Federal Court of Australia

NSD103/2023

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LTD & Anor

Respondents

APPLICANT'S CLOSING SUBMISSIONS

Reply submissions addressing the First Respondent's closing written submissions (1RS) and the Second Respondent's closing written submissions (2RS) are in single underline;

Further amended submissions responsive to the cross-claim and further questions from the Court are in double underline.

Further Reply submissions in response to submissions filed and served on 28 February 2024 are in single underline in light blue and are at [544A]-[544M]; [548A]-[548C].

Contents

A. GENERAL CREDIT OF WITNESSES

1. This part of the submissions is intended only to highlight some key points about the general credit of the main witnesses. More specific submissions about the credibility of particular pieces of evidence are made in Parts C-G below and elsewhere throughout these submissions.

Bruce Lehrmann

2. It is accepted that Mr Lehrmann's evidence was in a number of respects unsatisfactory, and it would be open to the Court to form an adverse view of his credit. With respect, however, the Respondents' submissions, which went so far as to describe him as a "compulsive liar" significantly and unfairly overstate the acknowledged problems with some aspects of the Applicant's evidence.

3. For example, Mr Lehrmann's evidence about the number of drinks purchased at the Dock or where he was when he replied to his Notice to Show Cause latter were less problematic than it was made out to be, for the reasons developed orally in closing address. Like the other witnesses who attended the Dock that night, it was not just the Applicant who was clearly wrong about various details. These witnesses (like the Applicant) had no reason to retain minute details of this night and it is unrealistic to expect anyone to do so, almost 2 years later.

4. So too it would be unreasonable to expect - in November 2023 – the Applicant to have recall of close details of his response to Senator ~~Minister~~ Reynolds in relation to what clearly was a *fait accompli* termination process that occurred in early April 2019. Whilst much was sought to be made of the fact the Applicant was tied in knots in his evidence about the when, where and whys of his responses to that process, it should not be forgotten that the Applicant was not seeking to stay following his deployment period and was in the process of relocating to Sydney and also visiting his mother in Toowoomba.

5. Exhibit 85A indicates that the Applicant's phone made calls using mobile phone towers in Canberra on 4 and 5 April 2019, in Vincentia (south Coast NSW) on 6 April 2019 and through a tower at "Gatton Campus"- a part of the University of Queensland about 40 km from Toowoomba - on 7 April 2019.

6. His presentation and evidence in these areas was undoubtedly unsatisfactory. He appeared to be trying to work out where Dr Collins was going in his questions and not get caught out on matters that he knew could be objectively established. Each of these were with respect peripheral issues. His evidence in these respects was dissembling, guarded, inconsistent, and lacking credibility. But this does not in and of itself justify a submission that he was a compulsive liar nor that other evidence, such as what happened on his return to APH should automatically be rejected or doubted, particularly when this evidence, could not be described as anything other than consistent and unwavering.

7. The fact his evidence as to Question Time Briefs might appear implausible, does not for that reason alone, render it untrue or fantastic or that of a fantasist. It is not an explanation devoid of objective support. He was speaking that night with various people who themselves were Navy officers and who worked for senior ADF officers within Navy and at the highest levels of the ADF. He was a political advisor who had a role in maintaining Question Time Briefs and there was almost certainly a Question Time Brief in that office on the general issue of the submarine contract.

8. Most of the attacks on the Applicant's evidence were in relation to relatively peripheral issues. The submissions as to the events of 2 March 2019 provide a good example. This again is an event so long ago and so relatively mundane that different individuals might genuinely, and honesty give different accounts of those events. Whether Mr Lehrmann made a comment that he found the objectively attractive Ms Higgins attractive can provide no rational support for the proposition that he may have violently raped her – in their workplace - 3 weeks later.

9. So too, Mr Lehrmann's strident evidence about Ms Gain. The fact the Applicant genuinely took the view that Ms Gain was lying about having seen he and Ms Higgins kissing passionately was not an objectively unreasonable one for him to take in the circumstances known to him. 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.

10. Ms Gain was able to give evidence of a clear recollection that Mr Lehrmann and Ms Higgins engaged in a passionate kiss within 88mph notwithstanding she otherwise could not recall leaving the Dock, could not recall arriving at 88mph, could not recall leaving 88mph, could not recall whether she had anything to drink at 88mph or even how or whether she returned to her own home that evening. That Mr Lehrmann took a strident view that given all that she was not giving honest evidence as to her recollection of the pair kissing does not translate into the submissions that because he took that view, he is necessarily a man without honour whose evidence should and must be wholly rejected in its entirety.

11. On this reasoning, then Ms Higgins extreme and outrageous allegations against Ms Brown and Senator Reynolds must equally expose Ms Higgins' ~~evidncee~~ evidence to a similar fate, Noting the onus the Respondent's carry on justification, if the Court found it could not place any weight on anything Ms Higgins alleged (which indeed is our submission), including any and all of her statements in the nature of complaint to Mr Dilllaway, the Court would have no rational basis to find (pursuant to s140) that any sexual activity, consensual or otherwise occurred. In such circumstances, it inevitably follows that the justification defence must fail.

12. When it comes to matters directly relevant to the facts in issue, Mr Lehrmann was it is submitted consistent and unshaken in his evidence. He maintained that upon entering the office he turned left and did not see Ms Higgins again. He rejected every suggestion that there was any sexual activity with Ms Higgins at all. He said this to police, even at a stage when he had no way of knowing whether any forensic evidence, such as DNA existed which might have proved that he had engaged in sexual activity with her. He

could not have known Ms Higgins had not seen a doctor. He could not have known that Ms Higgins had not retained or provided her dress to police for forensic testing.

13. If Mr Lehrmann had in fact engaged in any sexual activity with Ms Higgins his denial to police was perhaps the most counter intuitive thing he could have done. As the police told him at the commencement of the interview, he did not have to answer their questions and could have said nothing at all. If (as the Respondents posit) he in fact knew he had sex with Ms Higgins (consensual or otherwise), admitting that fact would have been a far more plausible response than an outright denial.

14. The suggestion that Mr Lehrmann may have been advised that by Mr Korn "*Ms Higgins was far to intoxicated to consent to sexual intercourse so don't say that*" does not stand up to scrutiny. Leaving aside the ethical issues with providing such advice, Ms Higgins was asserting publicly she was 10/10 drunk and had to be all but be carried through security. Mr Lehrmann however was there with her at this time and knew she was not so intoxicated as she was publicly asserting. It was hardly a risky thing to have stated consensual sexual activity had taken place if it had. But it was the gamble of his life to assert there had been no sex if in fact he knew that to be wrong and had no idea whether any forensic evidence existed.

15. It might be thought that a person conscious of their guilt, and who was attempting to obfuscate their wrongdoing, would be more likely to have conceded sexual activity took place asserting it was consensual or simply exercising his right not to answer any questions at all.

16. The Respondents also refer to the lies told by Mr Lehrmann on his entry to Parliament House and to Ms Brown. It is submitted the lie told to security to achieve access to the building is of no moment. It cannot rise to a consciousness of future guilt and the explanation for it is entirely rational. It is also in the circumstances a lie that can have no bearing on the assessment of every subsequent statement Mr Lehrmann made, including to police and in his evidence on oath.

17. What is the Court ~~might~~ to make of the statement made to Ms Brown about having returned to Parliament House with Ms Higgins to drink whiskey? If the Court finds this was a lie, it does not follow it is a lie told to deflect from the fact he had sexually assaulted Ms Higgins. Such a statement to Ms Brown – that he had brought his victim

back to the place he raped her and gave her alcohol – to dishonestly deflect from that very fact, is with respect untenable.

18. The more rational explanation is the one given by Mr Lehrmann and in large part corroborated by Ms Brown.: that he lied to deflect Ms Brown from the fact he had spent some time working, in circumstances where Lehrmann perceived Brown would have been very alarmed to hear he had accessed any work at that time when he was leaving and where Brown in fact was concerned and would have been alarmed if had indicated he had accessed any work at that time when he was imminently leaving.

19. A third distinct possibility arises in light of Ms Irvine's evidence (at T1180) that on the walk to the Passport office Ms Higgins told her that she and Lehrmann returned to APH because Bruce wanted to drink his whiskey. If this evidence is accurate, it necessarily undermines the entirety of Ms Higgins narrative that she had no idea she was being taken to APH.

20. It would suggest that Lehrmann and Higgins had both voluntarily returned together, in the circumstances perhaps with mutually amorous motivations. The reliability of this evidence is itself problematic given Ms Irvine's lack of contemporaneous notes and the possibility of subconscious pollution of Ms Irvine's recollection from other information.

21. In our submission, the successful attacks made on Mr Lehrmann's credibility were not such as to render his evidence wholly unable to be given any weight. Mr Lehrmann was a witness in our submission whose evidence on the core matters about what actually occurred within APH remained unshaken and consistent. This perhaps is why the Respondents have sought to rely on inconsistent and unsatisfactory evidence about peripheral matters as a basis to reject all of his evidence.

22. A fact finder (be it a judge or a jury) is of course free to accept a part of a witnesses' evidence and reject other parts of their evidence. In our submission Mr Lehrmann's evidence that he neither raped nor engaged in any sexual activity with Ms Higgins should be accepted.

Brittany Higgins

23. Ms Higgins in contrast was and can properly be described as a fundamentally dishonest witness such that the Court could not act on anything she says without independent corroborative evidence. The Court would conclude that Ms Higgins has lied repeatedly, in multiple forums and despite having legal moral or ethical obligations to tell the truth. She has persisted in asserting lies even when they became untenable. In these proceedings whenever Ms Higgins was challenged, her almost automatic response was to give unresponsive and self-serving speeches about the effects of trauma, or to go on the attack and make further allegations. Her mendacity extends so far and so wide that it is submitted that nothing she asserts could be accepted as reliable in the absence of independent corroborative evidence.

24. This extends to placing any or much weight on many of her "*contemporaneous*" text messages with Dillaway in the days following 23 March 2019. Elsewhere in these submissions we comment on the dangers of placing too much weight on 'complaint' evidence. With respect one cannot simply for example draw a distinction between the dishonesty, manipulation and deception engaged in by Ms Higgins since 2021 and her conduct and statements in 2019.

25. Even the first text messages to Mr Dillaway on 26 March 2019 must be approached with a degree of caution. Firstly, by 26 March 2019 Ms Higgins has had 3-4 days to consider her position. She has reached out to a security guard by text message (subsequently deleted) and has made no disclosures to Dillaway despite specific questions about what she got up to on Friday night.

26. Following the first meeting with Ms Brown on Tuesday and before making any disclosures to Mr Dillaway she sent him a disingenuous message about having already spoken to her father about the incident she is about to discuss and that he was coming down that weekend. Both of those representations were false. She had not discussed any incident with her father by this stage and Matthew Higgins was booked to come to Canberra that weekend before 23 March 2019.

27. We submit that where the person making the disclosures to others relied on as complaint evidence is found to be a totally unreliable witness and a person prone to say untruthful or deliberately manipulative things, little reliance can be placed on those complaints.

28. A sense of the range and nature of Ms Higgins' dishonesty, revealed by the evidence, can be gleaned from the following examples:

(a) Her conduct in asking Ms Brown for a day off to go to a doctor's appointment on 28 March 2019, but never actually going to the doctor: Ex R4 CB56, cb2274.

(b) Her conduct in telling her then partner, Ben Dillaway, that she went to the doctor and had an STI check, when she did no such thing: Tcpt 782.13-24.

(c) Her conduct in telling Federal Agent Thelning she had gone to Phillip Medical Centre and had tests done, and was awaiting results, when this was not true: Ex R77, CB71, page 2333; Ex R885, CB964 p5028.

(d) Her conduct in telling police that she was "falling all over the place" (Ex R884, CB934, page 4688) when the CCTV footage did not support that at all (Ex 17).

(e) Her conduct in telling the police she did not receive any emails from Mr Lehrmann before work on the Monday after the weekend of the incident, when she clearly had (Ex R885, CB964, 5031).

(f) Her conduct in telling police that her Bumble date (Nick) at the Dock left because he was being "ruthlessly" bullied by others in attendance (Ex 40 – p8 of draft Book, Ex R884, CB934, page 4686), when the CCTV footage demonstrates no-one bullied Nick (ruthlessly or at all) and instead shows Ms Higgins left him to go and sit with Mr Lehrmann (Ex 17A and Ex 48).

(g) Her conduct in telling both Detective Frizzell (Tcpt 813.17-18) and the criminal trial (under oath - Ex 71, page 130) that she did not wear the dress she wore on the night of the alleged rape again for months, notwithstanding she was photographed wearing it only weeks later (Ex 40, CB100) and had provided that same photograph to Network 10 on 30 January 2021 (Ex R280).

(h) Her misleading and dishonest claims about lack of forensic analysis of Mr Lehrmann's phone in her speech to the media after the mistrial, when she had been told by detectives during one of her records of interview that they had analysed Mr Lehrmann's phone. See Part G below.

(i) Ms Higgins' draft manuscript, at least the part of it which was admitted into evidence (Ex 40, CB 953), was full of inaccuracies and inconsistencies with her evidence. When challenged on this, her answer was "*That's what the book says, but the book is crap*": Tcpt 743.44. She accepted she was under a contractual obligation to tell the truth in the manuscript: Tcpt 735.29-34.

(j) Her evidence in this proceeding about having a panic attack and missing the start of Steve Ciobo's valedictory speech (T676 L16-L28; T715 L28-32; T717 L1-4; T723 L43-T725 L7).

(k) Her evidence that she was suicidal and lonely in Western Australia (T682 L26-33) when pages of text messages during the period to Mr Dillaway are inconsistent with those claims: see CB15 pages 1086, 1089, 1109, 1145, 1146, 1171, 1185, 1198, 1216.

(l) Her evidence the Commonwealth "came to an agreement that a failure of a duty of care was made" (T1025 28-29) when the Deed clearly says no admission of liability (see page 5 Letter J of Ex 59).

29. One significant matter on which Ms Higgins' version of events was utterly implausible was the bruise photograph: Ex 44, CB244. The photograph is dubious on its face because it quite clearly shows a bruise on her right leg, whereas she told the criminal trial that Mr Lehrmann had crushed her *left* leg in the alleged rape: Ex 71 pages 128-129. Her various explanations for why she had lost other data from her phone (the government hacking her phone), and for how this photograph had somehow survived the loss of all that other data, were, however, simply nonsensical. It is the Applicant 's contention that this photograph was taken by Ms Higgins well after the events of March 2019, perhaps as late as January 2021 and dishonestly represented as contemporaneous corroborative evidence of the rape allegation against Mr Lehrmann. This is developed in more detail in Part K.3 below.

30. The only plausible conclusion to be drawn from that most unsatisfactory morass of evidence is that the photograph was not a contemporaneous record of an injury left by the alleged rape. That is supported by the fact that the earliest record of the photograph – or indeed of any reference to a bruise is in 2021. There has never been an original photograph which has prevented scrutiny of the metadata, which would have shown

when the photograph was taken.

