same conclusion follows in relation to the YouTube Publication (being the 'third matter complained of' or the publication on *The Project* YouTube channel referred to in [7] of the statement of claim). In the letter dated 27 February 2023, Mr McDonald was nominated as someone who watched the YouTube Publication and identified Mr Lehrmann. His evidence, however, was that he watched *The Project* broadcast on television on the evening of 15 February 2021 (McDonald, [5]: CB1069). There is no evidence of any person watching the YouTube Publication and identifying Mr Lehrmann.
1035. Finally, the people nominated in Mr Lehrmann's affidavit (Lehrmann, [24], [25]: CB1071) as having messaged him or removed him from a chat group in the days following publication were not called to give evidence. Those people included: John Harding-Easson, Mike Lane, Lewis Cullen, Tim Shaw, Katie Pow and Sebastian Blackler. In cross-examination, Mr Lehrmann said he was still in contact with or able to contact these people. He did not do so, and in their absence the messages tendered by Mr Lehrmann (Exhibit #8: CB923, CB924, CB929, CB936, Exhibit #9: CB1065, Exhibit #10: CB1142) are devoid of context or explanation, including as to whether Mr Lehrmann may have told them personally that he was the subject of the allegations or whether they were contacting him about something unrelated. Exhibits #9 and #10 do

not even provide details of the dates on which the message chats were deleted and should be discounted in their entirety. Further, a *Jones v Dunkel* inference is open that their evidence would not have assisted Mr Lehrmann. Mr Lehrmann may have been defriended because of the news.com.au article, the *True Crime News Weekly* article the *Kangaroo Court of Australia* article, or some other reason.

1035A. Contrary to Mr Lehrmann's submissions at [338] of the ACS, there is no evidence of the kind referred to by Mason P in *Channel Seven Sydney Pty Ltd v Parras* [2002] NSWCA 202 at [57] capable of proving, in an indirect way, that Mr Lehrmann was identified to a broader audience. He did not give evidence of being contacted by people in circumstances showing that such contact was obviously a response to what they had seen in *The Project* broadcast (see the preceding paragraph). Further, there was no evidence of talk amongst viewers that was indicative of identification beyond the very limited class of political staffers and others who had worked at Parliament House at the relevant time referred to in [992] above.

## **J      SECTION 25 DEFENCE**

1036. To succeed in a defence of justification under section 25 of the Defamation Act, a respondent must prove that the imputations of which the applicant complains are “substantially true”.

### **J.1      Relevant Principles**

1037. The statutory formulation mirrors the common law: a respondent succeeds in a defence of justification at common law by establishing “*the ‘essential’ or ‘substantial’ truth of the sting of the libel*”—that is, the substantial truth of the imputations conveyed by the statement complained of: *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 11, [34]. See also *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293, 302-3; *Digby v Financial News Ltd* [1907] 1 KB 502 (CA), 507; *Sutherland v Stopes* [1925] AC 47 (HL), 55, 75, 78–9.
1038. On the present state of the authorities, there is, in Network Ten’s submission, no relevant distinction between the test at common law and the test under section 25. It follows that if the defence succeeds under section 25, it must also succeed at common law; and conversely that if it fails under section 25, it must also fail at common law.
1039. While it might be said that Network Ten could have pressed only one, rather than both, forms of justification defence, pressing both is not inconsistent with the overarching purpose. It has not added to the costs or duration of the proceeding.
1040. There is a purpose in maintaining both defences. It has been recognised elsewhere that, in some circumstances, the common law presumption of falsity in defamation law imposes an intolerable burden on freedom of expression.
1041. If the present facts had arisen in the United States, for example, the burden would have been on Mr Lehrmann to establish the falsity of the imputations of which he complains: see e.g. *Gertz v Robert Welch, Inc*, 418 US 323 (1974), 352. Until the *New York Times Co. v. Sullivan*, 376 US 254 (1964) line of authorities, of which *Gertz* is a part, the common law presumption of falsity had applied in most States of the United States, even in cases involving public figures and public interest publications.
1042. The European Court of Human Rights has held that, in some circumstances, the presumption of falsity at common law is contrary to article 10 of the European



Convention on Human Rights: *Steel and Morris v United Kingdom* (2005) 41 EHRR 403.

1043. In 1995, the New South Wales Law Reform Commission recommended reforming defamation law to reverse in almost all circumstances the presumption of falsity: Report No. 75, [4.15].
1044. There are thus credible arguments for a fundamental reform to the common law of defamation to make, in cases such as the present, falsity an element of the cause of action. Those arguments are not available in respect of the section 25 defence. Nor are they arguments that could succeed at first instance. Network Ten wishes to reserve its right on this question should the matter go further, and hence presses its common law justification defence.
1045. A defamatory imputation may be substantially true, even though some detail which does not alter or aggravate the character of the imputation is inaccurate; the test is whether the “sting” of the imputation has been proved true: *Edwards v Bell* (1824) Bing 403 (CP); 130 ER 162; *Clarke v Taylor* (1836) 2 Bing NC 654 (CP), 664–5; 132 ER 252, 256; *Sutherland v Stopes* [1925] AC 47 (HL), 56, 79, 81, 95; *Rofe v Smith’s Newspapers Ltd* (1924) 25 SR (NSW) 4 (NSWSCFC), 22; *Potts v Moran* (1976) 16 SASR 284 (SASCFC), 305–6, 308; *Chase v News Group Newspapers Ltd* [2002] EWCA Civ 1772, [2003] EMLR 11, 227; *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161, (2003) 9 VR 1, [306]. Every material part of the imputation must be true, otherwise the defence fails: *Howden v Truth and Sportsman Ltd* (1937) 58 CLR 416 (HCA), 420–1; *Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161, (2003) 9 VR 1, [274]; *Cross v Queensland Newspapers Pty Ltd* [2008] NSWCA 80, [71]; *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335, (2010) 278 ALR 232, [138].

## **J.2 Whether Mr Lehrmann Raped Ms Higgins in Parliament House in 2019**

1046. See Parts A to D and Part J above.

## **J.3 Whether Carried Imputations are Substantially True**

1047. Mr Lehrmann complains of four imputations:

- (a) The Applicant raped Brittany Higgins in Defence Minister Linda Reynolds’ office in 2019;

- (b) The Applicant continued to rape Brittany Higgins after she woke up mid-rape and was crying and telling him to stop at least half a dozen times;
- (c) The Applicant, whilst raping Brittany Higgins, crushed his leg against her leg so forcefully as to cause a large bruise;
- (d) After the Applicant finished raping Brittany Higgins, he left her on a couch in a state of undress with her dress up around her waist.

1048. The sting of each of those imputations is that Mr Lehrmann raped Ms Higgins. Network Ten submits that, if it has established the truth of that sting, then it is entitled to succeed in its defence of justification in respect of all four imputations. Network Ten submits that that sting has been established.

1049. By section 54(1) of the *Crimes Act 1900* (ACT) as in force as at 15 February 2021, “*A person who engages in sexual intercourse with another person without the consent of that other person and who is reckless as to whether that other person consents to the sexual intercourse is guilty of an offence punishable, on conviction, by imprisonment for 12 years.*” The statutory offence reflects the ordinary meaning of the word “*rape*” as it would have been understood by ordinary reasonable Australians as at 15 February 2021.

1050. If the Court is satisfied that Mr Lehrmann and Ms Higgins engaged in sexual intercourse while in Senator Reynolds’ Ministerial Suite on 23 March 2019, then the intercourse constituted rape. Mr Lehrmann did not at any time seek Ms Higgins’ consent to sexual intercourse: T319.6-20. In circumstances where Mr Lehrmann knew Ms Higgins had been drinking for several hours, had observed her drinking at least six spirit-based drinks at The Dock, and had seen her consume further drinks at 88mph, his conduct was at least reckless. To that may be added the unchallenged evidence that Ms Higgins was so drunk that she passed out while in the Ministerial Suite.

1051. Having regard to the evidence, the Court should also be satisfied as to the place of the rape (imputation (a)), the continuation of the rape after Ms Higgins woke up mid-rape (imputation (b)), that the rape was forceful (imputation (c)), and that after the rape, Mr Lehrmann left Ms Higgins on a couch in a state of undress (imputation (d)). Evidence in respect of each of those matters was given by Ms Higgins; no remotely credible counter-narrative has been proffered by Mr Lehrmann.

1052A. Contrary to Mr Lehrmann’s submissions at [265], [366] of the ACS, Network Ten does not advance any kind of new case that Ms Higgins wanted to have sex with Mr Lehrmann. Rather, the point made by King’s Counsel at T2225 was to emphasise Mr Lehrmann’s curious response to Ms Brown that he did not want to get into what else he did when he went back there. Network Ten has never contended that Ms Higgins wanted to have sex with Mr Lehrmann. There is no evidence to support that allegation and it was never put to her.

1052. Even if, contrary to these submissions, the Court considered that Network Ten had failed to establish some material part of one or more of the imputations, the fact of having established the rape is sufficient, in Network Ten’s submission, to deprive Mr Lehrmann of any entitlement to damages. By section 34 of the Defamation Act, the Court must “*ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.*” If Network Ten has succeeded in establishing that a rape occurred, any error in respect of the matters of detail incorporated in the imputations of which Mr Lehrmann complains cannot have caused any further harm to his reputation: cf *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295.

## **K      SECTION 30 AND *LANGE***

### **Introduction**

1053. It appears from the way in which Mr Lehrmann conducted his case that he wishes to contend that the section 30 defence fails unless the respondents can establish that they acted reasonably in relation to the entirety of the preparation of the relevant edition of *The Project*.
1054. So far as we could discern, with only two exceptions, the whole of the attack upon the respondents' conduct in relation to the conception, research and presentation of the program concerned matters unrelated to the imputations Mr Lehrmann has sued on. The two exceptions concern Network Ten's use of the bruise photograph, and the adequacy of the opportunity afforded to Mr Lehrmann to respond to the allegations against him.
1055. The cross-examination of the respondents' witnesses by Senior Counsel for Mr Lehrmann related overwhelmingly to what the Court called at one point the "obstruction" allegation made in the program, rather than the "rape" allegation. That is a useful division to focus upon: Mr Lehrmann's case concerns only the latter allegation. It is wholly unrelated to the former allegation. The cross-examination of the respondents' witnesses proceeded for the most part as if the applicants in the case were Ms Brown, Senator Reynolds or Senator Cash, rather than Mr Lehrmann.
1056. The respondents are not here to defend hypothetical defamation cases that might have been brought by other applicants. It is no part of the respondents' burden to establish that there were, for example, in fact roadblocks to a police investigation, or that Ms Higgins in fact had to choose between her career and the pursuit of justice. If those matters had been in play, different defences could have been pleaded and different evidence adduced. But those matters form no part of the parts of the program of which Mr Lehrmann complains or could complain: they simply do not concern him. No pleading was advanced by Mr Lehrmann signalling his intention to run a case that the respondents' conduct was unreasonable because of their treatment of persons other than Mr Lehrmann. Had such a pleading been advanced, it would have been liable to be struck-out.
1057. The case for Mr Lehrmann was not opened on the basis of an attack on the obstruction allegation. The only matter expressly referred to in opening in respect of Network Ten's

alleged absence of reasonableness was the adequacy of the attempts to contact Mr Lehrmann: T30.2–31.1.

## K.1 Relevant Principles

### Proper construction of section 30

1058. The starting point is the definition of “*matter*” in section 4 of the Act, and the different ways in which the Act then deploys the expressions “*the matter*”, “*defamatory matter*”, “*that matter*”, “*the publication*” and other terms referring to publications.
1059. The Act must be construed having regard to its objects and the policy underlying the cause of action as the law’s means of regulating the balance between an applicant’s right to reputation and freedom of expression. Regard must also be had to the canon of statutory construction that words defined in legislation apply “*except in so far as the context or subject-matter otherwise indicates or requires*”: e.g. *Interpretation Act 1987* (NSW), section 6; *In the Matter of The Fourth South Melbourne Building Society* (1883) 9 VLR (Eq) 54; *Buresti v Beveridge* (1998) 88 FCR 399, 401.
1060. Properly understood, the definition in section 4 of the Act (which is non-exhaustive) is directed to identifying the forms of publication that are capable of conveying meanings for the purposes of a cause of action for defamation (articles, programs, letters, pictures and so on). It is a definition that is relevant for the purposes of, for example, section 8 of the Act, which provides that a person has a single cause of action “*in relation to the publication of defamatory matter about the person even if more than one defamatory imputation about the person is carried by the matter.*”
1061. In our submission, on the proper construction of section 30 of the Defamation Act, the enquiry as to the reasonableness of a respondent’s conduct turns on its conduct with respect to the “*defamatory matter*”—the aspects of the publication that the applicant has selected for complaint as embodied in the imputations—not “*the matter*” in the section 4 sense of being the publication as a whole. In our submission, the defence does not invite some form of roving commission of inquiry into every aspect of the broader publication, untethered from the applicant’s complaint.
1062. The term “*defamatory matter*” is not defined in the Act, but its meaning is clear from its deployment, including its deployment in contradistinction to the term “*the matter*” elsewhere in the legislation.