31. The bruise photograph always was a matter of considerable significance because Ms Higgins put it forward as tangible evidence corroborating her claims – a visible mark left on her body by the alleged rape. This is how it was deployed during the Programme, and with some prominence. The Respondents were fully cognizant of the significance of the photo as corroborative evidence, as explained in Part K.3 below. It was also deployed in Mr Lehrmann's criminal trial where Ms Higgins asserted under oath, at least until it became clear that her assertions were unravelling, that it was a photograph of an injury sustained by her during Mr Lehrmann's sexual assault upon her. A conclusion that the photograph was recently created must be utterly destructive of her credit. It amounts to the fabrication of corroborative evidence in order to bolster her claims.

32. That Ms Higgins evidence has been so discredited, and she has been shown to be so manipulative that the Court cannot safely rely on anything she has said – even, we submit in contemporaneous text messages. From her second or third message post the meeting with Ms Brown on the Tuesday, she has acted deceptively and engaged in manipulation. She had not as she told Dillaway, spoken to her father and arranged for him to come down that weekend.

33. That Ms Higgins has at times admitted her duplicity also hardly is to her credit. It is submitted that if the Court finds it is unable to safely act on the uncorroborated evidence of either Higgins or Lehrmann then there can be no findings made to the requisite standard as to what actually occurred within Suite M1.23 in the early hours of Saturday 23 March 2019.

Additional Analysis – Brittany Higgins' out of court representations

33A. This additional section focuses attention on two categories of out of court representations made by Ms Higgins, namely those within the Commonwealth **Deed** between the Commonwealth of Australia and Ms Higgins (Ex 59) and Ms Higgins' evidence during the criminal trial; *R v Lehrmann* (Ex 71). It is plain that Ms Higgins would have understood the solemnity of her position in both instances.

33B. When entering into the **Deed**, where a significant settlement sum was being paid to Ms Higgins by the taxpayers of Australia, Ms Higgins warranted to the Commonwealth that

the "matters referred to in [the] deed are true and correct", that that warranty was made with the intention of inducing the Commonwealth to enter into the deed, and that she was aware the Commonwealth was relying on that warranty (Clause 7, Deed, Ex 59, page 11).

33C. The following tabular analysis provides a comparison between the core "matters referred to in the deed" as detailed in Attachment 2 "Events Complained About", which Ms Higgins' warranted were true and correct, and Ms Higgins' evidence, and other evidence, in this proceeding. It should be noted however that in many places throughout these submissions it has been shown that Ms Higgins evidence in this proceeding on multiple elements of the allegation is itself contradicted by other out of court representations made, such as to the Project during the two sit down interviews (Ex 36 and Ex 37), or representations in Ms Higgins' book (Ex. 49), or representations made to Ms Maiden (Ex 50).

Clauses of Attachment 2 to Deed – "Events Complained About'	**Representations by Ms Higgins contained in Deed which Ms Higgins warranted was true and correct**	**Ms Higgin's, and other, evidence in this proceeding.**
Clause 3.4	That Mr Lehrmann got into Ms Higgins' taxi without invitation or agreement with Ms Higgins: "*Without invitation or agreement with the claimant, Mr Lehrmann also got into the taxi and stated that they could share the taxi ride home as he lived in the same direction as the Claimant*".	Ms Higgins' evidence was: "*And I don't know who specifically said it, or how it was worded, but it was, "You and Bruce live in the same direction. You go together."* *So do you have a recollection of someone saying words to that effect?---I do.* *Okay?---But I'm not sure who it was.* *All right. But does it follow from your answer it wasn't Mr Lehrmann, it was one of the others?---It could have been Mr Lehrmann, I – I – I'm not sure. It was just a – I was told we lived in the same direction, and so at that point, I was so compliant, I said great. Sure. I will share a cab.*

		*Do you have a recollection of saying those words?---**I agreed.** I don't know if I said great or how I expressed it, but I agreed and I got in the cab or Uber, sorry. Ride share.*" [T621 L26 – 41] [Emphasis added]
Clause 3.5	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: "*Without invitation or agreement with the Claimant, Mr Lehrmann then directed the taxi to stop at Parliament house alleging that he wanted to retrieve something from his office*" (see Clause 3.5 of ECA)	Ms Higgins' evidence was: *"Q: So now we know you go to Parliament House, doing the best you can, how did you come to be in the car going to Parliament House?---Yes. At some point in the ride, I think it was pretty early, I remember Mr Lehrmann saying something to the effect of, "I have to just pick something up from work". And I didn't have all my wits about me to question it or to be curious about what he needed at work at whatever time in the morning it was. He just said he had to stop in, and so I was drunk, I wasn't really thinking about it, and **I just went went along with it. I – I didn't even have a second thought about it. It was just, "Okay, yes, you go to work."*** [T621 L43-T622 L7] [Emphasis added]
Clause 3.6	That Mr Lehrmann directed Ms Higgins to get out of the taxi and go with him into Parliament House without invitation or agreement with Ms Higgins: "*However, on arrival at Parliament House without advising or obtaining the agreement of the Claimant, Mr Lehrmann paid the taxi fare and then directed the Claimant to get out of the taxi and go with him into Parliament House*"	Ms Higgins as follows: "Q: *Do you have a recollection of why you got out of the car as opposed to staying in the car?---I don't know. I don't know if it was an Uber and it only had one destination that I had to get out or I don't know if, just because he got out, I thought I had to, because we were – **he was going to pick something up from work and so it was – or – I don't know. I don't know why, but when it stopped, I got out too**. I don't know why….* *And doing the best you can, what were the words he used?---He – he*

		never specified in the taxi or the Uber, sorry. He was never specific about what he was picking up at the time. He obviously has said something different into the intercom, so I was under the impression – I have no idea what he was picking up." [T622 L17-22 – 41-44] [Emphasis added]
Clause 3.9	That Mr Lehrmann led the Claimant to the Ministerial Suite of Minister Reynolds: "*Mr Lehrmann led the Claimant to the Ministerial Suite of Minister Reynolds*"	Video evidence tendered in this proceeding does not substantiate this claim. See Exhibit 17 (namely the video at FRT.001.00000015), being CCTV footage entry to Parliament House, which from .010 does not show Mr Lehrmann 'leading' Ms Higgins. In fact, the footage shows Ms Higgins being in front of Mr Lehrmann.
Clause 4.1	That Ms Higgins and Mr Lehrmann did not communicate on Monday 25 March 2019: "*On Monday 25 March 2019, the Claimant attended work at Parliament House, as did Mr Lehrmann. They did not communicate*"	Ms Higgins', and documentary evidence, establishes: a) they had coffee and exchanged words - see T637 L34-46, T638 L1-3; b) Ms Higgins and Mr Lehrmann exchanged emails on that day – see Exhibit 21.
Clause 4.4	That Ms Higgins during her meeting with Ms Brown on 26 March 2019 (the **First Meeting**) told her that Mr Lehrmann had sexually assaulted her: "*Ms Brown then spoke to the Claimant. The Claimant understood from Ms Brown that she wanted to discuss the events of 22/23 March 2019. The Claimant recounted to Ms Brown her recollection of the events, including that Mr Lehrmann had sexually assaulted her*".	Evidence in this proceeding establishes this to be false: See paragraph 64 of the affidavit of Ms Brown sworn 15 December 2023. See also evidence of Ms Brown at T2058 L37-40, T2060 L24-25, T2067 L5
Clause 4.5	That Ms Brown during the First Meeting confirmed that Mr	The evidence in this proceeding is: Ms Higgins' evidence was that Ms Brown had *"said that Bruce said*

	Lehrmann said that he had not been drinking that evening: "*Ms Brown confirmed that … Mr Lehrmann said that he had not been drinking that evening".*	*he had come back to the office for whisky"* (see T644 L6). Also see T644 L17, T653 L45 and T982 L28). According to Ms Brown's own evidence, Mr Lehrmann in fact told her that he had been drinking – see paragraph 42 of the affidavit of Ms Brown sworn 15 December 2023, and evidence of Mr Lehrmann at T333 L3-16.
Clause 4.12	That Ms Higgins asked Ms Brown several times if she could view the CCTV footage from 22/23 March 2019 but Ms Brown rebuffed her requests: "*The Claimant asked Ms Brown several times if she could view the CCTV footage from 22/23 March 2019 but Ms Brown rebuffed her requests*".	It was false for Ms Higgins to represent that she asked Ms Brown several times if she could view the CCTV footage from 22/23 March 2019 but Ms Brown rebuffed her requests. On this point Ms Brown's evidence is that this claim is not true: See paragraph 157 of the affidavit of Ms Brown sworn 15 December 2023 and the evidence of Ms Brown at T2119 L30-38 and T2136 L21-34. At T669 L35-38 Ms Higgins' evidence in this proceeding was simply that Ms Brown "rebuffed" the request to see the CCTV footage. When asked whether Ms Higgins recollected what words Ms Brown used Ms Higgins was unable to recollect any words used (T669 L38). Earlier Ms Higgins had emphasised the importance of this aspect of the conversation - "this one really small thing that I, I needed just personally for myself to process…it really upset me" [L89-93 Transcript of the Project, Sch. A to the SOC]).
Clause 4.22	That, at or about 11 April 2019, Ms Brown said it was Ms Higgins' problem to deal with the issue of sick leave for her mental health and also needing time off work to assist the AFP in its investigation:	Evidence in this proceeding establishes that this claim is not truthful. See paragraph 204(j) of Ms Brown's affidavit sworn 15 December 2023 where Ms Brown states that it would not be possible that this took

	"*At or about that time [being 11 April 2019], the Claimant raised with Ms Brown the issue of sick leave for her mental health and also needed time off work to assist the AFP in its investigation. Ms Brown demonstrated an unwillingness to discuss the issue and made it clear to the Claimant that it was her problem to deal with*".	place as Ms Brown was no longer an active Chief of Staff at that time. In short, Ms Brown would not be the person who Ms Higgins would talk to about this, let alone the unbelievable aspect of the supposed response to such a request for help with sick leave due to mental health issues. Even Ms Higgins' own evidence in this proceeding was that after the conversation about going to the Gold Coast to work (which Ms Higgins said was on 3 April [T671 L28-31]) Ms Brown "just disappeared. She left." [T1033 L39]. Also, at T681 L6 Ms Higgins' evidence was that by 5 April 2019 Ms Brown had "stopped being our acting chief of staff". Further, at no stage did Ms Higgins articulate such conduct in her evidence (see e.g. T678-T682 covering this period of time in Ms Higgins' evidence in chief) and neither was Ms Brown cross-examined on this.
Clause 4.24	That Ms Brown made it clear by her words and demeanour that the events of 22/23 March 2019 must be put to one side, and that Ms Higgins ought remain silent about the sexual assault, in order to keep her job/career: "*Ms Brown made it clear by her words and demeanour that the events of 22/23 March 2019 must be put to one side; that the Claimant ought remain silent about the sexual assault, in order to keep her job/career*".	Evidence in this proceeding establishes that this claim is not truthful. See paragraph 192 of Ms Brown's affidavit sworn 15 December 2023. See also Applicant's Closing Submissions at paragraphs 414-420. Further, at no stage could Ms Higgins articulate such a representation whilst she was giving evidence in response to questions from his Honour: Q: "*So dealing first with Fiona Brown. I just want to – I've heard what you said about your feelings and what you inferred, but I just want to understand what actually did she say to you or what actually did she do which you said put up a roadblock or obstructed you?---Of*

		course. So the – the first major thing that really made me first doubt Fiona Brown was the difference of account between what Chris Payne knew and what she knew and what she was forthcoming and telling me, and that was the first time that I questioned Fiona Brown, because initially I really trusted what she was saying. *So what is it that she said? That's what I want you to focus on: what she said - - -?---Yes.* *- - - or what she did, not what you took from things - - -?---Of course.* *- - - okay, because you've given a lot of evidence about what you felt?---Yes.* *I want to know what she said or what she did which you said amounted to an obstruction so you had to choose between your career and making a complaint to the police?---Yes. So - - -* *Specifically?---Yes. So she said that she didn't know about – she – she – okay. She – she said – she said that she didn't know certain things, or, like, she said that I had been found or was drunk or something, and then when I spoke to Chris Payne, I found out I had been found naked, and that was information she had that I didn't have. So she knew something and she was pretending like she had never heard or hadn't even considered a fact sexual assault could occur, and then, all of a sudden.* *these other people were coming to me telling me things that Fiona Brown obviously knew this, and yet - - -* *So it was her fact of saying she didn't know something?---Yes.*

		Okay?---And that was the thing that first created doubt - - - *All right?--- - - - and first mistrust and broke down in the relationship.* *All right. So what was the next thing that she did?---The next thing was the meeting in the office where the rape took place. It was the fact that they said if you go to the police, can you let us know, but it was done in a way where I felt threatened.* *Don't worry about what you felt?---Of course.* *I'm just asking you what they said or what they did?---Yes. And then - - -* *So it said – they said if you go to the – so the next thing was, "If you go to the police, let us know"?---Yes.* *Right?---And it was framed in the context – it made reference to the election.* *What was said?---I can't specifically remember the wording.* *Right?---But it was framed in the context that it – it was pertinent because of the election.* *But you can't recall what was said about that?---Not – not the exact wording.* *Yes. Anything else?---The next thing was she asked about whether I could go to the Gold Coast, get paid out, and then I wouldn't return to work, and that was what I perceived to be - - -* *Don't worry about what you perceived?---Of course.*

		That's the next thing?---She told me I could go to the Gold Coast and be paid out, but I wouldn't come back. *Yes. Anything else?---Then she just disappeared. She left."* [T1032 L21 – T1033 L39]
Clause 4.28	That Senator Reynolds did not engage with Ms Higgins at all during the election campaign. She avoided Ms Higgins and made clear that she did not want Ms Higgins attending events with her: "*Senator Reynolds did not engage with the Claimant at all during the election campaign. She avoided the Claimant and made clear that she did not want the Claimant attending events with her*".	Again, this representation is false. See Applicant's Closing Submissions at paragraphs 414-420. See also Exhibit 40, being a photograph of Ms Higgins with Senator Reynolds and her staff. In Ms Higgins' evidence she tried to explain the photograph away as her being "accidentally" sitting next to Reynolds because she was one of the last seated at the table (T816 L28-30). That is fanciful. Not least because it implies there was an active situation where people were trying to avoid sitting near Senator Reynolds, a 'mood' which Mr Wotton, who was also there, was not aware of if it existed (see T1094 L8-11).

33D. With respect to Ms Higgins' representations made during Mr Lehrmann's **criminal trial** under oath, the importance of truthfulness is reflected in the potential consequences of a criminal prosecution. The significance of untruthfulness in that scenario does not relate to a financial gain for the person making the representations (as with the Deed) but rather could lead to the most severe possible consequences that could be visited on another person, namely one's loss of liberty.

33E. Similarly to the above, the following tabular analysis provides a comparison between just two of the core representations made by Ms Higgins during the criminal trial (the bruise and the dress) and Ms Higgins' evidence, and other evidence, in this proceeding and even in the criminal proceeding. Again, as noted throughout these submissions, these representations traverse elements which have been contradicted multiple times by other out of court representations made by Ms Higgins.

Number	**Representations by Ms Higgins during the ACT criminal proceedings** **(Transcript references (Ex71, CB 1123))**	**Ms Higgin's, and other, evidence in this proceeding establishing the falsity of the representation**
1.	That the bruise photograph (Ex 44, CB244) showed a bruise on Ms Higgins' left leg that arose during her alleged sexual assault: "*MR DRUMGOLD: Now I am going to show you a photo. Now what are we looking at there?---My outside leg, my left leg. Your outside left leg?---Yes, I believe so*." [Ex71, T128 L40-43]	Firstly, this representation was contradicted by further evidence in the criminal proceeding: *HER HONOUR: Mr Prosecutor, could you just clarify, it is not clear to me and it might not be clear to the jury, whether what is shown is the inside of the thigh or the outside because the outside then the photograph, if it is the left leg, is in mirror.* *MR DRUMGOLD: Yes.* *HER HONOUR: If it is the inside, then it makes sense.* *MR DRUMGOLD: Can we perhaps clarify, is that the outside or the inside of your leg?---if I was laying down it would have been –* *...* *MR DRUMGOLD: Perhaps it would - if I could ask the witness to stand and show on her leg where that bruise is, where that mark is.* *HER HONOUR: Yes. Ms Higgins, you do not have to show your leg just on your clothing if you wouldn't mind, please?---Okay. Yes, of course. It looks like in that photo that it's taken on this leg but when I was assaulted I was pinned down on this leg so it looks like the bruise is more so on this side than this side. Are you accepting that that photograph shows your right leg?---It does. It shows that leg, yes. MR DRUMGOLD: Do you know when you sustained that bruise?---1 assume during the course of the assault.* [Ex71, T129 L14 – 40].

		Secondly, the evidence in this proceeding was that the bruise depicted in the photograph may have instead been caused by a fall: *Okay. And where did you graze it?---My leg. The – the one with the bruise, when I fell up the stairs, I assume.* *Sorry, could you say that again?---When I fell up the stairs, I assume.* *You just mentioned the bruise. Is that how you believe you sustained the bruise, was falling up the stairs at 88mph?---It's either during the rape or falling up the stairs. I've had to accept that both could be true, because I cannot definitively say whether it was during the rape or falling that caused the bruise. I've had to accept that.* (T769 L19 – 29) and Q*: But that's what you did say in the criminal trial?---I know. And I had to accept, after cross-examination by you that I couldn't definitely say that I knew what caused the bruise. I knew what I thought caused the bruise, but I had to accept I did fall over the – fall up the stairs and, therefore, it is possible that it was caused by falling up the stairs.* *You didn't make that concession at the criminal trial, did you?---I – I don't recall exactly. I was pretty traumatised during that period.* *You maintained, throughout the entire proceedings, that that was a photograph of a bruise caused by Mr Lehrmann sexually assaulting you, didn't you?---It's what I*

		believed at the time, but I obviously, as a person, have to accept that I did fall up – I did fall over that exact night and so, therefore, it is possible that the bruise was caused by falling and not the rape. I just, because the rape occurred, thought that it was because of him, because I was in pain, but just because I was in pain when he was raping me doesn't mean that that was what caused the bruise, and so that's where I've had to – that's where I - - - *But that's precisely what you told The Project?---That's what I believed at the time.* *That's what you told the jury in the criminal proceedings?---That's what I believed at the time.* *And you did not recant from that evidence at all in the criminal trial?---Until it was put to me that I didn't – I couldn't definitely say that it was just from the rape, the bruise. It was – it was when it put to me that it could have been from the fall, and then I thought about it and went, that's true, it could have been from the fall, so I just had to accept that as fact – or not fact, but I've had to accept that as a possibility.* [T863 L8-35) Thirdly, the issues with this representation (and the broader issues of dishonesty by Ms Higgins it entails) are also covered throughout these submissions and especially at paragraphs [378-382].
2.	That the bruise photograph (Ex 44,CB244) was taken around five days after the alleged assault, namely on 27-28 March 2019:	During this proceeding a number of pieces of evidence established that the date of the photograph was a speculation at best.

	Q: When did you take that photo?---lt was the week of budget which was a week after the assault. *If this night was Saturday, the 23rd - the early hours of Saturday, 23 March ---?---Yes.* *--- the next week started 25 March to 29 March. Is that the week you are talking about?---1 believe so, yes. I just remember it being the day before budget and I took a photo because it was still there and I - yes. Do you - what sort of - well let me ask it this way, are you in a position to estimate how many days after the 23rd of - well, including 23 March how many days after that?---lt would be around five. Around five days*. [Ex71, T128 L45 – T129 L10]	See Applicant's closing submissions at paragraph [378 (in particular 380(d))-382]. The variations range from a couple of days later, to around five days later, to 3 April 2019 (11 days later). Also, there was no proof the photograph existed at all before January 2021.
3.	That the dress she wore on the night of the alleged sexual assault was kept under her bed for a good six months: *MR DRUMGOLD: Now, between when you wore it in the early hours of 23 March 2019 and some two years later when you handed it over to police, what happened with the dress during that period?---* *I kept it under my bed in a plastic bag for a good six months, untouched, uncleaned; I just had it there And I felt - I wasn't sure because of all the party political stuff whether or not - how I could proceed or if I could proceed without losing my job and so I kept it there. It was like this weird anchor for me. And then once it was very clear that I couldn't proceed and maintain my career, I very symbolically washed the dress and I wore it once more, and then I've never worn it since.*	The evidence in this proceeding establishes this representation to be false. See Exhibit 40, being a photograph taken on 16 May 2019 (well within the "good six months" timeframe) of Ms Higgins wearing the dress whilst with Senator Reynolds and her staff. See also T813 L35-43). See also evidence of Ms Higgins in criminal proceedings arising as follows: Q*: And I want to suggest to you this photograph was taken on 15 May 2018 at the Pan Pacific Hotel. HER HONOUR: 2019? MR WHYBROW: I apologise, 2019, thank you, your Honour, Pan Pacific Hotel in Perth. Do you remember that photograph being taken?---I do. Do you remember that night?---I do, yes. Do you remember making some comments to Ms Wilkinson about how nobody wanted to sit next to Linda Reynolds and you were the last person there and that's how you ended up sitting there?---Yes, that's*

	Until you handed it over to the police?---That's correct. *Yes, thank you. Now, I am going to show you some text messages.* [Ex71, T130 L44 – T131 L7; see also Ex71, T173 L42-43].	*correct. Okay and you're wearing the same dress, aren't you?---Yes, I am. That was the dinner I was referring to before but clearly the amount of time I alluded to that had passed between it being under my bed and it being worn was shorter than I originally remembered but that's the dinner I was referring to, the Liberal Party function.* [Ex71, T174 L33 – T175 L4] [see also Ex71, T175L33 – T176 L46]

33F. The foregoing analysis of the Deed and of the evidence given by Ms Higgins in the criminal trial leads suggests Ms Higgins' had a preparedness to tell lies, including elaborate lies, on the most solemn of occasions. In the case of the Deed, this involved payment of a settlement sum to her that was life changing. In the case of the criminal trial it was the prospect of securing a guilty verdict against the man that she had earlier accused of rape in the most public of forums. Ms Higgins' obsession with securing a vindication through the Courts of her allegations against Mr Lehrmann is borne out by the condition stipulated to the first respondent that, for Ms Higgins' assistance to the first respondent in this proceeding, no offer must be made to Mr Lehrmann of "a payment of damages or a retraction of the defamatory statements or an apology or costs (or any other relief) to settle the civil claims commenced by Lehrmann" (see email from Mr Zwier to Ms Saunders 7 March 2023, Ex X1 page 1172). That is an extraordinary position for a witness to take.

33G. No confidence can be placed in Ms Higgins' understanding of her obligation to tell the truth under oath or on the most solemn of occasions. The Court would reject Ms Higgins' evidence in its entirety unless corroborated by other independent evidence or contemporaneous documents.

Angus Llewellyn

34. Mr Llewellyn was an unimpressive witness who made non-responsive speeches and struggled to give answers to questions. The Court should not accept his evidence unless it is corroborated by documents or other witnesses, not including Ms Wilkinson.

35. One example is Mr Lewellyn's evidence about the reason for not sending out a request for comment to Mr Lehrmann sooner than the Friday before the Programme aired on

the Monday. The witness agreed with Mr Bendall's evidence (Affidavit of Christopher Bendall (28.07.2023) at [88]) that the desire to protect the exclusivity of the story was a reason for implementing strict confidentiality controls and processes around the story: Tcpt 1620.11-26. He then sought to deny that commercial considerations, namely the desire to protect the exclusive, were the reason (or apparently even a reason) why the request went out so late: Tcpt 1620.28-1621.40. He was unable to offer any sensible explanation for why the request went out so late, beyond that the requests went out when they were ready, and he considered it a "*super reasonable*" amount of time: Tcpt 1620.33, 1621.9, 1621.36.

36. Another example is his evidence concerning Mr Sharaz. The witness was taken to evidence that at the 27 January 2021 meeting, Mr Sharaz described a plan to liaise with the Labor Senator Katy Gallagher to attack the Government during Question Time: CB tab 1114, page 6159; Tcpt 1629. It was put to him that he knew that Mr Sharaz intended to assist the then Opposition to pursue the issue in Parliament, and his response was "*Maybe*". The Court asked if that was a serious answer, and the response was "*Well he doesn't say that he's going to*". At Tcpt 1631, Mr Llewellyn clarified his position to say that he did not know whether Mr Sharaz would go through with this plan, before saying "*I didn't think he [Sharaz] had a political agenda*". This cannot be regarded as honest evidence. Viewed as a whole, the only available conclusions are that he was either dissembling about his awareness of the political motivations, or his state of mind was so unreasonable that reliance cannot be placed on his evidence.

37. In the context of cross-examination about the steps he took to seek comment from Mr Lehrmann, the witness was asked at Tcpt 1631.40-48 about a message to him from Mr Sharaz (CB:B tab 236, page 2987) which read, "*Hi, LinkedIn doesn't have the first employer listed anymore, but they can tell you where he went*". He was asked whether he understood that to mean that "*if you want to find out what his current job is, you should go to his previous employer*." The answer was "*I don't know*". He then gave an answer at Tcpt 1632.3-16 to the effect that when Mr Sharaz said "*Linkedin doesn't have the first employer listed any more, but they can tell you where he went*", he was confused as to what "*they*" meant and that this was "*a bit nonsensical*". Once again, the evidence is either dishonest or indicative of the fact that Mr Llewellyn's state of mind is so peculiarly unreasonable that no weight can be placed on his evidence.

38. Mr Llewellyn also repeatedly gave evidence that he believed Mr Lehrmann's LinkedIn

account to be inactive in 2021: Tcpt 1623-1624. That evidence cannot sit with the warning he gave to members of the team in his email of 25 January 2021, asking them to avoid clicking on the LinkedIn profile if their accounts were not switched to private: CB:B tab 201, page 2914. Against the evidence that Mr Llewellyn was worried about Mr Lehrmann receiving a notification through LinkedIn that journalists and producers from *The Project* were looking at his profile ("*something we clearly wish to avoid*"), his insistence that he thought the profile was inactive can only be regarded as an ex post facto explanation for the fact he did not take the obvious and easy step of reaching out to Mr Lehrmann for comment through LinkedIn.

39. Mr Llewellyn's evidence as to the meanings conveyed by the Programme and whether it conveyed that Ms Higgins would not be supported if she went to police, as it plainly did, was also repeatedly evasive. See for example Tcpt 1574.1-46.

Lisa Wilkinson

40. During her evidence, Ms Wilkinson manifested such an unreasonable state of mind concerning the Programme that the Court would have reservations about placing much reliance on her evidence.

41. For example, she believed that aspects of the Programme showed Fiona Brown as caring, and that it presented conversations where Ms Higgins was complementary about Ms Brown and Senator Reynolds: Tcpt 1775.1-8. That evidence can only be described as nonsense. Likewise her belief that the Programme conveyed to viewers that Ms Higgins was putting pressure on herself not to go to the police, rather than alleging that she was experiencing such pressure from Ms Brown and Senator Reynolds. On any reasonable reading of lines 2, 75-86, 99-103 and 109-135 of the Programme, that interpretation is not just untenable, but fanciful and ridiculous.

42. Also critical on the question of credit was the belief Ms Wilkinson had developed that Ms Brown and Senator Reynolds were part of a wicked systematic cover-up: see Tcpt 1777.1-24. There was simply no evidence before her to justify such an extreme belief, and it speaks poorly of Ms Wilkinson's objectivity and insight that she took that view and apparently still holds it no (noting her use of the present tense at Tcpt 1777.10-15, despite the cross-examiner's use of the past tense). The witness's insistence at Tcpt 1770.26-1771.8 that the mere fact that senior staffers from the Prime Minister's Office had met with Senator Reynolds in her office pointed to sinister dealings ("*I know how*

politics works" – Tcpt 1771.5) also points to a febrile journalistic state of mind, which would not give the Court confidence in relying on any of her evidence.

43. Ms Wilkinson also stood by the evidence in her affidavit at [110] to the effect that every single piece of new information which came to her attention prior to the broadcast corroborated Ms Higgins' version of events as relayed to her on 27 January 2021 and 2 February 2021: Tcpt 1724.14-25. That was a remarkable assertion in circumstances where, for example, Ms Wilkinson definitely read Mr Carswell's written response, which referred to the support offered to Ms Higgins and the assurance there would be no impact on her career: Tcpt 1866. To say that evidence corroborated Ms Higgins' account is sufficiently contrary to common and ordinary understanding as to establish that Ms Wilkinson's evidence is thoroughly unreliable. The same goes for the material received from the ACT Police and the DPS, although in her oral evidence, Ms Wilkinson was most unsure whether that information had come to her at all (see Tcpt 1883-1886), despite saying in her affidavit at [125] that she was kept informed of the responses arriving by Mr Llewellyn.

44. Another matter of significance is Ms Wilkinson's insistence that Mr Llewellyn told her at some point that the reason for the loss of data from Ms Higgins' phone related to transfers from multiple mobiles. This was never documented, and it was completely contrary to what Ms Higgins actually said on 27 January and 2 February 2023. This point is developed in the reasonableness submissions.

45. One aspect of Ms Wilkinson's evidence which warrants particular comment was her propensity to explain her own conduct by asserting that she relied on Mr Llewellyn or onto other Network Ten employees.

46. The point of this stance, as alluded to in her written opening submissions (CB:D tab 1106, pages 6001-6002), was presumably that she was part of a team and as such, she had to take on board her colleagues' views and was entitled to rely on the work her colleagues did on the story. While that is certainly true at one level, the fact is that she was a senior journalist. She was pleased to emphasise the extent of her experience in her affidavit, and made a point of the fact that she was made a Member of the Order of Australia for services to broadcast and print journalist. As such, she also had a responsibility to exercise independent judgment in relation to a publication which she herself was at the forefront of creating, and to satisfy herself that the manner in which the Programme was prepared and published was reasonable: see Russell v Australian

Broadcasting Corporation (No. 3) [2023] FCA 1223 at [395]. Aside from the fact that it is not an answer to the attack on the reasonableness of her conduct, this propensity on Ms Wilkinson's part says something of her attitude. It bespeaks a desire to minimise her own responsibility, which again, would give the Court reservations about placing reliance on her evidence.