1063. Section 28, for example, provides that it is a “*defence to the publication of defamatory matter if the defendant proves that the matter was contained in ... a public document or a fair copy of a public document, or ... a fair summary of, or a fair extract from, a public document.*”
1064. If the terms “*defamatory matter*” and “*the matter*” in section 28 were references to the publication as a whole, then the words “*was contained in*” would have no work to do. The defence is, we submit clearly, distinguishing between, on the one hand, the “*defamatory matter*” and “*the matter*”—being the parts of the publication selected for complaint by the applicant—and, on the other, the publication as a whole—being a publication that is a public document or a fair summary or fair extract from a public document. The term “*the matter*” is not being used in the sense of the definition in section 4.
1065. Similarly, section 29 provides that it is a “*defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.*” Again, if the terms “*defamatory matter*” and “*the matter*” were references to the publication as a whole, then the words “*, or was contained in,*” would have no work to do. The defence distinguishes between the publication as a whole (the fair report of proceedings of public concern) and the aspects of the publication selected for complaint by the applicant (the “*defamatory matter*” and “*the matter*”).
1066. Section 31 is a third example. It prescribes a defence of honest opinion that applies, relevantly, “*to the publication of defamatory matter if the defendant proves that ... the matter was an expression of opinion of the defendant rather than a statement of fact...*”. Self-evidently, the words “*defamatory matter*” and “*the matter*” in that provision cannot be a reference to the publication as a whole; otherwise there would never be a defence of honest opinion available in relation to a matter that admixed fact and opinion, which is of course the situation in almost every honest opinion case. The provision only makes sense if the words “*defamatory matter*” and “*the matter*” are understood as referring to the aspects of the publication selected for complaint by the applicant. This distinction was recognised and applied by the NSW Court of Appeal in *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468, [195] (Leeming J), “*The issue is ... whether the matter published insofar as it conveys the defamatory imputation is an expression of opinion.*”

1067. There are a number of elements in section 30 which point to the legislature’s use of the same distinctions.
1068. *First*, the defence begins in the same way as the defences in sections 28, 29 and 31 by describing the defence as a defence for the publication of “*defamatory matter*”. That term is apt to describe and should be understood as a reference to the field of battle in the action as defined by the matters selected for complaint by the applicant—in substance, the imputations.
1069. *Secondly*, s 30(1) distinguishes between “*defamatory matter*” (chapeau), “*the matter*” (s 30(1)(b)) and “*that matter*” (s 30(1)(c)). If the legislature had intended the enquiry as to reasonableness to extend to the whole of “*the matter*” in the section 4 sense, then the words “*the matter*”, not “*that matter*”, would have been used in s 30(1)(c). The words “*that matter*” in s 30(1)(c) can only rationally be understood as a reference to the words “*defamatory matter*” in the chapeau. The choice of language can be distinguished from that in section 29A, which the Court recently considered in *Russell v Australian Broadcasting Corp* [2023] FCA 1223, [309]–[316].
1070. *Thirdly*, the construction for which we contend is confirmed by the language of s 30(3), which sets out the matters which a court may take into account on the question of reasonableness (that is, the matter the subject of section 30(1)(c)). Section 30(3) defines the relevant enquiry as being “*whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances*” (our emphasis). The enquiry is not a roving one, it focuses upon the allegations concerning the applicant; that is, the *defamatory matter*, not the entirety of the publication.
1071. Those matters of construction are further confirmed by the objects of the Act. Relevantly, those objects include the provision of “*effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter*”: s 3(c). The focus is upon the provision of effective and fair remedies for the harm suffered by applicants, not upon the regulation of journalistic standards in respect of parts of publications not selected for complaint.
1072. It is also consistent with the policy of the law of defamation as a cause of action balancing the applicant’s right to reputation with the respondent’s right to freedom of expression.

1073. The point can be illustrated by an example with facts removed from those of the present case. Suppose a respondent had authored a five chapter book about the qualities of the last five Australian Prime Ministers. The book would be “*matter*” in the section 4 sense. Suppose, however, that all five chapters of the book were defamatory of the last five Prime Ministers in different respects. Finally, suppose that (say) Malcolm Turnbull sued for defamation, but the respondent’s conduct in respect of the preparation of the chapter about Mr Turnbull was reasonable in the circumstances. It would, we submit, be absurd if, on those facts, the respondent’s section 30 defence failed because there were shortcomings in the preparation of the chapters about Mr Albanese, Mr Morrison, Mr Abbott or Ms Gillard. Such an outcome would be remote from the objects of the Act, the policy underlying the cause of action for defamation, and points to the proper construction of section 30 being as we contend for above.
1074. Equally, in this case, it would be absurd, in our submission, if the Court were to conclude that Network Ten’s conduct in respect of the publication of the allegation selected for complaint by Mr Lehrmann—the rape allegation—was reasonable, and yet go on to award damages to Mr Lehrmann because Network Ten’s conduct was unreasonable in relation to its treatment of Ms Brown, Senator Reynolds or Senator Cash. Such an outcome would be inconsistent with the objects of the Act, the policy of the cause of action and would defy common sense to the point of bringing the law into disrepute.
1075. Support for our construction can be found in *Griffith v Australian Broadcasting Corp* [2010] NSWCA 257, see especially [117]–[120], a case involving the predecessor to the section 30 defence, namely section 22 of the *Defamation Act 1974* (NSW). In that case, it was held that it was not to the point, in relation to the application of the section 22 defence to one plaintiff, that the defendant’s conduct was unreasonable in relation to the publication in the same matter of imputations about another plaintiff.
1076. There is a further reason to favour the construction for which we contend. Were section 30 to be read as requiring the respondent to be reasonable in relation to its treatment of all persons potentially defamed in a publication, a problem would arise as to how to assess damages, which by section 34 of the Act must bear an appropriate and rational relationship to the harm sustained by the plaintiff. To put it rhetorically, in this case, if Network Ten’s conduct was reasonable in relation to the publication of the allegations concerning Mr Lehrmann, then what harm has he sustained that warrants



compensation? Or, to put it another way, if Network Ten's conduct was unreasonable in relation to (say) its treatment of Ms Brown, Senator Reynolds or Senator Cash, why should Mr Lehrmann be compensated in respect of that unreasonable treatment?

1077. The present case is not one which calls for a consideration of the correctness of the views expressed in *Russell v Australian Broadcasting Corp* [2023] FCA 1223, [309]–[316], or the cases cited therein. It suffices for present purposes to observe that that case concerned section 29A of the Act, in which each element of the defence refers to “*the matter*”. Section 29A, of course, cannot drive the proper interpretation of section 30, as it was inserted by way of amendment in 2021. The most that can be said is that the legislature in 2021 was presumably aware of the differing terminology in the two sections and intended them to have different operations.

## K.2 *Lange* defence

1078. Network Ten has pleaded, in the alternative to section 30, the *Lange* defence. Mr Lehrmann concedes that the program concerned government and political matters, so the only relevant question for the purposes of that defence is whether Network Ten's conduct was reasonable in the circumstances.

1079. We submitted in opening that the outcome of the section 30 and *Lange* defences is necessarily the same. That submission, however, would not be correct if, contrary to the above contentions, the section 30 defence invites a broad inquiry beyond the parts of the program selected for complaint by Mr Lehrmann.

1080. That is because, whatever the position with respect to section 30, it is clear that, for the purposes of the *Lange* defence, the reasonableness inquiry is confined to conduct in respect of the publication of the imputations complained of by the applicant.

1081. In the unanimous judgment in *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 574, the Court said this (our emphasis):

*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.*

1082. There is no support in *Lange* or the subsequent authorities for any contention that, in assessing reasonableness for the purposes of the *Lange* defence, one is to conduct a roving inquiry that extends beyond the reasonableness of publishing the imputations selected for complaint by the applicant.

1083. In the present case, it follows that the focus is, and is only on, the reasonableness of the publication of the rape allegation by Network Ten.

### **K.3 Reasonableness**

1084. We turn then to the aspects of Network Ten's conduct that is relevant for the purposes of the section 30 and *Lange* defences; that is, whether it was reasonable in the circumstances for Network Ten to publish that Mr Lehrmann had raped Ms Higgins.

1085. Mr Llewellyn and Ms Wilkinson heard the details of Ms Higgins' rape allegation on two occasions—in the five hour preliminary meeting held on 27 January 2021, and then in the on-the-record interview conducted on 2 February 2021.

1086. In the first meeting, Ms Higgins expressed herself as follows (Exhibit #36: CB1114):

[1:19:31.1]        And then, I was passed out and the next thing, when I finally came to, I was pinned down to the minister's couch. And I couldn't get up, and he had, his leg was on my thigh. Like, it was really, I remember, I was in quite a lot of pain because his leg was on my thigh, and he was on top of me. And at that point, he was assaulting me.

...

[1:20:13.6]        No. When I came to, I was crying. I remember telling him to stop it, he wouldn't listen. And he got to the point where I kind of realised, I don't know how, I don't know how I've kind of contextualised it or realised it. But I realised that it had been going on for a little while because he was already about to be finished. I remember...I was in pain. I was in a lot of pain. And I couldn't get him off me and I was, I was really inebriated and I couldn't get him off me...

[1:20:47.9]        I was telling him to stop.

...

[1:20:50.9] Yeah. And he finished. I remember he stopped, and he got up, and I couldn't get up. I physically couldn't get off that couch. And I think, when he realised I couldn't get off the couch, there was this weird panic moment where he looked at me. And then that's when he left. And after he left, I still couldn't get up, and I was just laying on the couch for a really long time, until I passed out again.

...

[1:21:19.8] And that was kind of like, I don't know how long that was. But yeah, I kind of only sort of remember the last five minutes of it.

1087. In the on-the-record interview, Ms Higgins said (Exhibit #37: CB377):

[0:27:13.2] The next thing I remember is when I came to and the senior staffer was on top of me. Sorry –

...

[0:28:08.3] The first thing that sort of awoke me was I was in a pain. My leg was kind of being crushed and I remember sort of, that was the first thing that sort of woke me up essentially. And at that point, it didn't take me that long to sort of ascertain pretty much what was happening. Bruce, sorry, the senior staffer was on top of me. He was clearly almost finished.

[Ms Wilkinson asked, "Sorry was there sexual intercourse going on?"]

[0:28:44.9] Yeah, I was, I woke up mid- rape essentially. I don't know why I knew he was almost finished but I felt like it had been going on for a while. Or that he was almost done, he was sweaty, I couldn't get him off of me, at this point I started crying and it was just, it was like this out of body experience of just, you felt like completely trapped.

...

[0:29:16.3] I told him to stop.

...

[0:29:29.7] It was just a big pressure on my leg. I was pinched into the corner of the couch, so I was laying down in sort of the leather couch, I was sort of jammed into the corner and his knee or his thigh was, I think it was his knee

was directly on this part of my leg. And I was pinned into the corner. I couldn't get out of it.

...

[0:30:05.7] Like a minute or two. It wasn't a particularly long time from by the time I sort of came to it was sort of finishing, I could tell he was almost sort of done. And he didn't speak to me the entire time. I just remember him eventually, he stopped, and he got up and he looked at me and I kind of looked at him and I couldn't get up. And then he left.

...

[0:30:35.8] Didn't say anything.

[Ms Wilkinson then asked, "How many times would you estimate you said to him to stop?]

[0:30:43.0] I felt like it was on a loop endlessly. At least half a dozen. I was crying the whole way through it.

...

[0:30:57.1] He was kind of hovering over me and it was dark. He wasn't even looking at me to be honest. It kind of just felt like, I don't know, it just felt like I was sort of a body that was there. It didn't feel like it was anything about me at all.

...

[0:31:19.9] No, I said stop half a dozen time a dozen times at that point. I think at that point I was pretty resigned. I just kind of felt a bit broken. It kind of just felt like a dream, it didn't even feel real. It was like something was just, it was happening to me, but I wasn't fully internalising that it was reality yet. And so, it was just, I don't know it was this sort of hard, it just, it seemed so obscene. And I wasn't even, I didn't even understand how I was even A, in parliament and then B, how this was happening. And see that he was there and then he was leaving and it was, I was quiet at that point, I didn't have any words left.

1088. Those accounts were consistent in all material respects.

1089. Mr Llewellyn and Ms Wilkinson, who are enormously experienced, each observed Ms Higgins on both occasions and considered her account of the rape to be consistent and credible. This was obviously fundamental to their ultimate decision, in conjunction with senior producers and others, to put the program to air.

Neither Mr Llewellyn nor Ms Wilkinson was cross-examined in relation to whether they disbelieved the rape allegation. They were simply not tackled on the topic at all.

1090. Mr Llewellyn was merely asked whether he knew the overwhelming message of the program was that the rape had happened, a proposition he assented to: T1685.38-42. Ms Wilkinson was asked whether she intended for *The Project* to allege that a rape had in fact occurred. She answered, “*Correct*”: T1769.31-32.

1091. Network Ten was entitled to consider Ms Higgins’ account to be credible. The Court had the benefit of hearing Ms Higgins’ account of the alleged rape at trial. It too was consistent and credible. As noted earlier, it was impossible not to be affected by the cogency and emotion with which she recounted what happened to her.

1092. Putting to one side the bruise photograph, to which we turn below, the attacks on Ms Higgins’ credit launched during the course of this trial did not go to her allegation of rape, and related to matters that were not reasonably capable of being foreseen by Network Ten in February 2021. At that time, Ms Higgins had not yet conducted a full record of interview with the Australian Federal Police and Mr Lehrmann’s criminal trial had not yet occurred. Network Ten had no way of obtaining the vast trove of material available to the Court as a result of discovery and subpoenas that formed the basis for Ms Higgins’ cross-examination. It did not have Mr Lehrmann’s account of the alleged assault, because he had not responded to its requests for comment.

1093. In respect of the rape allegation, at the end of the day, Network Ten’s assessment had to boil down to whether Ms Higgins’ account was consistent and credible.

1094. While it can be said that Network Ten might have had grounds for doubting other aspects of what Ms Higgins told them, they did not relate to the credibility of the rape allegation itself.

1095. None of the doubts that it appears Mr Lehrmann contends Network Ten ought to have harboured about Ms Higgins’ credibility were suggestive of the monstrous allegation that she had fabricated the rape itself.

1096. Network Ten took further steps by way of verification of the rape allegation.
1097. *First*, on 10 February 2021, it obtained a statutory declaration from Ms Higgins (Exhibit #R532: CB574) in which she declared, on pain of perjury, that “*the Interview, as recorded by the transcript at Annexure A, represents the complete truth of the events surrounding the rape and sexual assault of me by Bruce Lehrmann that occurred in Minister Linda Reynolds office overnight on Friday/Saturday 22/23 March 2019*”; that “*I did not lie or misrepresent the truth at any stage during the Interview*”; and that “*I did not omit any key details that would undermine the veracity of my account during the Interview.*”
1098. *Secondly*, on 14 and 15 February 2021, Network Ten obtained important further material by way of corroborative support for Ms Higgins’ rape allegation.
1099. On 14 February, Network Ten received confirmation from Mr Carswell, on behalf of the government, that an incident involving two staff had occurred in Minister Reynolds’ office in March 2019, that the Minister and senior staff had encouraged the reporting of the incident to police, and that a complaint had in fact been made to the Australian Federal Police at that time: Exhibit R716: CB763. The statement said, “*During this process, the Minister and a senior staff member met with the staff member in the Minister’s office. Given the seriousness of the incident, the meeting should have been conducted elsewhere.*”
1100. On 15 February, Network Ten received:
- (a) A statement from the Presiding Officers of the Parliament: Exhibit #R781: CB830. That statement confirmed that there had been an investigation into an incident in Parliament in 2019, that CCTV footage had been stored and viewed by the AFP at that time, and that the footage would be available to ACT Policing for their access as required. A statement to the effect that the CCTV would be available to investigators was included at the end of the program. Mr Lehrmann submits at [291] of the ACS that this statement conveyed that until that point the footage had not been available, when in fact it had been available to investigators since 2019, and the initial investigators had actually viewed the footage on 16 April 2019. In fact, the internal AFP officers had only been allowed to view the footage once, and their request to view it again or obtain a copy of it was refused (T1396.32-39, T1398,42-1399.3). Further, the external

SACAT officers who were actually responsible for the investigation were not able to view or access the footage (T1302.35-1303.43). At [444] of the ACS, it is suggested that Mr Llewellyn could not have believed that the program had allowed Ms Higgins to restart the police investigation, because he knew the footage would be available irrespective of whether the show aired. But that was not a proposition that was put to him in cross-examination and as a matter of fairness no such inference should be made.