B. FACT-FINDING PRINCIPLES

47. While there is but one standard of proof in all civil cases – the balance of probabilities – the application of that standard is context-sensitive. Whether the Court is reasonably satisfied or actually persuaded of the existence of a fact in issue on the balance of probabilities in any particular case will depend on (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: *Evidence Act 1995* (Cth) s 140(2). As the High Court has recently stated, this statutory rule reflects the common law position that the gravity of the fact sought to be proved is relevant to "*the degree of persuasion of the mind according to the balance of probabilities*": *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32 at [57] per Kiefel CJ, Gageler and Jagot JJ.

48. As explained in *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission* (2007) 162 FCR 466 at [30] per Weinberg, Bennett and Rares JJ, the more serious the consequences of what is in issue, the more a court will have regard to the strength and weakness of evidence before it in coming to a conclusion.

49. In *Transport Workers' Union of Australia v Qantas Airways Ltd* (2021) 308 IR 244 at [284], the Court summarised some of the fundamental common law principles relating to fact-finding in the following way:

> As Sir Owen Dixon emphasised, when the law requires proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found (*Briginshaw v Briginshaw* at 361). He also explained that a party bearing the onus will not succeed unless the whole of the evidence establishes a reasonable satisfaction on the preponderance of probabilities such as to sustain the relevant issue (*Axon v Axon* (1937) 59 CLR 395 at 403); and "the facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied": *Jones v Dunkel* (1959) 101 CLR 298 at 305.

That summary, with respect, encapsulates the principles which the Court should apply to the fact-finding task in this proceeding. The following should be noted by way of expansion on the three points summarised above.

50. The meaning of "*actual persuasion*" is explained in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-363 per Dixon J. Actual persuasion is not the product of a merely mechanical comparison of the probabilities. As his Honour said at 362:

> [R]easonable 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 the 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. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

When a question arises in a civil proceeding as to whether a crime has been committed, the standard of proof is the same as for any other civil issue, but weight should be given to the presumption of innocence and exactness of proof should be expected: at 363.

51. An instance of the application of these principles in a defamation case in relation to the defence of justification is *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219 at 226 per Mahoney JA:

> In approaching this question it is, as the plaintiff urged, proper at the outset to bear in mind the gravity of what is alleged against the plaintiff and, correspondingly, the nature of the proofs required to establish it. … The allegations and their consequences are very serious. If the plaintiff was a principal in the fraud, he was guilty of both a civil fraud and of a crime of some seriousness. The process of decision does not involve a "mere mechanical comparison of probabilities, independent of any belief in" the truth of the matters in issue; "the tribunal must feel an actual persuasion of its occurrence or existence" [citing *Briginshaw* at 361]. In matters of such gravity, the plaintiff urged, "the *Briginshaw* test" applies: "reasonable satisfaction should not be produced by inexact proof, indefinite testimony or indirect inferences" [citing *Briginshaw* at 361-362].

This passage was recently cited and followed in *Roberts-Smith v Fairfax Media Publications Pty Ltd (No. 41)* [2023] FCA 555 at [110] per Besanko J.

52. During the opening addresses, the Court raised for consideration the proposition that

the proper understanding of *Briginshaw* is that the focus is "*not at a level of abstraction on the allegation itself*", but on the "*asserted improbability of the conduct*": Tcpt 29.21-33. With respect, it is submitted that the principle is not so confined.

53. In *Briginshaw* at 362, Dixon J emphasised that reasonable satisfaction is not attained independently of the nature *and consequence* of the fact to be proved, and he referred to the seriousness of the allegation, the inherent unlikelihood of the alleged occurrence, "*or*" the gravity of the consequences flowing from the finding in question as matters which could all properly bear on whether the court is reasonably satisfied or feels actual persuasion. The asserted improbability of the conduct is certainly one of the relevant matters, but as articulated by Dixon J, it does not subsume the other two considerations. The other members of the Court in *Briginshaw* also referred specifically to the seriousness of the allegation sought to be proved as a matter relevant to whether or not the tribunal of fact could be satisfied of the fact alleged: at 347 per Latham CJ, 350 per Rich J, 353 per Starke J and 372 per McTiernan J.

54. In *Kumova v Davison (No. 2)* [2023] FCA 1 at [262], the Court said that "*The focus on the gravity of the finding is linked to the notion that the Court takes into account the inherent unlikelihood of alleged misconduct*", citing, as authority for that proposition, *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [137]-[138] per Branson J. With respect, however, those dicta of Branson J do not support a proposition that the inherent unlikelihood of the alleged misconduct is somehow the controlling factor, or that it subsumes references to the gravity of the allegation. What her Honour said there was:

> The final matter, identified in s 140(2) of the *Evidence Act* is, as mentioned above, the gravity of the matter alleged. …
>
> As identified above, in addition to taking into account the three matters specifically identified in s 140(2), it was open to his Honour to have regard to other relevant matters. Other relevant matters could include the inherent unlikelihood, or otherwise, of the occurrence of the matter of fact alleged… and the long-standing common law rule that evidence is to be weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict.

What her Honour should be understood as saying is no more than that the inherent unlikelihood of the alleged occurrence is a relevant consideration *in addition to* the gravity of the allegation.

55. The opposite approach would confine the applicability of the *Briginshaw* principle in a

way which is not consistent with observed practice.

56. When the allegation in question is something like fraud, or corruption by a Minister of the Crown (*Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2023] FCA 47 at [466] per Katzmann J), or war crimes by a highly decorated elite Australian soldier (*Roberts-Smith (No. 41)* at [95]-[116] per Besanko J), there is little difficulty with reasoning on the basis that such conduct is out of the ordinary. That kind of analysis breaks down, however, when applied to other factual circumstances in which trial and appellate courts have found it appropriate to apply the principles. *Briginshaw* itself was a petition for divorce on the grounds of adultery. However much an allegation of adultery might have scandalised the 1930s mindset, it makes little sense to talk about it as an inherently improbable occurrence. At 368, it was "*the importance and gravity of the question*" which Dixon J emphasised, not the notion that adultery was somehow an improbable thing. The principles have also been applied to allegations of sexual harassment: *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37 at [202]-[208] per Gleeson JA (Beazley P and Barrett JA agreeing); *Vergara v Ewin* (2014) 223 FCR 151 at [28]. Yet, to put the matter bluntly, adultery and sexual harassment happen every day of the week and cannot be characterised as inherently improbable. The principles are applied in these cases because the allegations are serious and the consequences (e.g. dissolution of a marriage) are serious, not because they are unlikely things to happen.

57. The cautious approach articulated by Dixon J in *Briginshaw* is fully warranted when the fact in issue is an allegation of rape against a young person. The allegation is profoundly serious. The fact the rape is alleged to have happened in Parliament House, in the office of a Senator and Minister of the Crown, certainly makes it improbable, but the application of these principles does not depend on this. The consequences flowing from a finding that rape did in fact occur would also be profoundly serious. It is not an exaggeration to say that such a finding would make it impossible for Mr Lehrmann to rebuild his life and would condemn him to permanent obloquy.

58. As to the last point, in considering the gravity of the consequences flowing from a particular finding, it is relevant to take into account the reputational effect of that finding on the person against whom the finding is made. That is to say, the fact that a particular finding would be seriously damaging to a person's reputation is a matter which would properly give the Court pause before making it: *Commonwealth v Fernando* (2012)

200 FCR 1 at [130] per Gray, Rares and Tracey JJ; *Ashby v Slipper* (2014) 219 FCR 322 at [68]-[69] per Mansfield and Gilmour JJ; *Roberts-Smith (No. 41)* at [112] per Besanko J; *Duma (No. 3)* at [466] per Katzmann J.

59. In general, disbelief of a witness's evidence does not establish the contrary: *Kuligowski v Metrobus* (2004) 220 CLR 363 at [60]. It may ultimately be the case that the court is not in a position to make a finding one way or another as to a disputed event. Where the state of the evidence is unsatisfactory, it is open to the court simply to decide the issue on the basis that the party who bears the burden of proof on the issue has failed to discharge the burden: *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 at 955-956 per Lord Brandon (Lords Fraser, Diplock, Roskill and Templeman agreeing).

60. The option of making no finding and deciding the issue on the balance of probabilities is available to the Court and may in the final analysis be appropriate, given the issues with the witness evidence on both sides of the record, as described in Part A.

C. PRE-22 MARCH 2019 EVENTS

61. Brittany Higgins commenced working with the then Minister for Defence Industry Stephen Ciobo, in October 2018. Mr Ciobo had a staff of approximately 17 people and his office was in M1.23 (T71 L33-34).

62. At around this time, Bruce Lehrmann commenced working as an advisor with Senator Linda Reynolds, who was then the Assistant Home Affairs Minister. In contrast to Minister Ciobo's office minister, Senator Reynold's staff comprise approximately four people and departmental two liaison officers (DLO). Nikki Hamer was Minister Reynolds media advisor and Jesse Watton was an assistant policy advisor.

63. Ms Higgins agreed with a proposition that in February and March 2019 she was going out a lot and drinking a lot (T927 L35), noting that at this time she was "socially drinking with everyone."

64. This statement is somewhat different to her evidence in the criminal proceedings where Ms Higgins stated, in response to a suggestion she had gone out drinking on several occasions in the weeks leading up to 23 March 2019, ~~stated~~ that she had only gone out twice "on the day, my minister was stood down, and I lost my job where I went out with Guy and Austin Wenke" and on the night of 22 March 2019 (Ex 71, T267 L45).

65. On 1 March 2019, Minister Ciobo announced that he would be retiring from politics at the next election. This triggered a reshuffle in which Senator Linda Reynolds was, on Saturday 2 March 2019, sworn in as Minister for Defence Industry, Emergency Management and North Queensland Recovery. (T150 L11-12; T171 L44-46).

66. As a consequence of these changes, all staff working for Stephen Ciobo and Linda Reynolds went into a 'deferment period' whereby their former positions were declared vacant and they had until the conclusion of their deferment period to either enter a new contract in a new position or seek other employment. Mr Lehrmann was initially undecided but ultimately decided he wanted to move on to employment outside of APH and resigned (T531 L7-19).

67. Following her swearing in Senator ~~Minister~~ Reynolds and her staff went to lunch at an Italian restaurant in Canberra. Following lunch, Mr Wotton, Mr Lehrmann and Mr Hammer went to the nearby Kingston Hotel, to continue drinking and socialising (see e.g. T1046 L18-19).

68. During the course of that afternoon, Ms Higgins came to join the group. There is conflicting evidence as to how and why this occurred and it is submitted little if anything turns on the events of this evening. Whether invited at the request of Mr Lehrmann or as a result of Ms Higgins' own messages to Ms Hamer, Ms Higgins joined the group for a period that afternoon/evening. During conversation with Ms Hamer, Ms Higgins was apparently offered a role by Ms Hammer as an assistant media advisor in Minister Reynolds office. Whether such an offer was or was not made is equally irrelevant in our submission.

69. The apparent relevance of this evidence is that ~~that~~ on 2 March 2019, according to Ms Hamer (T1047 L3), Mr Lehrmann is said to have made some comment to the effect that he thought Ms Higgins was attractive and that he along with Mr Watton, encouraged or implored Ms Higgins to stay for an extra drink before she left, going so far it was asserted, to take Ms Higgins phone from her for a minute or two in order to encourage her to stay.

70. How any of this conduct, even if established, could be said to be probative of whether or not Mr Lehrmann sexually assaulted Ms Higgins on the evening of 22 March 2019 is far from clear. It is not put as tendency evidence and the fact that Mr Lehrmann may have said he thought Ms Higgins was attractive in our submission has no probative value or relevance.

71. The evidence of Ms Hamer on this issue was totally discredited and undermined by the evidence of both Ms Lehrmann and Mr Wotton. Mr Wotton gave clear and credible evidence that the phone was never taken and that nothing untoward occurred (see e.g. T1087 L41-44; T1088 L44-46). He stated that it was he, and not Mr Lehrmann who engaged in a heated argument with Ms Hamer and the argument was so heated that Mr Woatton thought it appropriate to advise Michelle Lewis later that evening of his heated interactions with Ms Hammer (T1089 L4-7).

72. As it transpired, Ms Hamer, seemingly in a fit of pique, tendered her resignation (subsequently withdrawn) by email that evening. On Sunday, 3 March 2019, both Mr Wotton and Mr Lehrmann separately spoke with Minister Reynolds about the previous evening (see e.g. T1090 L36-39). Mr Lehrmann gave evidence that he was unaware Ms Hamer had resigned and his meeting with Minister Reynolds was not in the nature of a disciplinary meeting (T224 L5; L43).

73. The other way it appears the Respondents seek to rely on this evidence is as a makeweight "integer" demonstrative of Mr Lehrmann's unreliability as a witness. As noted above (General Credit), such a submission presupposes any discrepancies between Mr Lehrmann's recollections of those otherwise mundane events so long ago and those of Mr Wotton and Ms Hamer are because Mr Lehrmann was being deliberately dishonest, as opposed to the far more likely explanation – genuine and honest differences of recollection as between witnesses relating their own recollection of relatively inconsequential events that occurred several years earlier where everyone had been drinking.

74. On Sunday 3 March 2019 Ms Higgins went out to a nightclub drinking with Guy and Austin Wenke until after midnight and had a 'big weekend' (Ex35/Ex 99 CB15 p423-424)

75. In the first week of March 2019, Fiona Brown was appointed as the interim Chief of Staff for the new Senator Reynolds' office ahead of the upcoming Federal election. Ms Higgins was offered a position with Minister Reynolds, although most of the existing Minister Ciobo staff chose not to take up new contracts, including one of Minister Ciobo's former senior policy advisors Ben Dillaway. Mr Dillaway had been in an intimate relationship with Ms Higgins whilst they worked in Minister Ciobo's office and remained in regular contact, especially by text (T606 L1-3).

76. Ms Higgins gave evidence that Mr Lehrmann treated her poorly in these initial weeks effectively treating her as his personal secretary (T602 L9- T603 L9). However, in a text exchange with Mr Dillaway on 6 March 2019 asking how her day was, Ms Higgins replied "*actually, pretty good. I really like the Reynolds team. They are super relaxed. The remaining defence industry people are being such a pain though."* Ms Higgins went on to indicate that people were becoming annoying and territorial, but that she was " *super happy just to go hang with Bruce on the Senate side and work*." (T935 L35)

77. This contemporaneous message was entirely inconsistent with the impression Ms Higgins was trying to give this court as to how Mr Lehrmann was treating her. Rather than simply acknowledging that, as of 6 March 2019, Ms Higgins was "*happy to hang out with Bruce*" she told the court her message to Dillaway was untruthful (T936 L24).

78. We submit Ms Higgins was anxious to falsely present an impression of Mr Lehrmann as a person who had been bullying and treating her poorly within the workplace. The contemporaneous evidence undermines this assertion. If Ms Higgins evidence that her contemporaneous message to Dillaway was untruthful, this necessarily mu<u>s</u>ct call into question the extent to which other contemporaneous messages to Dillaway might be untruthful – ~~eg~~<u>e.g.</u> her messages on 26 March 2019 raising the possibility of some unwanted sexual~~k~~ activity with the Applicant.

79. The "*phone a friend*" email Ms Higgins sent to Mr Lehrmann on the morning of Tuesday 26 March 2019 (Ex 22, CB61), 3 days after Mr Lehrmann had allegedly raped her also stands in stark contrast to her evidence in this regard, and of course stands in stark contrast to the claim that anything untoward took place at any time, especially in the early hours of 23 M<u>a</u>rch 2019.

80. In a similar vein, Ms Higgins gave evidence that Mr Lehrmann attempted to kiss her on the evening of Thursday 14 March 2019 (T607 L33-38). It is submitted this evidence is a fabrication by Ms Higgins. It is something made up by Ms Higgins to try and establish some guilty passion on Mr Lehrmann's part that might perhaps bolster the credibility of her allegation of sexual assault. This evidence is entirely lacking creditability. There is no contemporaneous record of such a conduct. Mr Dillaway indicated that Ms Higgins had never told him the Mr Lehrmann had tried to kiss her (T1277 L33-34). Additionally, Ms Higgins had been asked on multiple occasions by Ms Maiden and Ms Wilkinson whether she ever had any inkling Mr Lehrmann may be interested in her (see for example The Project meeting #1, Ex36, CB1114, 1:18:55.5, p6256 and The Project Meeting #2, Ex37, CB377, 0:18:08.0 – 0:19:33.4, p3465 – 3466). She never mentioned this alleged attempted kiss – which one might think would instantly come to mind upon being asked such questions if it had in fact happened.

81. This allegation first arose at the end of Ms Higgins' second interview with police in May 2021. Whilst this kiss appears in the draft "book" (Ex 40), even Ms Higgins conceded her "*book is crap*." (T743 L45).

82. When asked by police when this attempted kiss occurred, Ms Higgins stated it happened during a sitting week, only to subsequently learn there were no sitting weeks in March 2019. In these proceedings she tried again and nominated 14 March 2019 as the date the attempted kiss occurred, with reference to some text messages and a clear recollection of a dinner Michelle Lewis attended (T604 L34-38).

83. She was caught out again in this lie after it was pointed out Ms Lewis was in Perth and her messages indicated Ms Higgins had in fact stayed out very late that evening (see T797-799). It is submitted this "attempted kiss" allegation is a clear and cogent example of just how prepared Ms Higgins is to give false evidence to protect or promote her position. She clearly has no actual recollection of an actual event. It is apparent that Ms Higgins is prepared to assert as truthful, things she does not in fact know to be correct.

84. Around 20 March 2019, Mr Lehrmann was involved in a security incident by leaving a Top Secret classified document unattended. The document was to go back to ASIO and the Department Liaison Officer for ASIO was not at her desk when Mr Lehrmann

sought to return the document. He had placed the document on her desk in the DLO's office and went to make a coffee to wait for her return. Mr Payne found the document on the desk and issued a 'ticket' for the breach and spoke to Ms Brown about it. Mr Payne considered it a very serious incident. Mr Lehrmann disagreed. Mr Lehrmann was not aware that, other than words spoken to him by Mr Payne, that Mr Payne had considered it to be so serious or that an incident report had been completed about the incident or that it had been escalated to Ms Brown. After Mr Payne spoke to him about the incident though Mr Lehrmann returned the document safely to its home agency (see e.g. T89 L7-16; T158 L19-20; T214 L1-11; T1433 L10-11). The Respondents sought to make much about this incident, presumably to cast Mr Lehrmann as a reckless untrustworthy security risk (see e.g T208-211). However, the evidence is Mr Lehrmann did not consider it as serious as an issue as Mr Payne. There was simply a difference in opinion. There really is only so far such an incident can be taken. At one level it does provide some evidence of Mr Payne's attitude of and towards Mr Lehrmann.

85. The real significance of this incident in these proceedings is that it helps to contextualise Ms Brown's evidence of her heightened concerns over what Mr Lehrmann was doing in the office. As discussed in the General Credit section, this incident caused Mr Lehrmann to be less than frank with Ms Brown about what he did in the office on the evening/morning of 22-23rd March 2019. In noticing Ms Brown's apparent agitation (from his perspective) about wanting to know if he accessed any information, Mr Lehrmann decided not to be frank with her about having noted up Question Time Briefs. This reticence appears to have been justified in the sense that Ms Brown evidence was to the effect that if she had been told by Mr Lehrmann that he had had accessed any work information she would have immediately escalated the matter (Brown Affidavit [52].

D. EVENTS OF 22-23 MARCH 2019

Events at the Dock and 88MPH

86. As developed more fully in oral submissions, the idea that Mr Lehrmann was plying Ms Higgins with drinks should be rejected. Mr Lehrmann accepted, after not being able to recall but then reviewing CCTV footage, that he did buy Ms Higgins two drinks but the CCTV footage (see for example MFI 64) shows that others were also giving drinks

to Ms Higgins and that everyone was buying drinks for everyone else. That is consistent with a group of people socialising on a Friday night.

87. It is also important that in her evidence in chief, Ms Higgins never gave evidence that Mr Lehrmann was plying her with drinks or being a predator or trying to get her drunk; this is notably contrary to other statements Ms Higgins has made elsewhere (see e.g. Maiden article and the Project first meeting on 27 January 2021).

88. It is obvious that Mr Lehrmann encouraged Ms Higgins to finish her drink at the end. However, it should be noted that firstly, he was not the only one to encourage her to finish a drink as detailed in the CCTV footage shown in oral submissions, but, secondly, it is understandable given they had agreed to go to a second venue and Mr Lehrmann was simply hurrying up the last person to finish their drink. Any submission that any of that activity amounted to predatory behaviour should be rejected.

89. Also of note is that almost all of the people at the drinks were from the Navy branch of the armed services (see below under Question Time briefs).

90. Higgins, Gain, Lehrmann and Wenke went on to 88MPH. No witness was able to recall with any confidence how that happened, by a single Uber or taxi or otherwise. There was conflicting evidence as to what took place at 88MPH. Mr Lehrmann and Ms Higgins both deny a kiss happened but the evidence of Ms Gain is that it did (noting also as above that Ms Higgins had been asked on multiple occasions by Ms Maiden and Ms Wilkinson whether she ever had any inkling Mr Lehrmann may be interested in her). Mr Lehrmann submits that Ms Gain's evidence is not correct. It is not something either of Mr Lehrmann or Ms Higgins would need to deny. Certainly for Ms Higgins if it happened it would of course be relevant and probative to establishing Mr Lehrmann's motives. Ms Higgins' denial of any kissing creates a direct conflict with Ms Gain's evidence on this point. It may be Ms Higgins overt failure to advise the AFP the name of the second venue reflected a consciousness of her having been amorous there with Mr Lehrmann. However, it is equally plausible that Ms Higgins was actively ~~tryig~~trying to frustrate any further investigation of what she knew to be a false allegation.

91. Whilst Ms Gain said in her evidence she does not remember people leaving (Gain Affidavit [53]-[55]) it is possible that Ms Gain saw Mr Lehrmann and Ms Higgins leave in an Uber together, and on that basis drew an understandable though not necessarily

accurate inference that they had 'hooked up.' In that context, a genuine but false recollection after 2 years after this night that she saw them kiss must also be a possibility. Noting Ms Gain left with Mr Wenke, (and Mr Dillaway used the term "hooked up" in the sense of sexual intercourse), there are various interpretations that might be accorded to the text message to Ms Irvine, at Gain Affidavit [57].

92. Regardless, even if a kiss did occur, it does not mean a rape occurred thereafter and nor, without more reliable independent evidence, does it mean any sexual activity occurred later that night. An intention on one or both parties to have sex does not of itself establish sex did occur.

Mr Lehrmann's reasons for returning to Parliament House and what he was doing there (Question Time Briefs)

93. Mr Lehrmann initially went back to Parliament House to collect his keys to get home. His evidence was he had to get his keys and he thought, at the time an immature man in his early twenties, that for such a silly reason Parliament House security would not let him in. No evidence was lead by the Respondents that that would not have happened or as to whether that was likely or not. His evidence was that it was actually easier to go back and get his keys then wake his girlfriend at that time of night and have his girlfriend assist him in entering his secure apartment complex (see e.g. T306; T539 L13-18). The inference is open that having already stayed out (by this stage until after 1am) he did not want to make a potentially fraught situation worse by requiring his girlfriend to wake up, get dressed and come ~~downn~~down to let him in.

94. Whilst at Parliament House, Mr Lehrmann said he turned left towards his desk and Ms Higgins turned right towards the COS office and the Minister's office. As he arrives at his desk to collect his keys he saw the Question Time folders and, having chatted with a number of aide-de comps including for the Chief of Navy and the Vice Chief of the ADF Admiral Johnston, generally about the submarine contract decided to quickly jot down a few notes on the Submarine issue, arising from his general and informal discussions with those people. The issue was topical at that time, especially for his Minister who was the Minister for Defence Industry.

95. It has been submitted, quite strenuously by the Respondents that this evidence was fanciful to the point of absurdity.

96. With respect, whilst perhaps having some superficial attractiveness, the asserted absurdness of this evidence is not borne out upon closer scrutiny.

97. Each of the persons sitting at the 'big table' at The Dock were identified by both name and role by Ms Gain (see e.g. T1101ff), The list included at least four serving Navy members, some of whom, clearly from the CCTV footage, interacted with Mr Lehrmann extensively.

98. However, not one of the named Naval officers that the CCTV shows were spoken to by Mr Lehrmann, gave evidence. The Applicant bears no onus on this issue and had stated in his interview to police in April 2021 this assertion. No explanation was provided as to why the Respondents could not have called one of more of these people to give evidence. It is submitted an inference is available in these circumstances that the Court could as a minimum infer from this unexplained failure, that the asserted implausibility of the Applicant's evidence cannot so readily be assumed.

99. Whilst on the subject of evidence not called by the Respondent on this point, it beggars belief the First Respondent would go to the trouble and expense of retaining and qualifying Mr Reedy, the UK lip reading expert, and not have him to look at conversations between Mr Lehrmann ~~and~~ and others to see if the word "submarine" is seen. Perhaps the explanation is that ~~he~~ Mr Reedy was only provided with such a small selection of the CCTV from that evening that it would not have been particularly probative evidence. However we do know footage of the entire evening does exist (EX R32)

100. Whatever the reason, it is clear from the instructions set out in his report, that Mr Reedy was not tasked with reviewing anything said by anyone other than Ms Higgins and Mr Lehrmann. Curiously, Mr Reedy seems to have taken it upon himself to nevertheless try and lip read what various of the other persons have said, at least on one occasion.

101. In circumstances where the Respondents have qualified a lip reading expert to examine the CCTV from the Dock and where (according to Mr Reedy) the CCTV is good quality, the failure to have him report on whether any discussion was had as to submarines at the least provides another reason to no so readily dismiss th~~e~~ Applicant's evidence on this point as either absurd or even patently implausible.

102. It should further be noted that Mr Payne, a witness who we would submit was not friendly towards the Applicant (and someone who was prepared to engage in both speculation and

"informed speculation" in his evidence-see e.g. T1425 L46-47) acknowledged that:

(a) there were dozens of Question Time (QT) folders in the office;

(b) the 'Submarines' contract was and at all times remained an active and ongoing political issue within the portfolio;

(c) submarines would likely have been the subject of a Question Time Brief; and

(d) he had no role in how that brief might be marked up or dealt with subsequently by political advisors on QT files.

(See e.g. T1426-1429)

103. Further, Mr Lehrmann's failure to disclose to Ms Brown that he had been working on QT briefs when he was in the office that night on the following Tuesday, would be explicable given his perception that telling Ms Brown that would lead to a further security incident. This perception was itself corroborated by Ms Brown's own evidence as to those concerns and what she would have done had Mr Lehrmann told her he had done any work whilst in the office after hours (see Brown affidavit [52]).

104. Finally, despite the multiple (albeit evolving) narratives given b~~m~~y Ms Higgins about what she recalls when in the office that evening, one consistent feature of her evidence in this regard is that there was a not insignificant period of time when she was alone and Mr Lehrmann was off somewhere else within the suite away doing something else (see e.g T626 L38-46 – T627 L1-19) and significantly the following statements by Ms Higgins, including a belief that Mr Lehrmann was "at his desk":

(a) "I remember sitting there waiting for him for a really long time" (**Ex 36**: The Project interview #1, Part 1, 0:35:53.8, CB1114, p6081);

(b) "1:17:53.4:…And I remember going into the minister's office and just laying down on the couch.

1:18:18.5 Brittany: And then –

1:18:19.4 Angus: So, sorry. He came back and said, I'll be a while, and you can -
1:18:22.8 Brittany: Yeah"

1:18:22.9 Angus: - go to the couch?

1:18:23.6 Brittany: Yeah, I just, I remember him being like, oh, I'm not finished yet, just go, you can just lay down for a bit, I'll be there. And I was like, okay, that's, sure, whatever, finish whatever you need to do.

1:18:33.0 Angus: But he was out of sight?

1:18:34.5 Brittany: Yeah. I was –

1:18:35.1 Angus: Possibly at his desk?

1:18:36.4 Brittany: I think so. **I think he was around the corner at his desk**. I wasn't really cognizant – [Emphasis added]

1:18:39.4 Angus: Yeah.

1:18:39.7 Brittany: - sort of where he was. I was just sort of waiting for him to finish so I could leave and so we could catch the cab home. (Ex 36:The Project interview #1, Part 3, 1:17:53.4 – 1:18:39.7, CB1114, p6255 - 6256);

(c) "0:25:30.9 Brittany: I remember that he was sort of taking a really long time with something. I don't know, it felt like he was taking a really long time and I was sitting on the ledge of the office sort of windows that overlook the Prime Minister's courtyard.. (Ex 37:The Project interview #2, 0:25:30.9, CB377, p3470);

105. In is submitted, the Court cannot simply dismiss Mr Lehrmann's evidence about having noted up Question Time Briefs on basis that such an explanation seems inherently implausible. As Charlesworth J noted (albeit in a different context but in a not entirely different factual case) in *Smith (a pseudonym) v R* [2121] ACTCA 16 at [319-321]:

> The trial judge did not accept the appellant's stated reasons for abruptly ceasing intercourse: a feeling of awkwardness referable in part to the lack of contraception and in part by a sense of mental unease having no particular reason articulated for it.
>
> The trial judge considered the stated reasons to be "positively implausible". By that phrase, his Honour may be understood to have determined that there was no reasonable possibility that the appellant's account was true.
>
> The reasoning of the trial judge presupposed some knowledge of the characteristics of 17-year-old males in the course of consensual sexual intercourse. His Honour reasoned from the premise that the sexual urges of a young man in the course of consensual intercourse are unlikely to be overcome by a sense of disquiet or awkwardness. In my view, that reasoning presumed a universality of human experience in sexual relations that does not and cannot exist. It appears that the generalised statement of likelihood informed the conclusion that the appellant's account could be excluded beyond reasonable doubt.

106. Mr Lehrmann's evidence that after coming into Parliament House after 1am on a

Saturday morning he 'noted up' Questions Time Briefs after a night of drinking on its face seems ~~highly~~ highly implausible. The Respondents submit the evidence should be summarily rejected on that basis. Similar submissions are made in respect of the explanations given by Mr Lehrmann for failing to check on Ms Higgins before he left on the basis they seem implausible not to mention unchivalrous bordering on the "caddish."