- (b) A statement from ACT Policing, which broadly confirmed the information provided by the Presiding Officers: Exhibit #R792: CB840.
- (c) A statement from the AFP in relation to CCTV footage access: Exhibit #R849: CB897.
- (d) On background, further information from Mr Carswell which was contemporaneous evidence, from 2019, of the assault allegation, and which included reference to 1800Respect (the national sexual assault, family and domestic violence counselling line) and the Employee Assistance Program: Exhibit #R810: CB858.

- 1101. All of these materials provided comfort to Network Ten in relation to the broadcast of the rape allegation. They showed that the rape allegation was not a recent invention, that it had been contemporaneously reported to the Minister and police in 2019, and that it had been the subject of at least some investigation at the time.
- 1102. Network Ten was entitled to rely on all of these matters as steps taken to verify Ms Higgins' account to the extent possible in the circumstances.
- 1103. In the program, Network Ten broadcast Ms Higgins' account of the rape in the graphic terms recorded during the 2 February 2021 interview. Ms Wilkinson was careful, however, in her words and questions always to refer to the sexual assault as an allegation, not a proven fact. All of the information provided by persons contacted for comment were made available to viewers in their entirety.
- 1104. We could discern only two relevant matters from the cross-examinations conducted by Senior Counsel for Mr Lehrmann going to an alleged absence of reasonableness in respect of the publication of the rape allegation. The two matters are (a) the bruise photograph, and (b) the reasonableness of the opportunity for a reply afforded to Mr Lehrmann.

1105. If further points emerge in Mr Lehrmann’s closing submissions, we will address them in reply. While we submit they are irrelevant, in case the Court is against us on the point, we have addressed the reasonableness of the “obstruction” allegations made in the program (see [1118]ff).

***K.3.1 Bruise photograph***

1106. Ms Higgins provided Network Ten with the bruise photograph during the five-hour informal meeting held on 27 January 2021 (Exhibit #36: CB1114). She said it was:

[1.23:37.6] ... a photo of my leg. I was, because he had pinned me down and I'm, I was in quite a lot of pain. I think that's what kind of woke me, sort of snapped me out of it, or woke me up. I was in a lot of pain, the way that my leg was sort of caught up against the couch. He was putting a lot of pressure on it. So, I had this big bruise on my thigh.

...

[Ms Wilkinson asked, “So, you took that when you were in the office, or just when it happened, or a couple of days later?”]

[1.24:34.8] Couple of days after.

...

[1.25:04.3] No, it's fine, it's fine. I guess you can kind of see it in that photo, I've got a different one. But it's, it was just, it was like this weird, large scale bruise, it was on my thigh.

1107. In the on-the-record interview conducted on 2 February 2021 (Exhibit #37: CB377), Ms Higgins said:

[0:32:50.7] Oh it’s just essentially where his leg pinned me down. It’s quite a large bruise and it’s just the weight obviously of his leg pinning me down.

1108. The only reference in the program to the bruise photograph was the image and that answer: Exhibit #2, (Annexure A, lines 35-37).

1109. Proper steps were taken by Network Ten in the circumstances to verify the bruise photograph:

- (a) The photograph (Exhibit #R222: CB244) was AirDropped by Ms Higgins to Mr Llewellyn’s phone. While the evidence at trial was initially quite confused, the



correct position is that the photograph (not a screenshot of the photograph) was AirDropped to Mr Llewellyn's phone in the course of the first meeting on 27 January 2021: see T1706.44-1708.38.

- (b) The AirDropped photograph did not contain any metadata identifying when the photograph was taken: Agreed Facts dated 18 December 2023, [5]. There was thus no objective indication that it was a recent invention.
- (c) On 8 February 2021, Mr Llewellyn sought confirmation from Ms Higgins of when the bruise photograph was taken: Exhibit R292: CB320 at 2:49:05pm. Ms Higgins responded at 3:14:45pm, "*I'm not sure on the exact date but it was taken in Parliament House during budget week (1<sup>st</sup> – 5<sup>th</sup> of April).*"
- (d) On 10 February 2021, Network Ten obtained Ms Higgins' statutory declaration (Exhibit #R532: CB574), in which she declared, "*The photograph at Annexure B shows the bruise on my leg that was caused by Bruce Lehrmann during the rape and sexual assault that occurred in Minister Reynolds office on 22-23 March 2019*" and "*I took the photograph with my iPhone at Annexure B on 03/04/19.*"

1110. In the circumstances, there was no basis as at 15 February 2021 for Network Ten reasonably to doubt what Ms Higgins had said and declared in relation to the bruise photograph.

1111. Mr Lehrmann's contention appears to be that Network Ten should have suspected that the photograph was an invention, because of the problems that Ms Higgins had disclosed with her phone and loss of other photos and messages. But that points to a counsel of perfection, not an absence of reasonableness. The fact was that Ms Higgins provided messages, recordings and photographs from her phone.

1112. Mr Llewellyn was entitled in the circumstances to put the problems with the phone down to operator error, rather than some conspiracy. His evidence in this regard was consistent and unshaken in cross-examination. It did not point to unreasonableness: see T1508.23-1509.4; T1509.43-1510.29; T1515.1-7; T1516.16-24; T1517.11-35; T1519.4-33. That evidence culminated in Mr Llewellyn saying, "*the only way we were going to use that – because of the lack of clarity, was whether we have a statutory declaration signed about that. Without that, we were unsure. Once the statutory*

*declaration was there, we could use the photo. Otherwise, we wouldn't have used it":*  
T1517.32-35.

1113. It is hardly an uncommon occurrence to lose messages and data from a mobile phone; there would scarcely be a person in Australia who has not had that experience.
1114. Finally on this topic, and notably, the bruise photograph was relied upon by the Director of Public Prosecutions at Mr Lehrmann's criminal trial in October 2022. The version in the DPP brief was dated 19 January 2021 (not 27 January 2021, being the date the photo was AirDropped to Mr Llewellyn): Exhibit #R883.
1115. It would be perverse, in our submission, if it were found that it was unreasonable for Network Ten to rely on the bruise photograph in its broadcast, in circumstances where, months later, and consistent with his obligations, the Director considered it reasonable and appropriate to put the photograph before the jury at Mr Lehrmann's criminal trial.

### ***K.3.2 Attempts to contact Mr Lehrmann***

1116. We have dealt with the evidence concerning Network Ten's attempts to contact Mr Lehrmann prior to publication fully elsewhere in these submissions.
1117. The short points are that:
- (a) Mr Lehrmann was not named in the broadcast.
  - (b) Network Ten sent very detailed questions to Mr Lehrmann's Hotmail account at 2.46pm on 12 February 2021 (Exhibit #R40: CB672) and a follow-up email on the morning of 15 February 2021 (Exhibit #R756: CB804).
  - (c) The detailed questions invited comment from Mr Lehrmann to the very allegations of which he complains in this proceeding, and offered him an interview. No criticism could fairly be levelled at the detail provided in the questions.
  - (d) It was never put to Mr Lehrmann in the course of his evidence that the time proposed for a response (10am on 15 February 2021) would have been an inadequate period of time for him to respond to the questions.
  - (e) There was no doubt a good forensic reason for not putting such questions to Mr Lehrmann—he had, for example, had no difficulty responding to the show cause notice delivered by the Minister on the evening of 4 April 2019 (Exhibit #23:

CB80) by 9.28am the following morning (Exhibit #24: CB83), despite that being one of the most important documents he had drafted in his professional life: T215.32-35.

- (f) Before *The Project* went to air, Mr Lehrmann had obtained three separate pieces of advice not to respond to media enquiries. He never had any intention of contacting Network Ten before *The Project* went to air: T434.1-34, T449.3-450.45, T451.37-452.5, T453.5-26).
- (g) The request for comment was sent to Mr Lehrmann's principal personal email address, which had been active since at least 2019 and that he used in January and February 2021 (T413.23-47, see also T418.1-419.23). It was the address to which Minister Reynolds had addressed the show cause notice on 4 April 2019. It was the address to which Mr Lehrmann said he had received anonymous emails in January 2021: T440.11-25).
- (h) The suggestion that Mr Llewellyn should have sent questions to Mr Lehrmann seeking a response to a rape allegation by way of a "friend" request on Facebook or Instagram, or by way of message to an apparently inactive LinkedIn profile, should be rejected. As Mr Llewellyn put it, "*I don't believe Facebook would be the appropriate way to contact someone about a very, very serious matter*": T1627.25-26, see also T1626.16-24. That is clearly correct. As Mr Llewellyn also correctly noted, the fact was he had sent the requests to Mr Lehrmann's active email address: T1632.45-47, "*I had his correct email address. I don't need to send out smoke signals and, you know, send a paper aeroplane. I had the right email address.*"
- (i) Mr Lehrmann's assertion that he did not see Mr Llewellyn's emails until after 18 February 2021 is not strictly relevant to whether Network Ten's attempts to contact him were reasonable in the circumstances. The assertion was, however, incredible and ought to be rejected.
- (j) The Hotmail address was Mr Lehrmann's active personal email address throughout the relevant period. The emails by Mr Llewellyn have none of the hallmarks of an email that would go to a spam or junk folder. Mr Lehrmann produced no evidence to support his bare assertion.

- (k) In the course of the morning on 15 February 2021, Mr Lehrmann sent a number of messages to his friends to the effect that he had not been contacted by anyone in relation to the allegations that had been published that morning on news.com.au and that were being promoted for broadcast on *The Project* that evening: Exhibit R36, MFI 27 at e.g. items 94546, 94577, 94582, 94591, and asserting that the allegations appeared to be very defamatory and expressing concern about whether anyone would be named: e.g. 94587, 94596, 94597. Those messages appear to disclose a consciousness on Mr Lehrmann's part that the allegations in the news.com.au article and about to be broadcast on *The Project* were about him, and are consistent with knowledge on his part that he had in fact been approached for comment. In the context in which he sent those messages, Mr Lehrmann's assertions that he had not been contacted in relation to Ms Higgins' allegations appears more likely to betray a consciousness of the exact opposite. It is otherwise a very strange thing for a person to say.
- (l) When he presented to Royal North Shore Hospital on 16 February 2021, among the first things Mr Lehrmann said was that he had been "*contacted by multiple journalists in the morning [of 15 February 2021] regarding an alleged incident occurring in early 2019*": Exhibit #R95, CB928 at p 4625. When asked about that admission in cross-examination, Mr Lehrmann was unable to provide any adequate explanation: T471.5-27. The obvious inference is that Mr Lehrmann was referring to the emails from Mr Llewellyn. There was no evidence that he had been contacted by any other journalists prior to the afternoon of 15 February 2021.
- (m) On Mr Lehrmann's account, he first saw Mr Llewellyn's emails sometime after 18 February 2021. By that time, however, *The Project* had gone to air and Mr Lehrmann had taken legal advice from Mr Korn about his potential rights to sue for defamation. If Mr Lehrmann's account were correct, the obvious thing he would have done, upon discovering Mr Llewellyn's emails, would have been to send them to Mr Korn or to his friends, or to at least make some reference to having found them in his many messages sent during that period. There are, however, no such emails or messages.
- (n) In the circumstances, and having regard to Mr Lehrmann's general lack of candour and honesty, Network Ten invites the Court to submit that Mr Lehrmann

received each of the emails sent by Mr Llewellyn to his Hotmail account at or about the time they were sent.

### **A broader construction of section 30**

1118. Contrary to the primary submissions as to the proper construction of the section 30 defence contended for above, Network Ten submits that even on a broader reading of that section, its conduct in publishing the entire broadcast was nevertheless reasonable.

1119. Mr Llewellyn and Ms Wilkinson heard and tested the details of Ms Higgins' allegations in the manner referred to above. This included, not just her allegations in respect of the rape allegation, but the matters she disclosed in relation to the handling of that allegation, including by Senator Reynolds, Fiona Brown, Senator Cash and the police.

### ***Roadblocks***

1120. As to the roadblocks to an investigation referred to in the broadcast, there were many. On this topic, Network Ten respectfully adopts the following submissions made on behalf of Ms Wilkinson.

1121. 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 – or impediment – to a sexual assault prosecution.

1122. The respondents were entitled to reasonably believe that the following were roadblocks:

- (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 10:00am;
- (c) no human resources 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) Mr 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 Parliament House police (no rape counsellor) instead of SACAT who specialise in these matters and ensure the presence of a rape counsellor;
- (h) the fact that the internal police in Parliament House answer to parliamentarians and different rules apply;
- (i) delay in viewing and obtaining CCTV;
- (j) failure to tell Ms Higgins that CCTV had been quarantined; and
- (k) culture amongst political parties (especially in the lead up to an election) and the pressure Ms Higgins felt to be a team player.

1123. The respondents were reasonably entitled to believe that Ms Higgins felt betrayed by the Government by reason of:

- (a) the way that she considered she was unsupported;
- (b) the fact that the Minister conducted their meeting in the office where the assault took place;
- (c) her belief that, if she went to the Gold Coast, there was no prospect of return and thus feeling 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.

1124. The respondents were entitled to believe that Ms Higgins’ genuinely held state of mind was that she faced no option but to choose between her career and the pursuit of justice because of the pressure she felt by a culture of silence, leading up to the federal election that the government was expected to lose, and not being seen to be a team player.

1124A. Mr Lehrmann makes a number of submissions on the topic of roadblocks or “obstruction allegations” at [216] to [250] of the ACS. As set out above, the respondents were entitled to believe that there were substantial roadblocks and that Ms Higgins felt betrayed. At [219] of the ACS, Mr Lehrmann is critical of Ms Higgins for “struggling” to articulate anything that Ms Brown or Senator Reynolds had done in terms of obstructing her. In fairness to Ms Higgins, she was asked by the Court (an extremely intimidating circumstance for a witness to find herself in, particularly after having given

evidence for a period of days) to state the express words spoken or actual actions taken by Ms Brown, Senator Reynolds, members of the police or anyone else in authority. She did not struggle to articulate herself. In relation to Ms Brown, Ms Higgins identified that at least one roadblock had been a breakdown in trust caused by what had been said during her conversations with Ms Payne and Ms Brown (T1032.21-1033.8). She also identified the fact of the meeting in the office occurring where the rape took place and that Ms Brown and Senator Reynolds had asked Ms Higgins to let them know if she went to the police (T1033.10-19). Ms Higgins also identified that she had been told that she could go to the Gold Coast and get paid out but she would not return to work (T1033.30-37). She said that after that, Ms Brown just disappeared (T1033.39). In relation to Senator Reynolds, Ms Higgins could not identify anything other than the matters she had referred to in the context of Ms Brown that constituted a roadblock because the Senator only spoke to her about the rape on 1 April 2019 and then later contacted Mr Try in October 2019 (T694.35-39, T695.16-45, T1033.41-44 – Network Ten’s understanding is that there was no evidence that Ms Higgins actually directly spoke to Senator Reynolds in October 2019). The lack of support and effective abandonment of Ms Higgins, in our submissions, amounts to a clear roadblock. Importantly, when asked if anyone else she perceived in authority “*said something or did something*” that obstructed her, Ms Higgins’ evidence was “*not in overt vocalised ways*” (T1034.1-4). Again, the lack of action taken by the Prime Minister's Office when the issue was escalated to obtain further support for Ms Higgins clearly impacted her emotionally as demonstrated by her text messages to Mr Dillaway on 11 April 2019: “*Honestly I've hit a bit of a wall. Fuck the PMO person. All I wanted was help through this and essentially I've been kind of left to my own devices*” (Exhibit #R99: CB15 p 941). Again, we submit this effective abandonment by the government was a roadblock to Ms Higgins pursuing a police complaint.

- 1124B. The matters referred to by Mr Lehrmann in the ACS on this topic do not detract from the fact that it was reasonable for the production team at Network Ten to hold serious concerns about the handling by the Government of the sexual assault allegation made by Ms Higgins. The evidence discloses actions and omissions by Senator Reynolds, Ms Brown and the Prime Minister’s Office that Network Ten was reasonably entitled to consider amounted to obstruction, including:

- (a) Ms Higgins was aware of difficulties experienced by police in obtaining CCTV footage (see [682]-[686] and [727] above);
- (b) On the topic of access to the CCTV footage (an issue referred to at [237] of the ACS), the evidence shows that in fact the CCTV was not properly quarantined: Exhibits #R886: CB1053 and #R887: CB1054, and it was not made available to the relevant police officers in a timely manner, and the request for access had to be escalated: see [683]-[686] and [739]-[740] above;
- (c) Ms Higgins was actively encouraged to go to Perth for the election campaign and said she felt pressured to go (Exhibits #R82: CB24 p 1952, #R83: CB25 p 1961 and #R91: CB88, T671.3-31, T678.39-45 and [693] above).
- (d) There was no proper HR investigation into the allegations of sexual assault. Even though Ms Brown had knowledge of the allegation when she spoken to Mr Lehrmann in relation to the show cause letter, she did not put it to him and the topic seems to have been actively avoided (see [714] above). This is truly an astonishing situation – it appears that Mr Lehrmann was terminated without Ms Higgins’ allegations ever being put to him, despite them being well known to Senator Reynolds and Ms Brown at the time of his termination.
- (e) The purported offer of support made at the meeting on 1 April 2019 was not followed up and no support was in fact provided to Ms Higgins by any of Senator Reynolds, Ms Brown or the Prime Minister’s Office despite the request for support being escalated (see [699]-[703] above). Ms Higgins was left to her own devices and felt unsupported. It is easy to understand why she felt the words spoken by Senator Reynolds and Ms Brown during the meeting on 1 April 2019 were merely a “ticking box” exercise.
- (f) Ms Brown denied Ms Higgins’ request to work from campaign headquarters in Brisbane during the election campaign (T2147.27-40).
- (g) There was believable evidence of a culture of silence and a need to be a team player if Ms Higgins wanted a job after the election, including in opposition, which was exacerbated by the presence of PMO staff in the office (T651.45-652.2, T656.5-34, T679.21-30, T681.12-35).

#### *Attempts to seek comment from others*

1125. Ms Higgins provided information about the roadblocks referred to above.



1126. As referred to at [929] in Part F above, requests for comment were sent to persons affected or potentially affected by the story, including the persons specified in [929](a)-(f) above. Those requests were detailed and identified with precision the allegations that were being made.
1127. In relation to Ms Brown, questions directed to the topic of roadblocks were squarely raised with her. In the longer email from Mr Llewellyn (Exhibit #R622: CB667), the questions raised with Ms Brown included:
- (a) when she first became aware of an alleged sexual assault;
  - (b) what support was provided to Ms Higgins, including what support she personally provided;
  - (c) whether more could have been done to support Ms Higgins;
  - (d) whether Ms Brown was dismissive or indifferent in her dealings with Ms Higgins;
  - (e) whether Ms Brown or anyone from her office contacted police after the allegation was made;
  - (f) whether the allegation was reported to Comcare;
  - (g) whether Ms Brown or anyone in the office instigated a workplace investigation;
  - (h) why Ms Higgins was sent to Western Australia three weeks after the alleged rape;
  - (i) whether anyone from Ms Brown's office at that time assisted the AFP Sexual Assault and Child Abuse Team (SACAT) investigation;
  - (j) whether she was aware that the AFP SACAT were not granted access to CCTV regarding the evening;
  - (k) whether Ms Brown had seen the CCTV; and
  - (l) whether Ms Brown was available for interview.
1128. Despite that message being received, Ms Brown made no response and instead left it to Mr Carswell to respond in a general way on behalf of the government and by way of backgrounding (see 939(b) above).
1129. As set out above, where requests for comment were made of others as to events concerning matters following the alleged rape, and responses were forthcoming, they were reported in the broadcast or published on *The Project* website.

1130. Network Ten otherwise relies upon the other matters referred to in Part F above as to the reasonableness of its conduct.
1131. In the event that the Court does not accept Network Ten's construction of section 30, when determining whether its conduct was reasonable "*in all the circumstances*" in our submission, the Court would nevertheless give most weight to the question of reasonableness in relation to the rape allegation rather than any other matter included in the broadcast, including the road block allegation – the rape allegation being the only element of the broadcast in respect of which Mr Lehrmann complains.
1132. In Network Ten's submission, even on a broader constriction of s 30, the Court should nevertheless find that its conduct in publishing the matter was responsible such that the defence should succeed.

## **L OTHER DEFENCES**

### **L.1 Justification at Common Law**

#### ***L.1.1 Relevant Principles and Why Pleaded and Pressed***

1133. The relevant principles and reasons why the defence of justification at common law is pleaded and pressed are set out in Part J of these submissions.

#### ***L.1.2 Whether Defence Established***

1134. For the reasons set out in Part J of these submissions, Network Ten contends that the Court should be satisfied that the sting of each of the pleaded imputations is substantially true.

### **L.2 Lange Qualified Privilege**

#### ***L.2.1 Relevant Principles and Why Pleaded and Pressed***

1135. The relevant principles and reasons why the defence of Lange qualified privilege is pleaded and pressed are set out in Part K of these submissions.

#### ***L.2.2 Availability of Defence to Network Ten***

1136. For the reasons set out in Part K of these submissions, Network Ten contends that the Court should find that it was reasonable in the circumstances for it to publish that Mr Lehrmann had raped Ms Higgins.

## **M DAMAGES AND OTHER RELIEF**

1137. The principles applicable to the court’s assessment of damages are uncontroversial, and were recently set out in *Palmer v McGowan (No 5)*(2022) 404 ALR 621, [2022] FCA 893 (**Palmer**) (referred to in *Russell v Australian Broadcasting Corporation (No 3)* [2023] FCA 1223 (**Russell**), [473]). They may be summarised as follows.
1138. Any award of damages is governed by the provisions of Part 4, Division 3 of the Defamation Act. Pursuant to s 34 of the Defamation Act, the Court is required to “ensure that there is an appropriate and rational relationship” between the harm found to have been suffered and the amount of damages awarded: *Palmer*, [425].
1139. Section 34 provides an ever-present guide to ensure remedies are fair and effective in the context of achieving the objects of the Defamation Act, with the aim of ensuring consistency of awards in defamation proceedings across jurisdictions and to correct any imbalance with awards of damages for personal injuries: *Stead v Fairfax* (2021) 387 ALR 123, [236].
1140. The maximum amount of damages for non-economic loss that may be awarded is limited (capped) by the operation of ss 35(1) and 35(3) of the Defamation Act. The cap was increased from 1 July 2023 in accordance with s 35(3) of the Defamation Act to the sum of \$459,000 (Gazette No 12 of 8.6.2023), with the applicable cap being that in force at the time of judgment.
1141. The three purposes of an award of damages are: *first*, consolation for the personal distress and hurt caused by the publication, *secondly*, reparation for the harm done to the person’s reputation, and *thirdly*, vindication of reputation: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60-1 (confirmed in *Rogers v Nationwide News Pty Ltd* [2003] HCA 52; 216 CLR 327 at [60]).
1142. The assessment is an intuitive evaluative process conducted “*at large*” but subject to the provisions of Part 4, Division 3 of the Defamation Act: *Palmer*, [428].
1143. At common law, once an applicant has proved the publication of a libel, and in the absence of a successful defence, an entitlement arises as to an award of nominal damages: *Palmer*, [503]-[506]. That presumption has, however, been disrupted. In *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 (**Dank**) (cited in *Palmer* at [507]), McCallum J said at [75]:

*“The need to nominate a nominal sum in this jurisdiction may be doubted. The Defamation Act 2005 [s 22] expressly contemplates the possibility that, even where no defence to a defamatory publication has been established, the judicial officer may determine that no amount of damages should be awarded. So much is explicit in the requirement to determine “the amount of damages (if any) that should be awarded to the plaintiff.”*

1143A. One of the matters in respect of which the Court has requested assistance from the parties is as follows:

*“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).”*

1143B. In Network Ten’s submission, the authorities support the proposition that the traditional presumption of damages in defamation proceedings has been displaced as a consequence of the evolution of the common law in Australia. That position is consistent with the presence of the words “(if any)” in s 22(3) of the Defamation Act. Section 22(3), however, has no application in the present proceeding. It applies (even in State courts) only in defamation proceedings that are tried by jury – see s 22(1).

1143C. The common law has over time moved away from the traditional presumption that a plaintiff who has been defamed is entitled to, at least, nominal damages. That evolution began in England and Wales, in part spurred by the requirement that the common law there conform with the rights and freedoms in the European Convention on Human Rights as a result of the *Human Rights Act 2001* (UK) (see in particular s 6). The presumption has now been definitively abolished in England and Wales by the enactment of the statutory serious harm threshold in s 1 of the *Defamation Act 2013* (UK). But the presumption had likely been reversed before then.

1143D. In *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946, the Court of Appeal held that in cases of trivial defamation, the common law presumption of damage was

inconsistent with, and had to yield to, the Article 10 guarantee of freedom of expression in the European Convention on Human Rights.

1143E. Then, in *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB); [2011] 1 WLR 1985 (**Thornton**), Tugendhat J analysed the authorities on the defamatory meaning element of the cause of action for defamation, concluding that the common law had always required any defamatory meaning or meanings to satisfy a threshold of seriousness in order to found a cause of action. Tugendhat J reasoned at [93]:

“If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should a presumption of damage if words can be defamatory while having no likely adverse consequences for the claimant.”

1143F. The minimum threshold of seriousness as articulated in *Thornton*, was accepted as a principle of Australian common law by McCallum J (as her Honour then was), as the Defamation List judge in the Supreme Court of New South Wales, in *Kostov v Nationwide News Pty Ltd* [2018] NSWSC 858; (2018) 97 NSWLR 1073. On appeal, the Court of Appeal observed that her Honour’s comments were *obiter*: *Kostov v Nationwide News Pty Ltd* [2019] NSWCA 84; see also *Lesses v Maras* [2017] SASCFC 48, [125].

1143G. There is no reason to doubt the correctness of McCallum J’s analysis. It applied Tugendhat J’s reasoning in *Thornton*, which was (with respect) a learned analysis of the common law authorities by a judge of impeccable authority in this branch of the law. Those authorities had, in turn, long formed part of the Australian common law: see eg *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460. The decision in *Thornton* did not turn on the application of the *Human Rights Act*.

1143H. In England and Wales, the common law presumption of damage was definitively abolished through the enactment of the statutory threshold of seriousness in s 1 of the *Defamation Act 2013* (UK). Section 1(1) of that Act provides that “a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant”.

1143I. In *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), Warby J found that s 1(1) imposed an additional requirement on a claimant and that it was no longer sufficient for a matter to be inherently injurious. He observed, however, that the presumption of damage had already been substantially or wholly eroded by the *Jameel* line of authority. At [60], his Lordship said (our emphasis):

*“I accept that my construction of s 1(1) means that libel is no longer actionable without proof of damage, and that the legal presumption of damage will cease to play any significant role. These, however, are necessary consequences of what I regard as the natural and ordinary, indeed the obvious meaning of s 1(a). **They are, moreover, consequences which had in practice already been brought about by previous developments. The HRA and the emergence of the Jameel jurisdiction which substantially eroded if they did not wholly undermine these common law rules. Since Jameel it has no longer been accurate other than technically to describe libel as actionable without proof of any damage. I cannot see this as a substantial argument against my construction of the statute.***

1143J. On appeal, the Court of Appeal reversed that conclusion, holding that s 1(1) did not affect the common law presumption of damage.