107. However, noting the matters ~~outined~~ outlined above and the fact that Mr Lehrmann does not assert he returned to Parliament House with any intention to note up Question Time briefs, and if it is accepted Ms Higgins either immediately or soon after their arrival took herself into the Minister's private office and Mr Lehrmann was off doing something for some time, it is submitted that Mr Lehrmann's evidence cannot be dismissed out of hand.

Entering Parliament House - Ms Higgins' supposed drunkenness

108. It is not in contention that Mr Lehrmann lied to security about his reasons for wanting to enter Parliament House. That has been dealt with elsewhere and Mr Lehrmann has always admitted that he lied to security.

109. What is important to consider is the level of intoxication of Ms Higgins when they entered Parliament House.

110. A submission will likely be advanced by the Respondents that even if they cannot prove a violent rape of the type described by Ms Higgins and pleaded as justification, the pair still engaged in sexual intercourse and even if Ms Higgins consented to that activity, this consent was not real consent and was vitiated as a consequence of her extreme intoxication. Any such submission should be rejected.

111. It is fundamental to Ms Higgins' narrative that she was '10 out of 10' drunk, and as drunk as has she's ever been in her life, seeking to describe circumstances where she had no capacity to make any decisions of her own and in particular, to consent to sex.

112. The CCTV footage of Ms Higgins entering Parliament House (Ex 17, CB47) and walking through security is clear evidence that significantly undermines the veracity of Ms Higgins evidence in this regard. That evidence shows Ms Higgins, far from being so drunk as not to be able to consent and having to be all but carried through security, displaying very little objective signs of significant intoxication.

113. What is clear from the footage is Ms Higgins:

(a) walks in a straight line through the metal detectors wearing high heels twice;

(b) bends over multiple times without falling over, or even losing her balance. She does so three times on one occasion bending from the hip and standing on one foot without any support.

(c) skips along the corridor to catch up to Mr Lehrman;

(d) smiles and acknowledges someone out of shot, likely telling her to speed up, and also acknowledges the security guard behind the counter when going to the lift; and

(e) does not fall over or need to be carried through security at any point.

114. The coordination shown in the CCTV contradicts any suggestion that Ms Higgins was so intoxicated she was incapable of consenting to sex.

115. The evidence of Dr Robertson it is submitted also undermines any rational suggestion that Ms Higgins was too intoxicated to consent to sex. It also further undermines the credibility of Ms Higgins assertions as to her "10/10"state of intoxication.

116. Dr Robertson gave evidence that if it was assumed Ms Higgins consumed 13 standard drinks from 7:30pm her Blood Alcohol Consumption (BAC) at 1:50am would likely fall somewhere between 0.17% and 0.27% (p5937). Dr Robertson accepted 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. (T1993 L1-7).

117. It is submitted that the foundation for the assumption Ms Higgins consumed 13 drinks is tenuous. It is submitted a close review of the Dock Footage (MFI 64) suggests Ms Higgins consumed not more than 9 drinks at the Dock. There is no consistent or reliable evidence as to how many drinks Ms Higgins consumed at 88mph, other than the fact Mr Lehrmann spent $40 at 88mph. This expenditure may not have even covered a full round for all present.

118. It is submitted that Ms Higgins' evidence on this issue is unreliable at best. The Applicant submits it is most likely Ms Higgins consumed no more than 10 drinks all night.

119. Dr Robertson explained that for every standard drink less than the 13 he was asked to assume it would be appropriate to reduce the numbers in the table on p5937 at 1:50 am by 0.025% for each standard drink (p5935).

120. Thus, if in fact Ms Higgins, being someone whose elimination rate put her on the low to average side of his table only had 9-10 standard drinks in the course of this evening, her blood alcohol level at 1.50am would have been approx. 0.075 - 0.1% less than expressed in the table in his report and therefore likely to have been between .07-0.085% and .130 0.155% at 1.50am.

121. Importantly in responding to a question from his Honour on where impaired judgment would begin Dr Robertson said:

> *.15% and higher…and particularly* ***once you get to .2****…your ability to take in the information that's around you and make appropriate, well-considered decisions becomes more and more impaired.* ***You're still able to make decisions****. We're not talking about confusion, inability to know where you are.* ***We're not talking to that extent, which is when you're really start to – it starts to become difficult to make appropriate decisions*** *because you just – you don't know what's going on, but prior to that, you're still able to make decisions based on what you're seeing around you; it's just that that's quite compromised and the decisions you're making, the judgment ~~20~~ you're making in the situation you're in is quite compromised, and that's really – from .2 and above, that's where it becomes quite marked.*

(T2003 L4-22). Emphasis added.

122. Even at a BAC of .2%, Dr Robertson did not opine that there is necessarily such intoxication and confusion to prevent a person from making decisions.

123. Further, Dr Robertson accepted in cross examination that his observations of Ms Higgins entering Parliament House at 1.50am were not~~t~~ relevantly different from how she appeared at 10.07am at The Dock. At 10:07pm at the Dock, according to Dr Robertson, even on his highest assumption, would have put Ms Higgins' BAC at .12%.

124. In summary the evidence from Dr Robertson tended to undermine any suggestion that Ms Higgins was so intoxicated that she was unable to consent rather than strengthen any

such inference.

The morning of 23 March 2019

125. Ms Higgins passed out naked ~~i~~on the Minister's private office some time after entering the Suite. At about 4 am security officer Nicola Anderson conducted a welfare check and saw Ms Higgins lying naked on the lounge with her head at the end of the couch closet to the windows. She was displaying no signs of distress and with her makeup undisturbed. (T1167 L10-23 and cf Ms Higgins' evidence at T619 L33-37). By 9am Ms Higgins was aware that security knew she was still in the Suite because they called into the office asking if everyone was ok and Ms Higgins replied 'fine'.

126. For a young 23-year-old woman to wake up having passed out naked after a night out on her Minister's private lounge would have been a horrible anxiety inducing moment for an ambitious young woman who had aspirations of becoming a politician one day. It could rightly be described as something as a career defining moment if it became widely known.

127. It is clear Ms Higgins was awake by about 8:30am as she sends a text to Dillaway around this time. Rather than leave immediately, Ms Higgins remained in the suite for over 90 minutes, not departing until shortly after 10am, a time where one's presence within Parliament House would likely appear less unusual. During this period Ms Higgins texts Mr Dillaway at 8.30am as if nothing had happened

128. It is the Applicant's contention that Ms Higgins was not as hungover as she was asserting, nor nursing any type of injury. We say she utilised the back stairs to avoid being seen and further increasing her embarrassment as to the simple fact she had passed out drunk in the Minister's office.

E. POST 23 MARCH 2019 EVENTS RELEVANT TO JUSTIFICATION

129. Any tentative uncertainty as to what took place, as displayed in Ms Higgins' first text message to Mr Dillaway on Tuesday 26 March 2019, is better seen in the light of Ms Higgins slowly conceiving a nascent narrative to protect her job and reputation after waking up having passed out naked in her Minister's office in the gossipy world of Parliament House. Importantly, Ms Higgins makes no reference to anything untoward (in the sense of unwanted) having taken place though she seems to have told Mr Dillaway by phone that she had returned to Parliament House after being out

earlier in the evening.

130. The initial text messages between Ms Higgins and Mr Dillaway from the morning of 23 March 2019 suggest Ms Higgins was not wishing to go into detail about what had happened despite requests from Mr Dillaway for more information~~)~~. Ms Higgins goes to work on the Monday and it is clearly 'business as usual'. Including Ms Higgins sending emails to Mr Lehrmann with no suggestion that there was an issue (see e.g. Ex 21, CB59). On Tuesday morning Ms Higgins sends to Mr Lehrmann the infamous "phoning a friend" email requesting his help with a task. (Ex 22, CB61).

131. This email is important for several reasons. Firstly, it suggests that as of Tuesday 26 March 2019, Ms Higgins was not aware that Mr Lehrmann had decided not to stay on with Minister Reynolds. This in and of itself may provide some insight as to why Ms Higgins seemingly lost all interest in Nick as soon as Mr Lehrmann entered the Dock. Ms Higgins had of course recently been in a relationship with Mr Ciobo's former senior adviser and their messages show Mr Dillaway went out of his way to support Ms Higgins in her jobs and career.

132. Secondly it is in its timing and tone, utterly inconsistent with Ms Higgins having been violently raped by Mr Lehrmann only 3 days previously. True it is that victims of sexual harassment and worse in the workplace, often young woman, will often have to reconcile the necessity of maintaining ongoing necessary communications with their harasser/ assaulter with a decision or reluctance not to complain about the conduct.

133. Here there is no rational explanation for this communication. It is not a task assigned to Lehrmann and she has already obtained the very willing and competent Dillaway to assist her. The clear inference is there was no issue between the pair or even anything awkward such as a drunken night of consensual sex.

134. At this stage Ms Higgins has made no report to anyone of any rape or sexual activity. Then, however on Tuesday 26 March 2019 she is aware that there is a major issue. Firstly, Mr Lehrmann is called in to speak with Ms Brown. Mr Lehrmann then packs up and leaves. The clear inference is he has been fired and Ms Higgins saw this. Then Ms Higgins is called in to what was clearly a disciplinary meeting. According to Ms Brown, Ms Higgins was offered a support person, which is usual for a disciplinary

conversation. Ms Brown's evidence was that after seeing the Code of Conduct on the desk Ms Higgins' eyes began to become ~~being~~ shifty as if she was "thinking really quickly" (see e.g T2060 L31-36 and L44-45). It is not to the point that all Ms Brown wished to do was have her 're-sign' the document or that, from Ms Brown's perspective, Ms Higgins' job was not in jeopardy. Whenever a superior presents an employee with the need to sign a Code of Conduct, the clear inference is that that employee has engaged in behaviour that is contrary to that Code of Conduct and something serious is required to address that behaviour. The ~~entir~~ entire context of this meeting was one that would have created in Ms Higgins both a rising sense of embarrassment and humiliation.

135. The Court would accept Ms Brown's evidence that Ms Higgins' response that she was responsible for her own conduct was what was actually said by Ms Higgins (see Brown Affidavit [57]). The Court would not accept Ms Higgins' account that at that first meeting she recounted to Ms Brown she had been raped, as was broadcast on the Project. Ms Brown made and retained contemporaneous notes. Almost every assertion Ms Higgins has made has been able to be shown to be, at best, wildly inaccurate.

136. In this meeting with Ms Brown, Ms Brown tells Ms Higgins that she was discovered in a state of undress. Ms Brown asks Ms Higgins if something happened that she did not want to happen and Ms Higgins says no (see Brown affidavit [57]). Ms Brown did not accept that this question was not asked. She said it was what she had been told by Ms Baron to ask. She accepted it could have been asked in the Thursday meeting – in our submission – for a second time. She merely accepted a possibility, nothing more than that, that she may not have asked the question on the Tuesday.

137. Nothing further is said, the clear inference being Ms Higgins is attempting to bury what took place and play it down. With what took place being Ms Higgins having passed out naked in the Ministers office after a night out. However, at this point Ms Higgins fears this may ruin her reputation and career aspirations, that others will find out about what took place because Ms Brown tells Ms Higgins that the Prime Minister's Office and the Government Staff Committee (elsewhere referred to as the 'Star Chamber') would have to be informed. This was a horrifically humiliating and embarrassing situation for a young professional woman. It might even be inferred that the media manager within her immediately began to manage the narrative as to what took place. For example, later, she even says to Mr Dillaway she doesn't know "how I want it to play out" (see

text to Mr Dillaway at 26 March 2019 at 2.05pm Ex35 CB15 p693) but "the only thing" she really wants "is for this not to get out and become public knowledge (text at 5.25pm 26 March 2019 to Mr Dillaway p699).

138. After the meeting with Ms Brown, the first thing she does is sends a text message to Mr Dillaway and does not articulate anything about an assault but simply says "So, I think I may not continue to be employed with Linda." The subsequent messages between the two do not at all evidence any knowing allegation of rape in Mr Lehrmann's submission. What they show, in Mr Lehrmann's submission, are the beginnings of a 'testing of the waters' for a blame shifting on to Mr Lehrmann, not necessarily with the view to make any formal complaint of any type, but to obfuscate the truth and excuse her own conduct.

139. Mr Dillaway, being a strong supporter of Ms Higgins, naturally picks up on the hint of Ms Higgins "vaguely remember[ing] Bruce being there"…and then waking half-dressed, and Mr Dillaway offers the following: "did someone take advantage of you" (2.16.44pm). Up until then nothing had been said by Ms Higgins as to that point. Then Ms Higgins' responds with "I really don't feel like it was consensual at all" (2.23.47pm). This idea is clearly framed by Ms Higgins viewed that if it was consensual "why would he just leave me there like that" (2.27.34pm). The clear point being there is no allegation of rape and there is no actual definitive statement that any sexual activity took place. On its face Ms Higgins simply does not know what took place. This strongly mitigates against a finding that anything took place, let alone a rape.

140. As discussed above in the credibility section, Ms Higgins continues to tell lies, trying to maintain the idea that something untoward had happened yet acting contrary to how one might act if it had. Ms Higgins' own actions show she did not think any sexual activity had taken place. For example, she tells Mr Dillaway she had an STI check done. But she does not have one completed. That is we submit, powerful evidence that Ms Higgins knew that no sexual activity had taken place (see T782 L13-24). It is especially telling when Ms Higgins' evidence was she believed Mr Lehrmann 'finished' inside of her (T630 L10-16).

141. The reason why Ms Higgins went to the AFP is because both Senator Reynolds and Ms Brown had arranged for that first meeting with the Parliament House AFP and raised it

during the meeting with Ms Higgins on 1 April 2019 (Brown Affidavit [115](d)). Senator Reynolds had already been forcefully pushing that the incident, at that stage only recounted as "I remember Bruce on top of me", be reported to the AFP but Ms Higgins did not want that (see e.g. Brown affidavit [105]; [108]).

142. After beginning to develop the narrative that something untoward had taken place Ms Higgins could hardly decline the Senator's invitation to talk to the AFP. That would cause doubt to arise as to Ms Higgins' narrative thus far.

143. Cleaves then makes the connection to SACAT and commences the process of obtaining the APH CCTV. Harman takes steps to secure the Dock CCTV upon being advised by Cleaves Ms Higgins had attended this venue. After that meet and greet (on 8 April 2019) Ms Higgins dropped the complaint at the first available opportunity, within a matter of days (13 April 2019), having told Dillaway by text message on 9 April that she had no intention of pursuing a complaint.

144. The evidence indicates Ms Higgins was urged and pushed into making various 'reports' after her comment to Brown that 'he was on top of her" were taken very seriously. Actions were initiated and investigations commence while Ms Higgins did everything not to stop a formal complaint of rape proceeding. We submit because Ms Higgins knew this complaint to be entirely false.

145. Interestingly, even prior to 13 April 2019, on 9 April 2019 Ms Higgins tells Mr Dillaway that she has no intention of pursuing a police complaint but at some stage subsequently deletes this message (see Ex45, Cb92).

146. In her interactions with Officer Harman, Ms Higgins continues to display behaviour that indicates a clear desire not to progress the complaint and to only do the bare minimum not to raise suspicion as to her initial allegation.

147. For example, she does not tell Officer Harman the name of the second venue, where CCTV footage should be able to be obtained. As discussed in the general credit section, Ms Higgins did know the name of this venue or could have easily discovered it. Secondly, at regular times Ms Higgins fails to respond to repeated messages and calls from Officer Harman when she was attempting to progress matters for Ms Higgins (see e.g. Ex R72, CB82, p2516; T1318 L39- T1319 L17). Further, Ms Higgins was asked

for photos from her phone (including being asked not to delete a photo of her and Mr Lehrmann apparently from that evening) but none were provided and that photo never materialised, and she was asked for the dress but it was not provided (see e.g. T1317 L21-45; T1324 L29-41). Crucial evidence not provided.

148. This is significant and cannot be explained away either by 'trauma' or other reasons. Even if Ms Higgins was unsure of pursuing a complaint at that stage she would have known the importance of preserving certain pieces of information and evidence, especially after each police officer had told her to do so.

149. As discussed in F and K, in short, the next interaction with the police was a meet and greet for what we submit was the sole purpose of enabling credence to a coordinated media plan lead by Mr Sharaz and Ms Higgins. There was no independent reason for Ms Higgins to reinstate her police complaint. When the media plan was executed Ms Higgins found herself, again, in a position where her credibility and public position would be challenged if she did not allow the process of complaint to continue.

What actually happened in M.23 on 23 March 2019

150. We submit the Court could not safely act on ~~ther~~ the evidence of Ms Higgins for the reasons outlined in these submissions. Despite some of the issues with Mr Lehrmann's credibility, it is submitted the Court could safely accept his evidence that there was no ~~sexualy~~ sexual activity at all at Parliament House.

151. If however, the Court has no confidence in accepting any of the uncorroborated evidence of either Higgins or Lehrmann, it is submitted there is otherwise insufficient reliable and independent evidence sufficient to permit any ~~postivive~~ positive findings to be made as to what happened that night. Even if the Court formed the view that the only plausible explanation for the pair returning to Parliament House was to engage in sexual activity, this is still a far way from being able to find such activity actually took place. There are simply too many competing possibilities.

152. The Second Respondent during oral submissions referred to *R v Baden-Clay* [2016] HCA35; (2016) 258 CLR 308. The application of principles of criminal law as to inferential reasoning and the use of circumstantial evidence in the context of the various principles applicable in such proceedings (including the presumption of innocence and the onus and

standard of proof) do not readily translate to civil proceedings. However, it is submitted that in principle, this Court should be very careful to make positive findings of fact where there are multiple possibilities as to what happened. It may be that knowledge of human affairs suggests some may be more ~~lijkely~~ likely or plausible than~~t~~ others, but this it is submitted is not a sufficient basis to make positive s140 findings of fact in a situation where the evidence is wholly unsatisfactory and lends itself to any number of possibilities.

153. If the Court finds itself unable to reject the justification defence on the basis of concerns over the evidence of Mr Lehrmann, it is submitted the evidence would not otherwise permit any positive finding to be made. In such circumstances, the Respondents ~~not~~ have not discharged their onus in relation to justification.

F. THE PROJECT PROGRAMME

F.1 Conception

154. Mr Sharaz pitched the idea for the Programme to Ms Wilkinson. Given Mr Sharaz was not called to give evidence, his motivations for doing so could not be explored. An inference should be drawn that any evidence he might have given would not have assisted the respondents. Contemporaneous documents suggest that motivations for Mr Sharaz and Ms Higgins included:

(a) To launch a politically motivated attack on the Liberal Party using the MeToo movement as the vehicle. See the email from Mr Sharaz dated 18 January 2019; Ex R105 CB122 (the **first Sharaz email**), particularly the subject line "MeToo, Liberal Party, Project Pitch" and body of email "going after the Liberal Party machine".

(b) To address what Mr Sharaz felt was an injustice: Ex 42 CB132.

(c) That Ms Higgins wanted "*to make sure no other woman is assaulted within Parliament House*": Ex R111; CB1114 (**aide-memoire to Ex 36, herein simply CB1114**, p6230 at 0:56:16.9). See to similar effect CB1114 p. 6230 at 56.16.9

(d) Mr Sharaz said that Ms Higgins had said that she wished to ensure Mr Lehrmann would forever have difficulty getting a job: CB1114, p6229 at 0:55:52.3.

(e) In the "*best case scenario*", to ensure Senator Reynolds would forever have difficulty getting a job: CB1114, p6230 at 0:56:04.1.

155. Although some of those stated motivations were obviously unobjectionable, others were more problematic, and the failure to call Mr Sharaz meant that there was no opportunity to test how they might be reconciled, or indeed whether they could be.

156. In assessing the extent to which a desire for a political attack on the Liberal Party motivated Mr Sharaz and Ms Higgins, the following evidence is relevant:

(a) Statements made by Mr Sharaz including:

(i) "*the reason we've chosen the timeline we've had is because it's a sitting week when we want the story to come out*";

(ii) that Labor Senator Katy Gallagher will "*probe and continue it going*";

(iii) that the Liberal Party will have to "*answer questions at Question Time*", and it would be a "*mess for them*" before the election, and "*[t]hat's why Britt's picked that timeline*":

See eg CB1114 p6159 – 6160, from 1:14:09.6; see also CB1114 p6192 at 0:16:35.1.

(b) Ms Higgins' statement in discussing the date of publication that "*It'd be good to get a question time in, I think…so, they're actually, they're all stuck in Parliament House with it*": CB1114 p6193.

(c) Ms Higgins agreeing to find some "*friendly MPs*" who "*could fire questions in question time*": CB1114, p6194.

157. As early as 19 January 2021, Ms Wilkinson described Ms Higgins' "*explosive political story*" as being "*an extraordinary coverup involving Linda Reynolds, Michaelia Cash and the PMO*": Ex R117 CB135 p2767. The inference is that they were sent after a phone call between Ms Wilkinson and Mr Sharaz (see e.g. Ex R109 CB126). In an email on 11 February 2021 to key members of the team, she said, "*it is not just the rape itself that is so horrifying, it's the systemic coverup*": Ex R584 CB628.

158. In her cross-examination, Ms Wilkinson agreed that she actually believed that Senators Reynolds and Cash were part of a systemic cover-up: Tcpt 1777.15.

159. As early as on 20 January 2021, only two days after receiving the first Sharaz email, Ms Wilkinson communicated to Mr Llewelyn that they were "*going huge with it*" and it would be a "*March release*": Ex R117 CB135. It is surprising that she could make such a decision prior to even meeting Ms Higgins in person talking to her. In fact, the date of publication was brought forward, despite the problems discussed below.

F.2 Preparation and research

The timeline document

160. Research began with Ms Higgins' timeline document, given to Ms Wilkinson by Mr Sharaz on 19 January 2021: Ex R11, CB332. The document was purportedly prepared by Ms Higgins (T688 L23). It was provided as an attachment to an email with the subject header '*Everything you need'* (Ex R115 CB132).

161. On 20 January 2021, the timeline was sent by Ms Wilkinson to the rest of the team. It does not appear as if anyone ever questioned the contents of the document, for example by querying why particular documents had been annexed and not others. The team used the timeline to guide the initial lines of enquiry for the story (see Ex R124 CB142; Wilkinson affidavit [34]; Llewellyn affidavit [71])).

162. Both Mr Llewelyn's and Ms Wilkinson's research and preparation proceeded on the basis that the allegation was true, that there had been a cover up, and that the issue was not the truth of the allegation or how that allegation was said to have been made but how it had been handled by others.

163. The claims that so many people apparently knew about the incident but yet no action had been taken, should have at least caused Mr Llewellyn, Ms Wilkinson and the Project Team to wonder about the underlying allegation. Rather than start from the position of researching whether the allegation was true, the research began with accepting that the allegation had been made (see e.g. Llewelyn affidavit [86] "how *that* allegation had been handled") and then focused on "how far this allegation was followed by Ms Higgins' workplace and the police, and whether it was done properly."

(Llewellyn affidavit [79]).

164. In fact, if the Project Ten team, including Ms Wilkinson, had acted reasonably and began their research instead with the question 'whether the allegation had been put to the Government as detailed in the timeline' Mr Llewelyn might have at least attempted to speak with Ms Brown far earlier than the perfunctory email sent by Network Ten. If Mr Llewelyn had tried to speak with Ms Brown, it would have been at least possible for him to discover some of the many contradictions between the Ms Higgins on the one hand and Ms Brown and the contemporaneous records on the other.

165. The respondents appear to have believed that a systemic cover-up of a rape by the Morrison Government existed and that their program would expose this. In the end, the only information they had relevant to this claim was the contradictory material provided by Ms Higgins (discussed below) and ultimately material from the government that was inconsistent with any kind of cover-up or attempt to silence Ms Higgins.

166. Other problems with the timeline (which on proper investigation ought to have alerted the respondents that it was not "everything they [needed]" include the following:

(a) The clear implication made by the timeline document that Mr Lehrmann was fired because of the assault (p 3339);

(b) The fact that Ms Higgins' asserts that she met with the Parliament House AFP on Wednesday 26th March 2019 – notwithstanding the date does not match the day, an enquiry to the AFP would have confirmed Ms Higgins met with them on 1 April 2019 (p3339). This is not a minor detail that was slightly incorrect, particularly in circumstances where Senator Reynolds and Ms Brown organised the first visit and where Ms Brown took her down to the office in Parliament House.

(c) The references to pressure from Ms Brown and the wider Party forcing Ms Higgins to choose between her job and staying 'onboard'. This was particularly questionable given this was said to have happened after Meeting 1 where the alleged rape was purportedly recounted to Ms Brown. Any reasonable journalist would have appreciated the seriousness of this allegation from the beginning. They would have questioned whether a senior public servant would have been

so callous after a claim of rape to pressure someone into two dichotomous choices for their future;

(d) The fact that the day after receiving this timeline document Ms Wilkinson was already aware of the supposed death of Ms Higgins' phone (see email 20 January 2021 at 7.08pm CB148 to Mr Sharaz about Ms Higgins taking her phone to 'Apple') and that in a matter of days Mr Llewelyn also knew of the complete death of Ms Higgins' phone and that everything was "all gone" (see e.g. CB1114 p6180-6182 0:05:56.6 ff). However, instead of drilling down and challenging Ms Higgins Mr Llewelyn suggested not raising it because it raises unanswerable questions and adds "unnecessary doubt where there currently isn't any" (see e.g. Ex R203, CB225 p2958). It can only be the case that both believed Mr Lehrmann was completely guilty from the outset otherwise how could there not be 'doubt'. This point is developed further below.

167. An additional point is that the timeline document named Bruce Lehrmann (Mr Lehrmann was also named by Mr Sharaz in an email to Ms Wilkinson on 20 January 2021; Ex R126 CB144; with his LinkedIn profile provided, something anyone could view whether one has a LinkedIn profile or not).

168. Therefore, at any point in time from 20 January 2021 the Project team could have engaged with Mr Lehrmann. Instead, they waited until Friday 12 February 2021 at 2.45pm to attempt to contact him. This is even more concerning given on 20 January 2021 Ms Wilkinson had told Mr Llewellyn that Network Ten was going to go "huge" with the story CB135).

169. Mr Llewellyn and Ms Wilkinson gave evidence to the effect that the timeframe from Friday afternoon to Monday morning was ample (see eg Mr Llewellyn T1650 L18-23; and Ms Wilkinson at T1854 L32 "80 hours before the program went to air")). However, in deciding the sufficiency of the timeframe regard needed to be paid to the amount of time from the stories' genesis to publication (nearly 4 weeks) as well as the seriousness of the allegations and position of Mr Lehrmann.

170. The research and preparation for a story about a rape allegation (with no eyewitnesses and no medical evidence) failed, until the last possible moment, to actually include any real attempt to research the other side. In fact, the evidence is the Project Ten team were

warned more than once not to research Mr Lehrmann via LinkedIn in case Mr Lehrmann was notified of that research (again see Ex R126 CB144 for example and also Mr Llewelyn's email to the team on 25 January 2021; Ex R180 CB201). The journalists were clearly worried that Mr Lehrmann would find out that he was under their scrutiny.

171. This is the same with any research conducted to Senator Reynolds, Ms Brown, Senator Cash, etc. Any research that could have undermined Ms Higgins' story was engaged in on a quite nominal basis and was an afterthought.

The 27 January 2021 meeting

172. The next steps in the research and preparation included a sit-down interview with Mr Llewelleyn, Ms Wilkinson, Ms Higgins, and Mr Sharaz on 27 January 2021. This took place in Sydney and began at approximately 10.30am (Ex R203; p2956 CB225).

173. The contents of this meeting were canvassed extensively in cross examination and in other sections of these submissions. Suffice it to say that Mr Llewelyn in cross examination attempted to play down the importance of this meeting in terms of testing the credibility of Ms Higgins. The revelations in this meeting provided the Network Ten team with reasons to doubt the claims of Ms Higgins particularly as they pertained to the loss of data from her phone, the photograph of the bruise of the alleged assault and the words and actions of Senator Reynolds and Ms Brown.

174. Mr Llewelyn's own affidavit (CB 1079) attests to the importance of this first meeting in terms of research and preparation of the programme. Firstly at [98] he says Ms Wilkinson and himself needed a face-to-face meeting with Ms Higgins to "assess her demeanour" and to determine whether the details provided would give them more or less "confidence in her believability" and "whether to take the story further".

175. Then, at [108] Mr Llewelyn says the purpose of the first meeting was to determine whether to pursue the story (although other evidence suggests that in substance that decision had been made – see e.g. Ms Wilkinson comment on 20 January 2021 proposing going "huge" with the story); and to assess Ms Higgins as a source, including her reliability; and her credibility. In addition, see Ms Wilkinson's affidavit in the same vein at [68].

176. As will be developed in other places in these submissions, the inherent unlikeliness of many of the details provided to Mr Llewelyn and Ms Wilkinson in that first meeting by Ms Higgins would have prompted any journalist acting reasonably to take different steps, including attempts to speak much earlier to key individuals such as Ms Brown and Mr Lehrmann.

177. A point appeared to be made in re-examination of Mr Llewelyn that the transcript of this first meeting was created well after the Project went to air (T1710 L9-15). Presumably the submission will be made that Mr Llewellyn and Ms Wilkinson could not have gone back to this transcript at CB1114 to scrutinise the discrepancies in Ms Higgins' story. That submission should be rejected for the simple fact that any journalist acting responsibly in a first meeting of the importance that Mr Llewellyn attaches to it would have taken extensive notes. Secondly, Mr Llewellyn had the audio file of the recording (see Llewelyn affidavit [117]) and could have, and should have, checked relevant parts during the course of research and preparation for the broadcast, given the importance he himself attributed to this meeting in terms of the assessment of the credibility of Higgins.