1143K. On further appeal to the United Kingdom Supreme Court, however, Lord Sumption, reinstated Warby J’s conclusion: *Lachaux v Independent Print Ltd* [2019] UKSC 27. At [20], his Lordship said (our emphasis):

*“The Court of Appeal’s analysis not only gives little or no effect to the language of section 1. It is to my mind internally contradictory. Davis LJ, who delivered the only reasoned judgment, accepted the submission on behalf of Mr Lachaux that the seriousness of the harm caused to the claimant’s reputation by the publication depended on the inherent tendency of the words. But he appears to have thought (paras 70-73) that where this was “serious”, the result was to set up an inference of fact, which it was open to the defendant to rebut by evidence. As Ms Page accepted, this will not do. **The common law rule was that damage to reputation was presumed, not proved, and that the presumption was irrebuttable. If the common law rule survives, then there is no scope for evidence of the actual impact of the publication. That is the main reason why in my opinion it cannot survive.** Davis LJ has, with respect, accepted the legal analysis advanced on behalf*

of Mr Lachaux, while attaching to it the consequences of the legal analysis advanced on behalf of the newspapers. In my opinion, Warby J's analysis of the law was coherent and correct, for substantially the reasons which he gave."

1143L. In Australia, s 10A of the Defamation Act introduced, in those States and Territories where it has been adopted, "serious harm" as a new element of the cause of action for defamation in respect of publications occurring on or after 1 July 2021. In Network Ten's submission the section is, at least in respect of the survival of the presumption of damage, to the same effect as s 1(1) of the 2013 UK Act: cf *Whittington v Newman* [2024] NSWCA 27, where the Court of Appeal identified, without needing to resolve, the issue: see [41]-[51].

1143M. Section 10A does not apply to the present proceeding because the impugned publications predate its introduction. Nor does Australia have any spur to the evolution of the common law equivalent to article 10 of the European Convention on Human Rights. Nonetheless, there is a clear trend in the authorities towards rejection of the common law presumption of damage, independently of those two developments. That trend is consistent with the modern conception of the law of defamation and the objects in s 3 of the Defamation Act, particularly s 3(c).

1143N. In *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116, Neill LJ recognised at 120 that mitigation could reduce a successful plaintiff's damages "perhaps almost to vanishing point".

1143O. In *Charan v Nationwide News Pty Ltd* [2018] VSC 3, [765]-[768], Jack Forrest J went further, accepting that any presumption of damages could be entirely rebutted. His Honour found for the defendant, but said that even if he had found for the plaintiff, he would not have awarded any damages, concluding at [768]:

"On the evidence before me I think that it is not possible to find that Mr Charan had an entitlement to an award of damages for vindication of his reputation or to provide reparation for injury. I cannot be satisfied that he has suffered any lasting anguish other than hostility towards Nationwide and its legal advisors. Whilst I accept that he may have suffered some injured feelings at the time of the publication, the apology proffered by Nationwide the next day was, I think, sufficient to salve any hurt he might have suffered."



1143P. Gibson DCJ reached the same conclusion in *Massoud v Radio 2GB Sydney Pty Ltd & Ors* [2021] NSWDC 336, [599]-[607]. On appeal, it was determined that there was no error in the primary judge’s notional order for nil damages: *Massoud v Nationwide News Pty Ltd* [2022] NSWCA 150; 109 NSWLR 468, [279]-[285].

1143Q. Network Ten submits that these authorities ought to be followed and accepted as correct statements of the common law of Australia. They reflect the fact that the presumption of damage in defamation law is an historical anomaly that is difficult to reconcile with the objects of the tort in their modern conception (balancing the right to reputation and freedom of expression), let alone the statutory objects in the Defamation Act which include, relevantly, to “*provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter*” (our emphasis): s 3(c).

1143R. In Network Ten’s submission, the policy objectives underlying the law of defamation would not be furthered by the making of awards of damages, even nominal damages, in cases where an applicant is found to have suffered no harm to reputation or has engaged in conduct which disentitles them to damages; to the contrary, awards of damages (and potentially costs) in such circumstances would be more likely in 2024 to bring the law into disrepute. The introduction of section 10A of the Defamation Act now definitively precludes the making of such awards, but as we have endeavoured to demonstrate, the common law had evolved away from the presumption of damages independently of the introduction of that provision.

### **Section 22(3) of the Defamation Act**

1143S. Section 22(1) of the Defamation Act provides that the section applies only to defamation proceedings that are tried by jury.

1143T. The decision in *Dank* was a damages assessment following a jury verdict in which the defence of truth was successful in respect of two matters, but only partly successful in respect of a third matter: *Dank*, [3]-[4].

1143U. In Network Ten’s submission, the words “(if any)” in s 22(3) are consistent with, and reflective of, the common law approach to the presumption of damages as it has evolved, but are not themselves a source of the abolition of the presumption.

## **M.1 General Damages**

1144. In Network Ten's submission, and for the reasons set out in Part I above, this is a case involving publication to a very limited class of persons able to reasonably identify Mr Lehrmann. Any damages award would necessarily be modest (in that regard, Network Ten respectfully adopts the submissions made by Ms Wilkinson in relation to the mitigating effects of the Mr Lehrmann's settlement in the News and ABC proceedings at [625] of her submissions). There are three further matters that would bear on the Court's consideration of damages:
1145. *First*, no attempt was made by Mr Lehrmann to identify any damages flowing from *The Project* broadcast as opposed to damages flowing from the news.com.au publication.
1146. The high point of Mr Lehrmann's case on publication concerns the assertion that he may have been identified as a result of the rumour mill among persons in Parliament House. On Mr Lehrmann's case, however, the rumour mill that caused relevant persons to reasonably identify him had started to grind at the time the news.com.au article was published. It is highly unlikely that any person who worked in Parliament House and thus had an interest in rumours concerning staffers there would not have seen the news.com.au article, which was published some 10 hours before *The Project* went to air. Certainly no evidence was adduced at trial of the existence of any such person.
1147. As set out in Part I above, the only two former staffers called in relation to identification by Mr Lehrmann, Ms Abbott and Ms Quinn, both read the news.com.au article and had particular knowledge as former staffers that allowed them to identify Mr Lehrmann as the subject of the allegations in that article.
1148. In Network Ten's submission, Mr Lehrmann has failed to satisfy his burden of establishing a causal connection between the broadcast of *The Project* program and any damage caused by that publication, as opposed to damage caused by the news.com.au article.
1149. *Secondly*, the parties agree that: (a) Mr Lehrmann was charged with one count of sexual assault by the ACT Police, and (b) was not named in any mainstream media until after he was charged on 7 August 2021 (CB1108). Upon the bringing of those charges and the naming of Mr Lehrmann, there followed an avalanche of publicity.

1150. Such publicity inevitably caused damage to Mr Lehrmann’s reputation – he was being identified by name as someone charged with, and therefore reasonably suspected by police and the Director of Public Prosecutions of, having committed a rape.
1151. In Network Ten’s submission, any damage caused by the publication of the news.com.au article or the broadcast of *The Project* program, which did not name Mr Lehrmann, was swapped by the reputational damage that flowed from the effect of the publicity on and from 7 August 2021. The chain of any reputational damage that may have been caused through the publication of the news.com.au article or *The Project* broadcast to recipients who were able to reasonably able to identify Mr Lehrmann as the subject of those publications was broken by the flood of publicity that followed the bringing of charges. That is when the real damage to Mr Lehrmann’s reputation was caused, and Mr Lehrmann cannot be compensated in this Court for that damage.
1152. In any assessment of the appropriate award of any damages, it will be necessary to isolate the damage caused by *The Project*, where that damage was within the space of a few months swamped by the publicity that followed him being charged and publicly named. There is no causal nexus between anything done by Network Ten and the fact of the subsequent charges (and no such nexus is alleged).
1153. *Thirdly*, in Network Ten’s submission, this is the kind of “very exceptional case of abuse of process” where it would be open to the Court to reduce any damages on account of Mr Lehrmann’s conduct: *Wright v McCormack* [2023] EWCA Civ 892. In that case, Warby LJ (with whom Singh and Andrews LJJs agreed) considered *Joseph v Spiller* [2012] EWHC 2958 (QB) (**Spiller**) and *FlyMeNow Ltd v Quick Air Jet Charter GmbH* [2016] EWHC 3197 (QB), two decisions in which nominal general damages were awarded in circumstances where the plaintiff had advanced a false case and supported it with false evidence in an attempt to deceive the court: *Wright*, [62]ff; see also Gatley C, Parkes R and Busuttil G, *Gatley on Libel and Slander* (13<sup>th</sup> ed, Thomson Reuters, 2022) at para 10-005.
1154. As referred to in closing address, abuses of process are constrained only by the limits of human ingenuity, but they usually involve one or more of (a) the misuse of court processes for illegitimate or collateral purposes; (b) the use of the court’s processes in a manner that is unjustifiably oppressive to a party; or (c) the use of the court’s

procedures to bring the administration of justice into disrepute: *Rogers v R* (1994) 181 CLR 251, 286.

1155. In *Spiller*, Tugendhat J held that the (relevant) plaintiff should be awarded only nominal damages on the grounds that he had deceived the Court in his evidence. His Lordship described Mr Joseph's conduct as "*a sophisticated deception of the court*" which involved putting forward a witness statement to support a claim for special damages which was known to be false and relying on a false document to mislead the court, [55]. Tugendhat J found that Mr Joseph had "*abused the process of the court by deliberately pursuing a false claim for special damages*", [177]. That deception, "*massive as it was*", did not affect the whole claim, but his Lordship was persuaded that adequate vindication of reputation was given in the reasons for judgment and that an award of nominal damages would entail no injustice in the circumstances, [178].
1156. In these proceedings, Network Ten submits that Mr Lehrmann gave false evidence to the Court about every significant integer of the event in relation to which he has sued. This is not, then, a case involving dishonesty about some aspect of a claim – it is dishonesty at the very core of the claim. Mr Lehrmann has offered no honest account of what he says he did on the night of 22-23 March 2019.
1157. Further, Mr Lehrmann engaged in a range of disgraceful conduct, much of which is referred to in Part A of these submissions. In closing address, two matters were proffered as stand out examples of Mr Lehrmann's disgraceful conduct:
- (a) *First*, he allowed a false account of his conduct to go uncorrected by his Senior Counsel or the Chief Justice at the time of his criminal trial – an account he must have known was knowingly false.
  - (b) *Secondly*, he made a scandalous and baseless attack upon Ms Gain, who was obviously a witness of truth. Mr Lehrmann accused her on the *Spotlight* program, and then again before this Court, of concocting evidence to pervert the course of justice. This, on its own, constituted a massive attempt to deceive the Court: *Spiller*, [178].
1158. Further, if the Court concludes that sexual intercourse occurred between Mr Lehrmann and Ms Higgins on 23 March 2019, and whether consensual or not, then Mr Lehrmann's conduct would be utterly wicked. On that hypothesis, he would have defended the criminal charge he faced on a wholly false basis, having lied to police and then allowed

that lie to go uncorrected before the jury. He would have instructed his Senior Counsel at the criminal trial to cross-examine the complainant at length, over days, on the basis of a knowingly false premise. As the Court knows, Ms Higgins ended up in hospital in the middle of cross-examination, and attempted suicide.

1159. Then, on the same hypothesis, Mr Lehrmann brought this case, as the moving party, again on the same false factual foundation, and instructed his Senior Counsel to cross-examine Ms Higgins again - this time for three days, unconstrained by the protections that apply to sexual assault complainants in criminal trials, on the same false factual basis. As the Court graphically and correctly summarised our submission on this point in closing address, it would turn a black lie into one that plunges Sumerian depths.
1160. As contended by Network Ten in closing address, that would be wicked conduct of the highest magnitude that would, in Network Ten's submission, rise to the level of a very exceptional case of abuse of process. Mr Lehrmann's conduct would have involved:
- (a) the gross misuse of the Court's processes;
  - (b) subjecting a media organisation and a journalist to a four and a half week trial conducted on the basis of a factual foundation that he has known at all times to be false;
  - (c) furthering his scheme by the giving of false evidence and the making of scandalous attacks on a third party witness, Ms Gain; and
  - (d) instructing his Senior Counsel to embark on a lengthy attack on the complainant's credit with the purpose of seeking to persuade the Court to conclude that she had done a most wicked thing, namely fabricate an allegation of rape.
1161. It would be one thing if the battleground in this case had turned on whether admitted sexual intercourse between Mr Lehrmann and Ms Higgins was consensual or not – but that has never been the battleground, because of Mr Lehrmann's denial that any sexual activity took place. If the Court were to find that there was sexual intercourse, but was not satisfied that it was non-consensual, then Mr Lehrmann's conduct in denying the intercourse is simply inexcusable.
1162. The circumstances would be such that it would bring the administration of justice into disrepute to award Mr Lehrmann any damages. Mr Lehrmann's misconduct would, on

that hypothesis, also be closely related to the sector of reputation that he seeks to vindicate in this proceeding, namely his reputation in relation to his intimate affairs.

1163. In addition, Network Ten acted reasonably and responsibly in removing the broadcast from the Internet on 7 August 2021, as a direct response to Mr Lehrmann being charged with raping Ms Higgins (Statement of Agreed Facts, [31]: CB1108).
1164. Finally, if the Court does not accept the construction of s 30 of the Defamation Act contended for by Network Ten, or its submissions in relation to the meaning of reasonableness for the purposes of the *Lange* defence, but nonetheless concluded that it was reasonable for Network Ten in the circumstances to have published the rape allegation, that would be a matter that the Court would take into account on the question of damages. In those circumstances, no injustice would be done in a finding that the defence failed because it was not reasonable for Network Ten to have published the obstruction allegation (which is not the subject of the imputations on which Mr Lehrmann has sued), but to award no damages to Mr Lehrmann (because it was reasonable for Network Ten to have published that part of the program that concerned the imputations on which he has sued). On that hypothesis, no award of damages would be necessary, within the meaning of section 34 of the Act, in order to fairly compensate Mr Lehrmann for any harm sustained *by him*.

## **M.2 Aggravated Damages**

1165. At common law, aggravated damages have traditionally been awarded to compensate an applicant for harm that has been exacerbated by a respondent's conduct in publishing defamatory matter or by subsequent conduct: *Russell*, [494] (citing *Bickel v John Fairfax & Sons Ltd* (1981) 2 NSWLR 474 (at 496 per Hunt J)).
1166. The Court is entitled to look at the whole of the conduct of the respondent from publication to the time of judgment: *Russell*, [495]. The applicant must establish that the respondent's conduct was improper, unjustifiable or lacking in *bona fides*: *Triggell v Pheeny* (1951) 82 CLR 497 (at 513-514 per Dixon, Williams, Webb and Kitto JJ).
1167. The pleaded grounds relied upon by Mr Lehrmann in support of his claim for aggravated damages are:
- (a) That Network Ten was recklessly indifferent to the truth or falsity of the imputations carried by the Publications in publishing the assertions and allegations giving rise to the imputations without giving Mr Lehrmann a

reasonable opportunity to respond (Statement of Claim, [9(a)]: CB2). Having regard to the facts, matters and circumstances relied upon in support of the defence of statutory and *Lange* qualified privilege, the Court would not be anywhere near satisfied that Network Ten behaved with reckless indifference as to the truth or falsity of the pleaded defamatory imputations, not least because it did conscientiously attempt to give Mr Lehrmann multiple reasonable opportunities to respond to the relevant allegations. There was nothing improper, unjustified or lacking in *bona fides* in Network Ten's conduct such as to warrant an award of aggravated damages.

- (b) That false assertions were published in a letter from the solicitors for Network Ten to the solicitors for Mr Lehrmann dated 20 January 2023. The substance of the allegation is that the letter asserted that the Publications had made clear that the statements made by Ms Higgins in *The Project* broadcast were "claims" or "allegations". There was nothing about that letter that warrants an award of aggravated damages. It was a response to serious allegations made about *The Project* in the letter dated 20 January 2023, and it is an aspect of the reasonableness of the conduct of Network Ten that has been maintained throughout these proceedings. It comes nowhere close to warranting an award of aggravated damages.

1167A. The other matters in respect of which the Court has requested assistance from the parties are as follows:

- (a) "His Honour is presently confused about the final position as to aggravated damages taken by the applicant and seeks clarity. Although the applicant has identified four particulars of aggravated damages (reattached for ease of reference), the primary submissions filed by the applicant only develop an argument in respect of two particulars (that is, in relation to (b) and (d)). Further, given the additional evidence that has now been adduced since this document was provided to the Court, his Honour wishes to receive, so that each respondent has the opportunity to respond, any final version of the particulars of aggravated damages following the conclusion of all evidence in the proceedings (so that previous circumstances not pressed or any new matter now relied upon is specifically identified). Any amendment to the current document which either deletes particulars or seeks to add another particular (arising from any new

development since the last document was provided) should be served and provided to the Court forthwith, and well in advance of the filing of the additional written submissions, so that the current lack of clarity is resolved and so the respondents have every opportunity of responding to the final version of the particulars actually pressed.” (First Question)

- (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?” (Second Question)

### **First Question**

1167B. Mr Lehrmann provided the Court and the parties with updated particulars of aggravated damages on 22 February 2024. In summary, the updated particulars allege that:

- (a) Ms Wilkinson made the Logies acceptance speech “on behalf of and/or with the approval and/or authority of [Network] Ten” which amounted to an endorsement of the credibility of Ms Higgins, and which in the context of the ACT criminal proceedings...was ill advised, reckless and prejudicial to the Mr Lehrmann’s right to a fair trial because it destroyed the distinction between an untested allegation and the fact of guilt (First New Particular of Aggravated Damages); and
- (b) Ms Smithies adhered to the advice she gave to Ms Wilkinson regarding the Logies speech in her evidence during the cross-claim proceeding (Second New Particular of Aggravated Damages).

1167C. The First New Particular of Aggravated Damages is, in effect, an allegation that the harm alleged to have been suffered by Mr Lehrmann was aggravated by the fact that



Network Ten approved/authorised Ms Wilkinson making an acceptance speech on its behalf.

1167D. Mr Lehrmann’s position is that there is a distinction between the question of whether the speech was unlawful and whether it was improper or unjustifiable. The former is said to be irrelevant to the question of whether an award of aggravated damages is warranted. It is the (alleged) public assertion that Ms Higgins was credible and should be believed, on the eve of the trial, that is said to be the relevant aggravating factor: see ACS at [538].

1167E. In response to the First New Particular of Aggravated Damages, Network Ten respectfully adopts the submissions made on behalf of Ms Wilkinson at [646]-[655] and [656]-[659] of her closing written submissions filed on 22 December 2023, insofar as they concern the circumstances in which the speech was made and the content of the speech. Further, in Network Ten’s submission, far from Mr Lehrmann suffering harm as a result of Ms Wilkinson’s speech, Mr Lehrmann in fact said that he agreed with the view of his counsel (referred to during the *Spotlight* program) that he was very close to being convicted and that if it had not been for the Logies speech and the delay in the trial, he would have been in “*more trouble*” (T525.23-35). While Mr Lehrmann denied the proposition put to him in cross-examination that the Logies speech saved him from conviction (T526.38-42), his response to Liam Bartlett in the *Spotlight* program (which he agreed in evidence he had made) was that the delay occasioned by the making of the speech had, at least, afforded his legal team the opportunity to “*dig deeper...go down the rabbit holes...find the golden nuggets*” with the potential result that “*if they had not done what they did [it] would have been catastrophic*” (T526.16-36). Mr Lehrmann thus believed it was to his ultimate advantage that the trial was temporarily stayed. That state of mind is inconsistent with one of increased harm warranting an award of aggravated damages.

1167F. In Network Ten’s submission, the Second New Particular of Aggravated Damages is embarrassing and ought to be struck out. The particular seeks to rely upon evidence given by Ms Smithies in the cross-claim proceedings which was, in substance, that she adhered to the advice she had given to Ms Wilkinson that the Logies speech prepared by Ms Wilkinson could be given. Whatever Mr Lehrmann, the Court or anyone else may think about the advice that was given, the evidence that Ms Smithies gave – being the basis upon which Mr Lehrmann seeks aggravated damages – was

given on oath when she was under an obligation to tell the truth. It cannot be in dispute that Ms Smithies' evidence was anything other than frank and truthful. No matter how upset Mr Lehrmann might have been at hearing that evidence, it cannot constitute conduct that is improper, unjustifiable or lacking in *bona fides*.

1167G. To the extent that the First and/or Second New Particulars of Aggravated Damages seek to rely upon the fact and substance of Ms Smithies' advice in respect of the speech, in Network Ten's submission, that advice was not improper, unjustifiable or lacking in *bona fides* such as to aggravate any harm caused to Mr Lehrmann. That is so for at least the following reasons:

- (a) The Court ought to be satisfied, on the evidence given by Ms Smithies in the cross-claim proceeding, that at the time she advised Ms Wilkinson in respect of the speech, the consequence that followed the giving of that speech (namely the temporary stay of the criminal proceedings) was not something that was foreseen by Network Ten, and nor was Ms Smithies' advice ill-intentioned or deliberately cavalier.
- (b) Whatever view the Court might take of the advice given by Ms Smithies, it must have regard to what matters were in fact in the mind of Network Ten and Ms Smithies at the time the advice was given. The evidence given by Ms Smithies in the cross-claim proceeding demonstrates that she had a rational basis for the advice, and in Network Ten's submission, the Court should accept that evidence. Ms Smithies turned her mind to the potential impact of the Logies speech on the forthcoming criminal trial, and honestly formed the view that it would not preclude Mr Lehrmann from receiving a fair trial.
- (c) Prior to the speech, as part of her role at Network Ten, Ms Smithies had kept a close eye on the press and general reporting in respect of Ms Wilkinson and Ms Higgins (T2617.18-21). Ms Smithies felt that Ms Wilkinson had in effect become "*part of the story*" (T2616.19). At the time Ms Smithies provided her advice, and when assessing the likely impact of the speech, she had these matters in her mind (T2617.21-23).
- (d) From the broadcast of *The Project* program until shortly before the Logies speech, Ms Wilkinson had regularly expressed her public support of Ms Higgins through social media and other sources (e.g. CB1413-1485 (Cross-Claim)), and including

by (i) attending the March4Justice in March 2021 and delivering a speech in support of Ms Higgins, (ii) posting statements of support on her Instagram page that were widely reported, (iii) attending the National Press Club of Australia joint address given by Ms Higgins and Ms Tame in February 2022 and (iv) attending Marie Claire’s Annual International Woman’s Day breakfast with Ms Higgins (CB1462, 1466, 1476-1478, 1483-1484 (Cross-Claim)). Ms Wilkinson’s friendship with Ms Higgins was well known and widely reported on throughout Australia (CB1436-1441, 1445-1450, 1455-1460, 1462-1485 (Cross-Claim); T2616.17-25). At the time Ms Smithies was asked to provide her advice, she was acutely aware of the Australian media landscape which demonstrated the “*clear and unequivocal*” friendship and support between Ms Wilkinson and Ms Higgins (T2616.17-25; Smithies, [37(d), (f)]: CB320 (Cross-Claim)).

(e) In her affidavit, and during oral evidence, Ms Smithies gave unchallenged evidence as to her reasons for giving her advice. While Network Ten accepts that reasonable minds may differ as to the reasonableness of the advice given by Ms Smithies (T2617.23-26), the explanation she gave had a rational basis, and did not rise to the level of being improper, unjustifiable (in the requisite sense) or lacking in *bona fides*.

(f) When asked to provide advice on the speech, Ms Smithies turned her mind to a number of matters:

(i) The content of the speech, including the fact that it did not make reference to Mr Lehrmann, the criminal trial or the interview with Ms Higgins: Smithies, [37(a)]: CB320 (Cross-Claim); T2617.15-16.

(ii) Ms Wilkinson’s intensive public support of Ms Higgins in the 18 months pre-dating the speech, which had been widely reported on throughout Australia: Smithies, [37(f)]: CB320 (Cross-Claim); T2616.17-26; T2617.18-23.

(iii) The speech was entirely consistent with previous public statements made by Ms Wilkinson and did not add anything new to the media landscape: Affidavit, [37(f)]: CB320 (Cross-Claim); T2616.7-25; T2617.18-23. Ms Smithies accepted in cross-examination that the speech amounted to Ms Wilkinson endorsing the credibility of Ms Higgins (T2616.3-6). However,

the unchallenged evidence of Ms Smithies was that the speech was entirely consistent with Ms Wilkinson’s public position over the preceding 18 months, such that the speech would not add anything new to the media landscape (T2616.6-9; Affidavit, [37(d), (f)]: CB320 (Cross-Claim)). Ms Smithies did not anticipate the nature of the reporting that in fact occurred following the Logies speech, which in her mind simply repeated comments previously made by Ms Wilkinson on numerous previous occasions. Applying the benefit of hindsight, it might be suggested that this was an error on Ms Smithies’ part but, in Network Ten’s submission, the Court ought not adopt a hindsight approach when assessing the reasonableness of the advice at the time it was given.

- (iv) The fact that the speech was drafted in a way which made it clear that it reflected Ms Wilkinson’s personal experience and observations: Affidavit, [37(c)]: CB320 (Cross-Claim); T2617.16-18. The speech conveyed a number of representations about Ms Wilkinson’s view of Ms Higgins, but to the extent that the following messages were conveyed, Ms Wilkinson had previously and publicly made those same comments: (i) Ms Higgins was seen as a “*political problem*” (CB1414, 1415, 1418, 1428 (Cross-Claim)); (ii) Ms Higgins was a woman of unwavering courage (CB1416, 1423, 1431, 1432, 1434, 1435, 1443, 1447 (Cross-Claim)), (iii) Ms Higgins inspired more than 100,000 women to take to the streets and say “*enough*” (CB1420-1422, 1443 (Cross-Claim)), and (iv) Ms Higgins had never given up (CB1461 (Cross-Claim)).
- (v) Ms Smithies was alive to the risk that media reporting could cause prejudice to the forthcoming criminal trial (T2616.32). She considered that one likely way that prejudice could occur would be by Ms Wilkinson acting in a way (for example, by refusing to give a speech) which could be considered by the media as inconsistent with her previous and public support for Ms Higgins. Ms Smithies believed that if Ms Wilkinson gave no speech at all, there was a real risk that this would lead to widespread speculation and commentary of Ms Wilkinson’s withdrawal of her support for Ms Higgins so close to the trial (T2616.6-33; 2617.15-23). In Ms Smithies’ view, the best way to minimise the likelihood of reporting about

the criminal trial was for the speech to simply repeat matters which were already in the public domain. That was the preferred course to Ms Wilkinson not giving a speech (T2617.1-2).

(vi) A significant factor which influenced the advice given by Ms Smithies was the fact that Mr Drumgold had not raised any concerns about the parts of the speech which Ms Wilkinson had read aloud to him, including the mention of Ms Higgins’ “unwavering courage”: Affidavit, [37(e)]: CB320 (Cross-Claim).

(g) Ms Smithies' oral evidence must be understood fairly, and in the context of her cross-examination as a whole. What is clear from her answers is that she was doing her best to put herself back in the position she was in in June 2022 when she gave the advice. She gave frank and honest answers about her state of mind at that point in time, based only on the information then available to her: T2616.17-20. Ms Smithies was not asked to give her opinion about the advice with the benefit of hindsight or what advice she would have given had she somehow anticipated the scale of the media reporting that followed. It was in that context she gave evidence that she did not consider herself embarrassed by the advice (T2588.23-24) and that she still “stands by” the advice she gave (T2617.25-26). Understood in that way, it would be wrong and unfair to characterise Ms Smithies’ evidence as demonstrating any disrespect for the findings made by McCallum CJ or a denial of the objective seriousness of the events which followed the giving of the speech. What was clear from Ms Smithies’ evidence is that she believes she did the best she could at the time she was asked to give the advice, having regard to the information available to her. Ms Smithies fairly acknowledged that she was “very accepting...and respectful of the fact that others may hold a different view” (T2617.24-25).

(h) Having regard to the entirety of Ms Smithies’ evidence, Network Ten submits that the provision of the advice in respect of the speech was not improper, unjustifiable or lacking in *bona fides* such as to warrant an award of aggravated damages. Ms Smithies was not reckless as to the risk to the criminal trial. She turned her mind to the possible risks associated with the speech, and ultimately had a rational basis for giving her advice based on the information available to her at the relevant time. She did not have any ill intention or malice in giving the

advice, and Mr Drumgold had given no indication that the speech should not be given or that it was a bad idea. Ms Smithies' evidence was that had he done so, it would have informed the advice she gave and been communicated to Ms Wilkinson (T2544.37-2545.9; T2545.30-45).

- (i) In the circumstances, no amount of aggravated damages should be awarded in respect of the First and/or Second New Particulars of Aggravated Damages.

1167H. In connection with this topic, a number of matters should be noted in respect of an answer given by Ms Smithies at the conclusion of her evidence in the cross-claim proceeding in relation to the letter of apology sent to the Associate to McCallum CJ following the vacation of the criminal trial in June 2022. Ms Smithies was asked by his Honour (T2615.35-38):

*“By [the letter sent to the Associate to McCallum CJ] you were seeking to convey a recognition that there was something that Channel Ten had done that was worthy of regret or a profound apology.”*

1167I. Ms Smithies responded (T2615.38-43):

*“I think the regret and profound apology, in my view, was in relation to the fact that the trial had been vacated, and that, in my view your Honour, it was that that we were addressing in the letter, not, in my view, anything in relation to the advice that had been given, because her Honour also wrapped up consideration of the advice with the warning that had been given or not given. And so in my view, that’s what we were trying to address.”*

1167J. In Network Ten’s submission, the following matters should be noted in relation to Ms Smithies' response:

- (a) First, by noting that the regret and apology related to the vacation of the trial, Ms Smithies was attempting to be faithful to the terms of the letter, which stated: “we profoundly regret that the trial has been vacated”.
- (b) Secondly, at the time the letter was drafted, Network Ten and Ms Smithies understood that McCallum CJ held the erroneous view (based on evidence adduced by the DPP) that any legal advice relating to the speech was given in flagrant disregard of a warning from the DPP. As Ms Smithies sought to explain, if Network Ten had simply apologised for the advice and the speech, without any

qualification, this would have amounted to an admission that Network Ten had deliberately ignored a “clear and appropriate” warning by the DPP. For this reason, as Ms Smithies sought to explain, the letter was not seeking to apologise for that advice: T2615.41-43.

- (c) Thirdly, Ms Smithies did not have the letter before her at the time she gave her answer, but was involved in the drafting of its terms in 2022. The letter apologises for Network Ten’s failure to “foresee the volume and damaging nature of the media and social media commentary that followed from Ms Wilkinson’s acceptance speech”. This is consistent with Ms Smithies’ evidence that when providing the advice, she did not foresee the nature of the public attention that would follow. It is also consistent with Ms Smithies’ careful response to the question raised by his Honour and referred to at [1167I] above, which sought to make clear that the letter of apology was not seeking to address the advice, given the erroneous view held by McCallum CJ about a warning having been given based on the evidence of the DPP.
- (d) Fourthly, Ms Smithies’ acknowledgement that she still believes the advice to have been appropriate is not inconsistent with, and should not diminish the genuine nature of, the apology. For the reasons set out above, Ms Smithies’ view as to the appropriateness of the advice must be understood having regard to the information and circumstances known to her at the time it was given.
- (e) Finally, to the extent the Court does consider there to be some inconsistency between Ms Smithies’ evidence and the terms of the 21 June 2022 letter, the importance of Ms Smithies’ evidence as to her subjective intention two years prior should not be elevated beyond the terms of the letter itself. The letter was reviewed and signed by the CEO of Network Ten, and should be understood as a sincere apology, on behalf of Network Ten and Ms Wilkinson, in the terms expressed.

1167K. Contrary to the submission made by Ms Wilkinson at [655A] of her amended closing submissions, Ms Smithies evidence at T2615.35-2617.25 and at Smithies, [37] was not that she strongly held the view that Ms Wilkinson should give the speech in the terms she spoke. In fact, the relevant evidence was directed to the reasons why Ms Smithies gave the advice she did (as to which see [1167G] above), and given in

response to a question from his Honour about the content of the letter of apology to McCallum CJ (as to which see [1167H]-1167J] above).

## **Second Question**

1167L. Aggravated damages are a form of compensatory damages for increased harm suffered by reason of the conduct of a respondent: Russell, [494].

1167M. As Nicklin J observed in *Lachaux v Independent Print Ltd* [2021] EWHC 1797 (QB); [2022] EMLR 2 at [227]:

*“To speak in terms of whether a claimant is “entitled” to an award of aggravated damages is misleading. Every claimant who succeeds in a claim for defamation is “entitled” to an award of damages which may reflect any proved elements of aggravation.”*

1167N. Nicklin J at [227] also warned that viewing aggravated damages as anything other than a component of compensatory damages has an inherent tendency to stray into punishment:

*“In my judgment separating out a specific award for “aggravated damages” is unnecessary and, I consider, generally unwise. The Court’s task is to assess the proper level of compensation, taking into account all the relevant factors, which include any elements of aggravation. If, as the authorities recognise, the assessment of libel damages can never be mechanical or scientific, attributing a specific figure to something as nebulous as “aggravation” has an unconvincing foundation. Worse, as it would represent the imposition of a clearly identified additional sum of money, it risks the appearance of being directly attributed to the conduct of the defendant. That comes perilously close to looking like a penalty. For these reasons, I consider the better course is to fix a single award which, faithful to the principles by which damages in defamation are assessed, is solely to compensate the Claimant. The award can properly reflect any additional hurt and distress caused to the Claimant by the conduct of the Defendants.”*

1167O. Exemplary or punitive damages can no longer be awarded for defamation in Australia: s 37 of the Defamation Act. In distinguishing between compensatory damages and punitive damages, Hunt J in *Bickel v John Fairfax & Sons Ltd* (1981) 2 NSWLR 474 said at 496:



“The distinction between compensatory damages and punitive damages cannot be overemphasized. Compensatory damages are given to compensate the plaintiff for the harm done to him by the publication of the matter complained of; aggravated compensatory damages (which are also known as merely “aggravated damages”) are given to compensate him when that harm has been aggravated by the defendant’s conduct. Punitive damages, on the other hand, are given to punish the defendant and relate only to the defendant’s conduct; they do not depend upon any effect of that conduct on the harm of the plaintiff.”

1167P. In Costello v Random House Australia Pty Ltd (1999) 137 ACTR 1 at 46, the nature of aggravated damages was expressed in the following terms:

“The concept of ‘aggravated damages’ is not, whether calculated separately or not, a different ‘head’ of damage. It focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means of punishing a defendant.”

1167Q. It follows from these principles that if, as the Second Question posits, the Court determined that the appropriate award of damages to Mr Lehrmann was no, or nominal, or contemptuous damages, then the Court would have reached that conclusion having taken into account any aggravating features proved by Mr Lehrmann, and any award of damages on account of aggravating features alone would, in substance, be a form of punishment.

1167R. To put it in more concrete terms in connection with the present matter, the Second Question assumes a conclusion that, although he had technically succeeded, Mr Lehrmann’s conduct was such as to disentitle him to compensatory damages. The disentitling conduct would, on that hypothesis, be principally (if not entirely) Mr Lehrmann’s conduct in relation to the prosecution of this proceeding. The matters said to have aggravated his damages are, however, all antecedent to that disentitling conduct.

1167S. It is logically difficult to see why Mr Lehrmann, having conducted himself before this Court in such a way as to disentitle him to any compensatory damages, ought nonetheless be entitled to receive a substantial award of damages because of some feature of the way in which the Respondents had conducted themselves prior to Mr

Lehrmann engaging in that discrediting conduct, where that conduct occurred independently of the discrediting conduct engaged in by him (rising to the point, in Network Ten's submission, of constituting an exceptional case of abuse of process: see [1153]ff above). Any such award could only, in substance, be punitive.

1167T. In response to the last sentence of the Second Question, in those jurisdictions in which it applies, in respect of publications occurring after 1 July 2021, there is now an obligation for awards of aggravated damages to be made separately from awards of (general compensatory) damages for non-economic loss: s 35(2B) of the Defamation Act. That provision does not apply in this proceeding, because the impugned publications predate its commencement. Prior to the insertion of that provision in the Defamation Act, the general practice, consistent with the observations made by Nicklin J extracted at [1167N] above, was to make a single award of compensatory damages, with no identification of the component referable to proved aggravation.

1167U. In Network Ten's submission, consistent with the above submissions, if no or nominal damages are awarded to the Applicant, then the Court would have reached that conclusion having taken into account any aggravating features proved by Mr Lehrmann, and so no question of separate awards of general compensatory and aggravated compensatory damages will arise.

1167V. Suppose, however, that the Court were to conclude that Mr Lehrmann is entitled to an award of damages, including a component on account of proved aggravation. In that circumstance, in Network Ten's submission, despite the cogency of the reasons given by Nicklin J set out in [1167N] above, it would be prudent in the circumstances of the present case, and particularly for the purposes of any prospective appeal by either party, for the Court to identify separately the amount of damages that the Court would have awarded the Applicant but for any proved aggravation.

**Response to Mr Lehrmann's submissions as to the availability of aggravated damages**

1167W. At [559]-[560] of the ACS, Mr Lehrmann refers to the recent decision of *Greiss v Seven Network (Operations) Ltd (No 2)* [2024] FCA 98 at [417]-[420]. In reliance on that decision, Mr Lehrmann submits that, even if adverse credit findings are made against him, they would not be in the "same territory" as an actual rape allegation and therefore his position is not analogous to Mr Greiss whose conduct in spitting "towards" a rape victim rather than "at" her

warranted an award of nominal damages. Secondly, he submits that even if his conduct is found to have been so disreputable as to mitigate damages to a nominal level, he, like Mr Greiss, would still be entitled to an award for the subjective hurt (hurt to feelings) caused by the publication.

1167X. As to the first submission, it is with respect without merit. The relevant hypothesis is that:

- (a) Mr Lehrmann engaged in sexual activity with Ms Higgins, at a time when they had both been drinking and Ms Higgins, in particular, was drunk to the point where Mr Lehrmann knew or must have known that her capacity to consent to sexual activity was, at best, impaired.
- (b) Mr Lehrmann has, at all times since engaging in that sexual activity with Ms Higgins, lied about it, including to the Australian Federal Police, this Court, his legal advisors and in his public statements including television interviews.
- (c) Mr Lehrmann instructed his Senior Counsel to engage in lengthy cross-examination of Ms Higgins at the criminal trial (unbeknownst to Counsel, of course) on a wickedly false basis.
- (d) Mr Lehrmann instructed his Senior Counsel to advance submissions at his criminal trial that Mr Lehrmann (but not his Counsel) knew were false.
- (e) Mr Lehrmann brought this proceeding, seeking to vindicate his reputation, and then prosecuted the proceeding on the same knowingly false basis, including by instructing his Senior Counsel again to cross-examine Ms Higgins on a wickedly false basis, this time unconstrained by the protections that applied in the criminal trial.

1167Y. On that hypothesis, the facts underlying the finding of adverse credit against Mr Lehrmann would, we submit, be within the “same territory” as the impugned imputations, such that no injustice would be done by a finding of the Court that there had been sex, but not rape, and otherwise denying any remedy to Mr Lehrmann. Mr Lehrmann would be sufficiently vindicated by the judgment of the Court.

- 1167Z. As to the second submission, Mr Lehrmann contends that any subjective harm may be aggravated by the conduct of a defendant such as to warrant an award of substantial damages, even where no or minimal damages would otherwise be awarded. He submits that the correct approach is reflected in the decision in *Newsgroup Newspapers Ltd v Campbell* [2002] EWCA Civ 1143 (*Campbell*).
- 1167AA. The decision in *Campbell* was not concerned with the aggravation of purely subjective harm. It was a case where the Court of Appeal adopted a staged approach to the reassessment of a manifestly excessive award of damages by the jury: first by determining the range of an award had the claim been made good in full, then by applying a reduction to reflect the partial success of the justification defence and then by applying a further reduction to reflect the claimant's willingness and attempts to abuse the process of the court in the course of the litigation.
- 1167AB. As Ms Wilkinson correctly observed at [659F] of her submissions, adopting a staged approach to the assessment of damages may be problematic.
- 1167AC. *Campbell* has been correctly described as an outlier in the jurisprudence (*Russell*, [469], citing Warby LJ in *Wright v McCormack* [2023] EWCA Civ 892 (*Wright*) at [76]). The decisions in *Joseph*, *FlyMeNow* and *Wright* (at first instance) were determined without reference to *Campbell*: *Wright*, [71]. As Warby LJ said at [41] of *Wright* in respect of the primary judge's decision to reduce damages to a nominal £1: "In my opinion, the judge's decision was a legitimate application of sound principles of defamation law, which are not inconsistent with the aims and general principles of compensation for tort. *Those rules do not depend on or flow from Campbell but are independent of it. The judge's decision was properly made without reference to Campbell, or Ul Haq or Summers. That is not just because none of those cases was cited to the judge, it is also because none of them has a bearing on the outcome of this case*" (our emphasis).
- 1167AD. This is not a case like *Campbell* where the Court would make a modest reduction to any award of damages to reflect Mr Lehrmann's misconduct. As Network Ten submits at [1153]-[1162] above, this is an exceptional case of abuse

of process where it would be open to this Court to apply the principles referred to in *Wright* to reduce any damages award to a nominal or nil amount.

1167AE. In Network Ten’s submission, Mr Lehrmann advanced a false case supported by false evidence in a sophisticated attempt to deceive the Court (*Spiller*, [178])—considerably more sophisticated, in our submission, than that which occurred in *Spiller*. Those matters are disreputable facts properly before the Court and which would logically affect the extent to which Mr Lehrmann is entitled to the vindication of his reputation through an award of damages (*FlyMeNow*, [128]).

1167AF. In Network Ten’s submission:

(a) Any relevant facts which properly emerged in the course of the trial may be relied upon to reduce damages (*Wright*, [27], [68]). It is not necessary to show that the relevant disreputable facts are in the “same territory” as the sting of the libel. But in any event, as outlined in response to the first submission above, the litigation misconduct in this proceeding and the libel are in fact properly comparable, in that Mr Lehrmann gave false evidence about every significant aspect of the events in relation to which he has sued – as we have said at [1156] above, this is a case involving dishonesty at the very core of the claim.

(b) It does not follow that Mr Lehrmann would nevertheless be entitled to an award of damages in respect of any hurt to feelings (and aggravated damages in respect of any such award). As Chamberlain J put in at first instance in *Wright v McCormack* [2022] EWHC 2068 (QB) at [143]-[144] (referred to by Warby LJ at [25] of *Wright*) (our emphasis):

“143. In a libel action brought by an individual, compensation is awarded for injury to reputation (objectively assessed) and for injury to feelings. Had it not been for Dr Wright’s deliberately false case as to serious harm, a more than minimal award of damages would have been appropriate, though the quantum would have been reduced to reflect the fact that Mr McCormack was goaded into making the statements he did and, [having found Dr Wright not to be a witness of](#)

truth, I would have rejected in its entirety his case as to the distress he claims to have suffered.

144. But the deliberately false case on serious harm advanced by Dr Wright until days before trial in my judgment requires more than a mere reduction in the award of damages. In my judgment, it makes it unconscionable that Dr Wright should receive any more than nominal damages.”

1167AG. Similarly, as set out in [1143O] above, in *Charan v Nationwide News Pty Ltd* [2018] VSC 3, at [768] Jack Forrest J said that, if he had found for the plaintiff, he would not have awarded any damages for vindication of reputation or reparation for injury, and rejected the plaintiff’s case as to hurt feelings on the basis that the apology proffered by the defendant was sufficient to “salve any hurt he might have suffered”.

1167AH. Consistent with the reasoning of Chamberlain J referred to in the preceding paragraph, if this Court finds that Mr Lehrmann engaged in the misconduct referred to above and elsewhere in these submissions, Network Ten submits that it would reject in its entirety his claim to have suffered any subjective hurt at the time of publication warranting an award of damages (particularly having regard to the weakness of his case in respect of substantial identification); alternatively would be satisfied that the judgment of the Court would be sufficient to salve any such subjective hurt.

### **M.3 Other Relief**

1168. To the extent that Mr Lehrmann presses for permanent injunctive relief alongside damages, the Court must be satisfied that there is a real apprehension that there will be a republication of any imputations found to be conveyed and defamatory; *Rush v Nationwide News Pty Ltd (No 9)* [2019] FCA 1383, [4]-[46]. The Court would not be sufficiently satisfied of such a risk, and otherwise it would not generally interfere with or restrict the right to free speech in that way: *Rush*, [11]; *Carolyn v Fairfax Media Publications Pty Ltd (No 7)* [2017] NSWSC 351, [13] (McCallum J, as her Honour then was). Network Ten responsibly removed the only remaining available stream of the relevant edition of *The Project* on the day Mr Lehrmann was charged, 7 August 2021.

1169. Network Ten is a responsible broadcaster. It ought not to be assumed that it would publish imputations that had been found by the Court to be indefensible.

1169A. Network Ten notes that Mr Lehrmann does not press for injunctive relief: ACS, [539].

~~22 December 2023~~ ~~22 January 2024~~ ~~28 February 2024~~ **11 March 2024**

M J COLLINS

T SENIOR

Counsel for the First Respondent

## Schedule

### MS HIGGINS' DRINKS AT THE DOCK

Drink 1 – 19:26:27



Drink 2 – 19:50:30

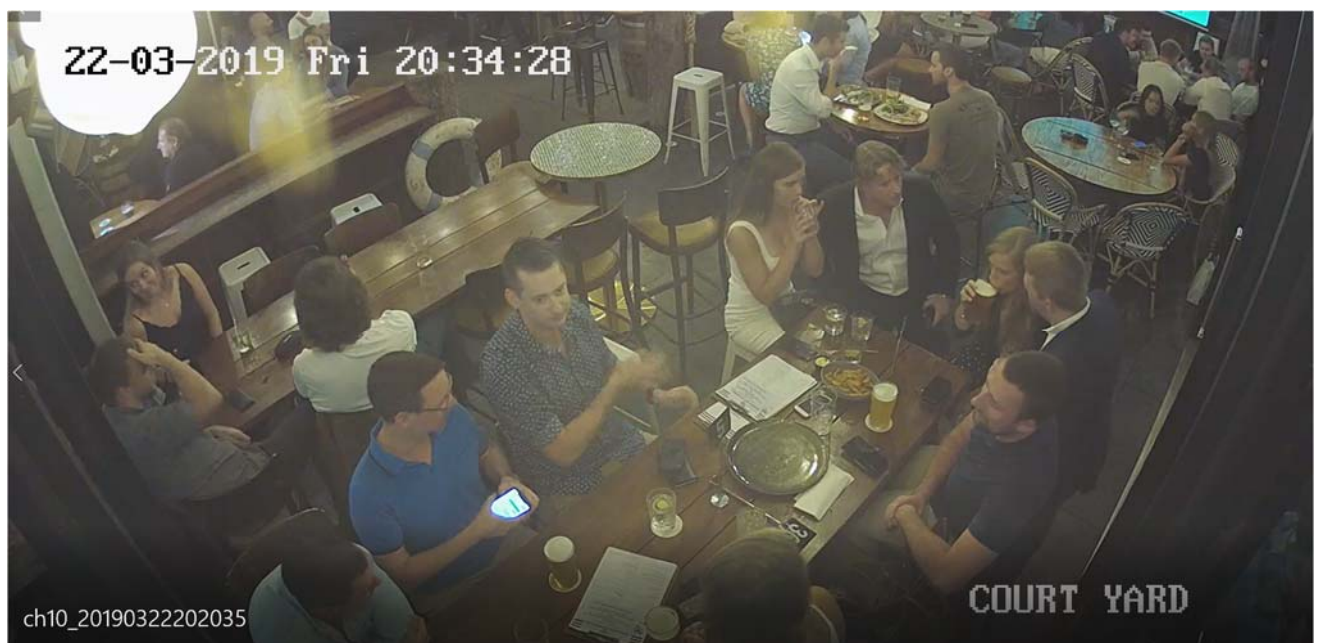




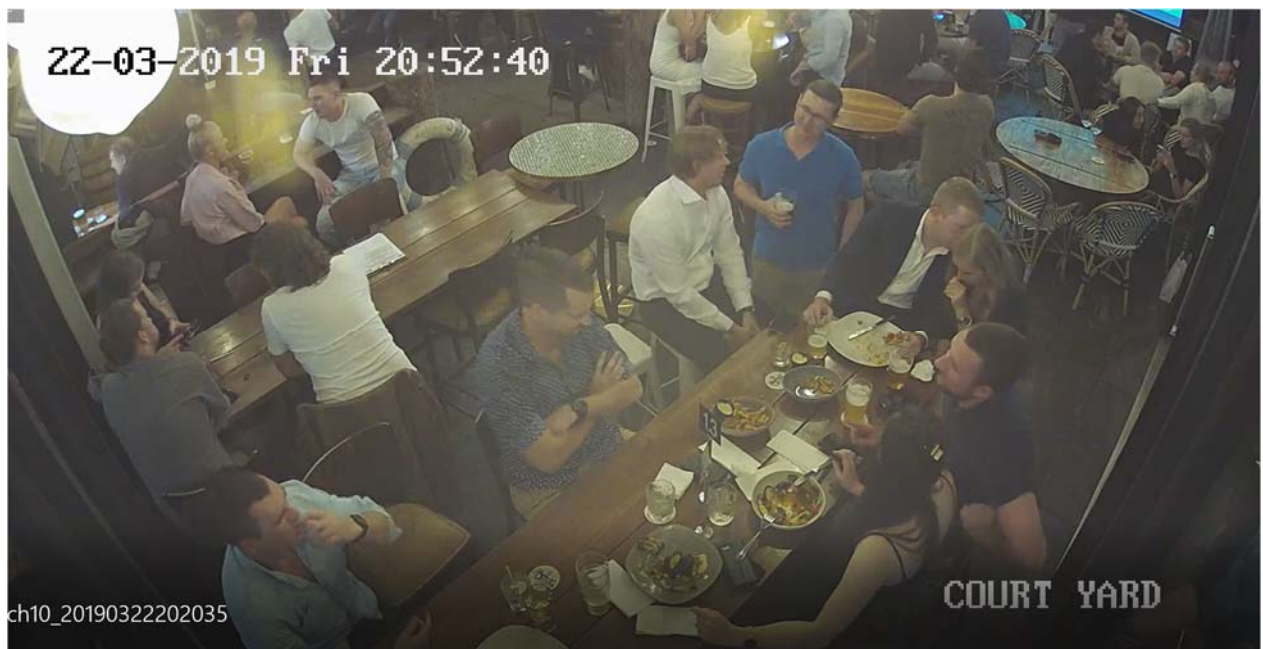
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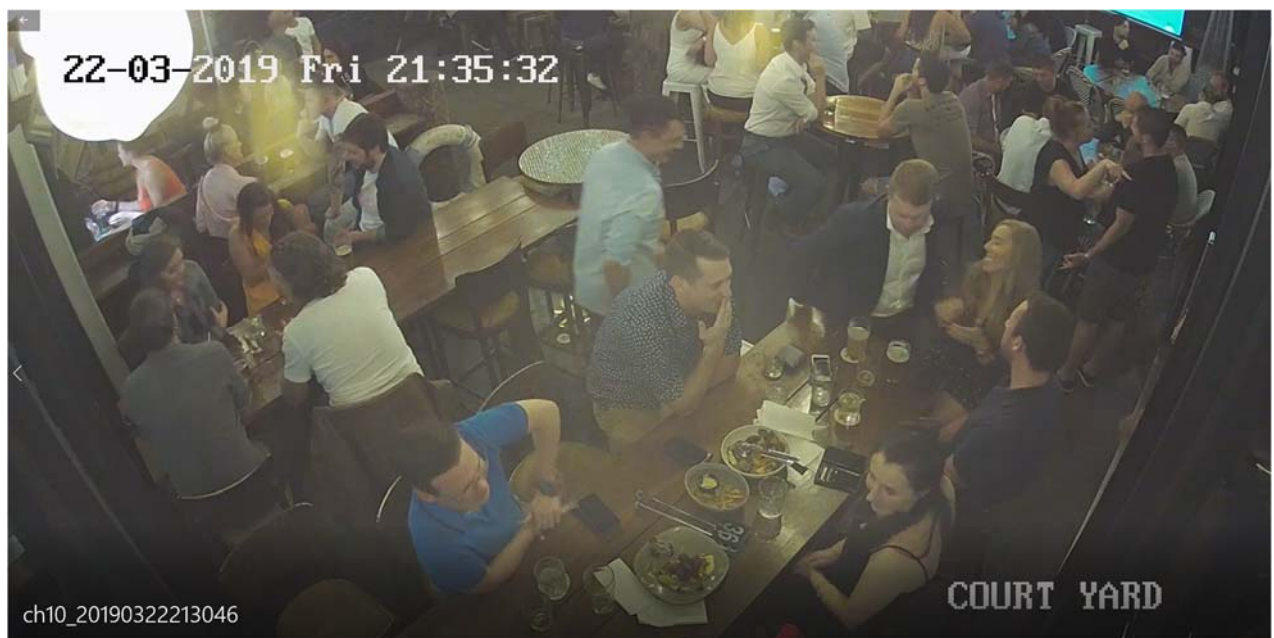
Drink 4 – 20:34:28



Drink 5 – 20:52:40

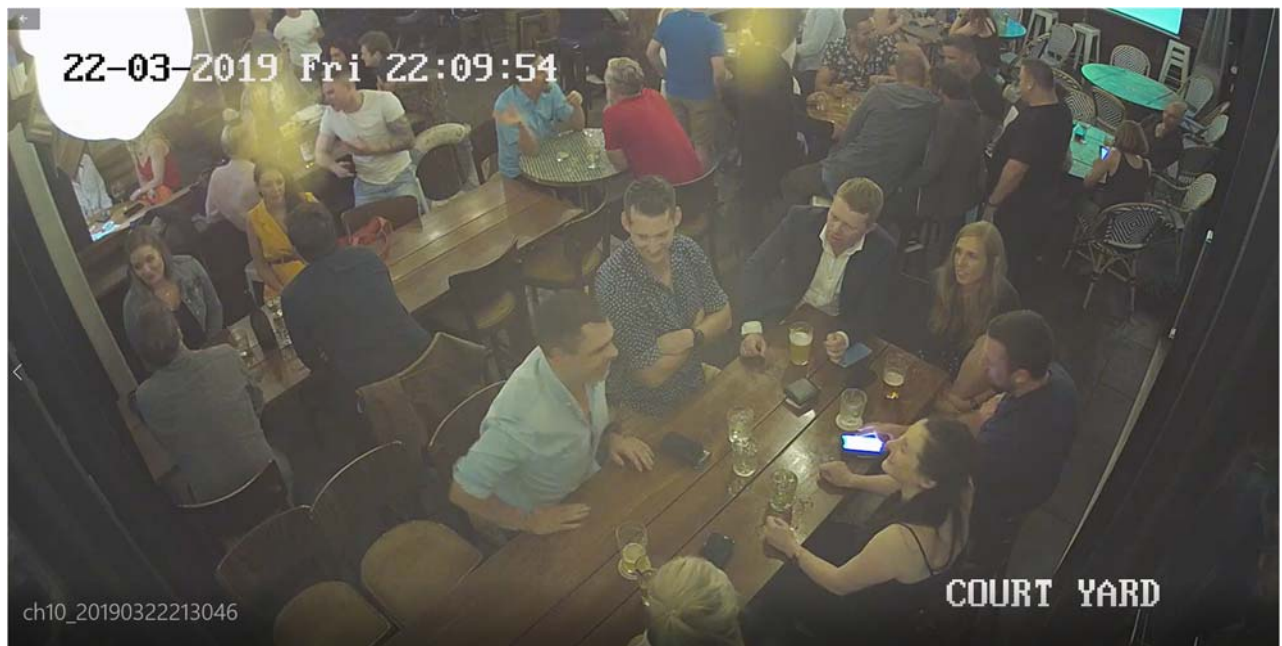


Drink 6 – 21:35:32 (Exhibit R22)





Drink 7 – 22:09:54 (Exhibit R23)



Drink 8 – 22:42:34 (Exhibit R24)



Drink 9 – 23:11:38 (Exhibit R28)



Drink 10 – 23:51:09