The 2 February 2021 meeting

178. The next significant step in the timeline of research and preparation appears to the filming of the interview on 2 February 2021. Before that recording, the evidence is that the Network Ten team shared multiple emails, live documents via Google Docs with interview questions and many phone calls between team members in researching the story (see e.g. Llewelyn affidavit [153]ff). At this point though the evidence appears to be that Ms Higgins' claim of being raped and her recounting of the events that took place in her timeline document were all completely accepted by the Project. For example, Mr Llewelyn says at [184] that even though he was "unable to confirm anything about the AFP investigation into Ms Higgins' allegations…a lack of information in this specific case did not mean that something was untrue or that the reliability of Ms Higgins' story was otherwise in doubt". That only emphasises the extent to which it was important to assess and test Ms Higgins' claims. The general approach was unreasonable.

179. The belief in what Ms Higgins had told the Project team tainted the approach to research

in various ways. For example, Mr Llewelyn's view as to why the AFP would not talk to him was because the AFP officers would not have wanted to talk to him "about an investigation that they were *apparently having difficulty with*." (Llewelyn affidavit [184]). Of course, the only piece of information suggesting that the AFP was having difficulties with Parliament House was from Ms Higgins herself (see e.g. Ex R11, CB332, p3342). For Mr Llewelyn to rely on Ms Higgins' own untested information to then confirm in his mind why the AFP might not want to talk to him, and which might give Mr Llewellyn reason to not put much effort into his AFP enquiries, is the proverbial 'tail wagging the dog'.

180. The evidence concerning the research and preparation by both Mr Llewelyn and Ms Wilkinson reveals their own biases, views and prejudices against Parliament House. These seem to increase their unquestioning support for Ms Higgins' version of events. For example, both refer to their 'research' on policing within Parliament House as leading them to a belief that the system of policing within Parliament House to be "archaic" (Wilkinson affidavit at [83]) and "anachronistic" (Llewelyn affidavit [189]). Both believed the AFP police "operated at the directive of the parliamentarians themselves" (Wilkinson [83]; see also Llewelyn [193]). The problem of course is that this misunderstanding and bias lead to both believing that "no one was independently policing potentially criminal behaviour within Parliament House" (Wilkinson [83]; Llewelyn [193]) and lead to the belief that everything Ms Higgins had been saying about the difficulty getting the CCTV footage (itself most implausible see further below in these submissions) was explainable by reference to the anachronistic and politically managed approach to policing within Parliament House (see e.g. Llewellyn [189]). This lent support to the conspiratorial view that a systemic cover-up was taking place in Parliament House, as Ms Wilkinson believed.

Ms Higgins' phone issues, the bruise photograph and selective texts

181. The issue regarding Ms Higgins' phone first came up early in the preparation and research process.

182. In an email dated **20 January 2021** Wilkinson to Sharaz (Ex R130 CB 148 p. 2815) Ms Wilkinson asked Mr Sharaz whether Ms Higgins had taken her phone to Apple to "*see what the issue is that made it shut down so completely*". Clearly Mr Sharaz had

said something when they spoke prior to this email on 19 January 2021 (Wilkinson aff [21]) about Ms Higgins' phone.

183. Evidently by this time, Ms Wilkinson already knew that Ms Higgins had suffered a complete phone 'shut down' and that she had said she would take it to Apple (though Ms Wilkinson could have meant Vodafone (see T1733 L39)).

184. In the first face to face meeting on **27 January meeting**, relevantly on this issue, Ms Higgins told Ms Wilkinson and Mr Llewellyn the following (with CB page references to CB1114):

(a) That she intended to take her phone to Vodafone and that she had in fact missed an appointment and couldn't get in (p6180, 6184)

(b) That recently she had been in a process of screenshotting documents including conversations with Senator Reynolds and Senator Cash (p6180, 6182)

(c) That the night after she had requested Ms Pearson's number from many persons including the Reynolds office, her phone "*completely died*". Ms Higgins said "*all my whatsapps were gone, all my conversations were gone, all my photos were gone*." She said further "*and I've swapped devices half a dozen times, it's quite normal, but yeah, it was completely wiped which was weird*" (p6180-1)

(d) At p6251 Ms Higgins confirmed that her whatsapp was "pretty much all gone". She identified the message from Fiona setting up the meeting with Reynolds (which is attached to the Timeline at R11 and which, with parts blurred, appears in the final program at L91A) as the exception.

(e) Ms Higgins confirmed that the photos were also gone from her iCloud at this point even though both her and Mr Sharaz say that everything should have been in her iCloud (p6182)

(f) In the context of the events described above Ms Higgins referred to authentication software placed on her phone by the government (p6181). After Ms Wilkinson raises the phone issue again (p6282) Ms Higgins stated that the government had the capability to monitor her phone and that she knew they could remote wipe phones and did not know if that had happened to her.

185. In this meeting, Ms Wilkinson returned to this topic on four occasions. It clearly was of real concern to her at the time (see pages 6180, 6222, 6251, 6282) and at p6283 says "it's got alarm bells written all over it for me…when can you get to Vodafone? Because I think *we need to know that before we do* the interview." (emphasis added). There is no evidence that Ms Higgins went to Vodafone before the interview was filmed.

186. It was in the meeting of 27 January 2021 that Ms Higgins provided the photograph of the bruise (Ex 44 CB244) that would be put to air as evidence of a rape (see L35-37).

187. Ms Higgins gave the following information at the 27 January meeting concerning the photograph of the bruise:

(a) That she had on her phone a photo of her leg. She then immediately referred to the fact she had been pinned down and that pressure had been placed on her leg which caused the bruise on her thigh (p6261)

(b) Ms Higgins showed a photograph to Ms Wilkinson on her request (p6261-6262)

(c) Ms Higgins said she took the photograph "a couple of days after" the assault (p6262)

(d) At the same time, Ms Higgins referred to a different photo of the bruise in her possession (p6263)

188. During that meeting the photograph that was discovered by Ten was airdropped to Mr Llewelleyn (see CB1114 p6313 – 6314 especially Ms Higgins clearly searching and finding on her phone to airdrop to "Angus' phone?" at 2:08:39.3), and Mr Llewelyn replying: "Yeah, that's me.") (see also T1509 L15-23 and T1510 L10-11).

189. The photograph given to Ten bears a date and time stamp "*8.45 am 27 January*". At that time Ms Higgins and Mr Sharaz were on a plane from Canberra to Sydney (see Ex R179 CB 200a and R213 CB 235 p. 2979 messages between Sharaz and Llewellyn 26-27 January including particularly the message at 9.12 am "*Just arrived*".) As discussed above, the evidence also establishes the meeting began at approximately 10.30am (R203, p2956 at 7:44.39am CB225).

190. There is no explanation as to the 8.45 am 27 January information which appears on Ten's discovered document. Consistent with the agreed facts (Ex67) it is at least

possible that the information is referable to an action of Higgins or Sharaz Ms Higgins simply said she did not know at T870 L6-8 and that she may have taken it accidentally T871 L3-18).

191. In that meeting, neither Mr Llewellyn nor Ms Wilkinson made any inquiry about the metadata of the photo or asked to see an original photo and it appears neither of them picked up on Ms Higgins' saying she had a 'different' photo of the bruise.

192. Mr Llewellyn agreed (Affidavit [131] CB 1079 p. 5613 that he interpreted Ms Higgins' remarks during the interview as a suggestion that the loss of the data (including WhatsApp, conversations and photos) could have been the result of the government hacking her phone. He said he discounted this suggestion because there was no evidence to support it and that "*I decided that it was something that needed to be left out of the story. I thought that it sounded more like operator error than any conspiracy on the part of the government*."

193. Mr Llewellyn further agreed (Affidavit [152] CB 1079 that he found the suggestion the phone had been wiped was "*strange*".

194. Then on **31 January 2021** Ms Wilkinson and Mr Llewellyn have a message exchange which sheds some light on their state of mind at this time (Ex R203; CB225, page 2958):

> Wilkinson: I want to zero in a little on this whole phone thing. Have a look at my questions Ive just added. I need to know what Vodafone are saying about her phone going to black. And if she took screenshots of crucial messages she now no longer has, how come she still has the bruise shot? Im confused on this point. And why is she delaying or at least appears to be delaying – getting answers on that.
>
> Llewellyn: I'll talk to her. With no proof of my own 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 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.

195. The exchange shows that Ms Wilkinson was confused about the survival of the bruise photo in circumstances when Ms Higgins claimed to have lost material on her phone. She was concerned why Ms Higgins was delaying approaching Vodafone. Mr Llewellyn, however, wished to avoid the topic, seemingly because it raised difficult questions which weakened Ms Higgins' credibility.

196. Mr Llewellyn further stated in his affidavit at [152] CB 1079 p. 5616 that he "*did not*

think it was unusual for Higgins to have the photograph of the bruise even though she said her phone had been wiped and she had lost lots of material because she had provided me with other supporting screenshots which suggested her phone had actually not been wiped or at least some of the contents was still accessible." That explanation, however, really highlights the problem and begs the question.

197. Ms Wilkinson did not further respond. In her affidavit at [94] CB1075 p. 5563 she referred to this exchange. She says "*she relied upon Mr Llewellyn to investigate this issue*." That is no excuse given she herself had plainly identified a problem. There is no evidence for instance that she ever again pressed Ms Higgins as to whether she had been to Vodafone. Ms Wilkinson says further in her affidavit at [94] that she later recalled Mr Llewellyn "*telling me that Ms Higgins had access to multiple mobile phones in her role as media adviser and issues had arisen in the transference of data. Sometime before broadcast I was satisfied this was not an issue*."

198. Mr Llewellyn could not recall saying that (T1520 L3-6). Furthermore, Mr Llewelyn did not know whether Ms Higgins had actually ever said to him that the reason she lost her data was because of transferring material between mobile phones (T1588 L26-35).

199. Even if he had given this explanation to Ms Wilkinson, or Ms Higgins had said it to Mr Llewelyn, this additional explanation as to why Ms Higgins only had some selective and supportive photos and texts on her phone which otherwise had died would have been inconsistent with Ms Higgins' earlier explanations and just raised a whole new raft of questions about her reliability.

200. By the time the interview was recorded on **2 February 2021** it is apparent there was no definitive explanation as to what had happened to Ms Higgins' phone or why certain photos and text messages survived or why nothing was available in Ms Higgins' iCloud.

201. When the interview was recorded both the general topic of Ms Higgins' phone issue and the bruise photograph were dealt with in truncated fashion (see e.g CB377 (aide-memoire to exhibit 37, herein simply CB377, p3474).

202. With respect to the bruise photograph, Ms Wilkinson proffered a question "You have a photo that you took of a bruise that developed that night. What does that photograph show" and Ms Higgins gave a reply to the fact that the bruise was caused by Mr

Lehrmann's leg pinning her down during the assault.

203. Clearly the words by Ms Wilkinson, "you have a photo" imply acceptance of the provenance of the photo that would be put to air as contemporaneous evidence of a rape, not least because 'when' the photograph as taken was never explored in the interview.

204. Ms Wilkinson raised the topic of the phone in brief fashion near the end of the interview (p. 3524ff.) Ms Higgins said her whatsapp had crashed and "*even though I'd swapped previous handsets before, it lost all my previous sort of memory*."

205. In response to a question from Ms Wilkinson "*Your phone what inexplicably died?*" Ms Higgins agreed. There followed a brief inconsequential discussion about ownership of and access to the phone. In short, there could not be said to have been any real testing by Ms Wilkinson as to the explanation as to Ms Higgins' phone. Furthermore the narrative was consistent with that advanced by Higgins on 27 January – that is the complete phone death following screenshotting and not some problem caused by transfers between multiple mobile phones.

206. On **8 February 2021**, Mr Lewellyn asked Mr Sharaz to ask Ms Higgins for the date the bruise photo was taken (Ex R292, p3240 CB 320). Higgins replied "*I'm not sure on the exact date but it was taken in Parliament House during budget week (1st-5th of April).*"

207. Two days later in her statutory declaration on **10 February 2021** (R463, p3794 CB 505), in which Ms Higgins attested to the correctness of all the answers she had given in her interview recorded on 2 February 2021, she relevantly stated: "I *took the photograph with my iphone at Annexure B on 3 April 2019*."

208. On 27 January 2023 Ms Higgins had said the photo had been taken a couple of days after the assault (suggesting 25 or 26 March 2023). On 8 February, just two days prior, she was able to say 1-5 April but by 10 February apparently able to say with certainty 3 April. Mr Llewellyn did not question these changes. It does not appear to have occurred to him that without metadata it was presumably very difficult for her to have some kind of dual epiphany – first moving the timeframe a week later within a five-day range and then suddenly fixing on a specific date.

209. In his affidavit at [277] CB 1079 p. 5632 Mr Llewellyn stated that he believed the inclusion of the photograph in the statutory declaration was important because it was "*key information. We did not have any other visible evidence to show there had been an assault."*

210. In cross-examination, Mr Llewelyn, said it did not strike him as odd as to why Ms Higgins' phone had apparently died but yet some messages and photos had survived, despite it being clear that the only remaining items were supportive of Ms Higgins' account and those other items were curated by Ms Higgins and provided as part of her timeline document (T1509 L4).

211. When asked about checking the date of the bruise photograph Mr Llewelyn said in cross-examination that he "had no reason to believe that it wasn't anything other than what Ms Higgins told [him]." (T1509 L43-45) and that the explanation to the evident phone issues was a "stuff-up" (T1510 L3). He admitted he never asked to check the metadata of the original photograph and they relied on Ms Higgins' Statutory Declaration to assure himself that the photograph was contemporaneous (T1510 L25-29). This is a very poor process in terms of research and verification in circumstances where the photograph was put to air as physical evidence of the assault.

212. Likewise, Mr Llewelyn admitted that he had been told prior to being given the photograph that Ms Higgins had fallen over at the second venue on the night in question but it never occurred to him to probe or test whether that bruise was due to the fall (T1511 L36-46).

213. In cross-examination, and in reference to what Ms Higgins had been saying about the death of her phone in the 27 January 2021 meeting, Ms Wilkinson admitted that she could not follow what Ms Higgins was saying and she found it confusing (T1734 L26-33; T1736 L40) and that Ms Wilkinson was concerned because what Ms Higgins had been saying in that meeting about her phone was "barely comprehensible" (T1736 L42-43). Ms Wilkinson's action was to rely on Mr Llewelyn and speak "to my producer about it" (T1741 L17).

214. On the issue of testing when the photo was taken, Ms Wilkinson did not agree that she knew what metadata was, despite tweeting about metadata some years hence (see T1848-T1849 and Ex 65). She also disagreed that it was improbable that in 2021 a

journalist of 40 years' experience would not know what metadata was. Either she is not telling the truth, or her own lack of knowledge on such a basic prerequisite for the verification of evidence is itself indicative of unreasonableness. What was a journalist in 2021 doing putting photos to air in support of a rape allegation if she did not even know what metadata was? Otherwise, it may be assumed she was relying on Mr Llewelyn, and, presumably, Mr Llewelyn's reliance on the Statutory Declaration from Ms Higgins.

215. On **15 February 2021** the broadcast simply contained two lines relating to a bruise that developed from that night (L35-37). It showed the photograph as evidence of a rape. The whole concern and confusion as to what had happened to Ms Higgins' phone, including the perfunctory questions asked in the **2 February 2021** interview, were not raised in the final broadcast. It was edited out. The viewers were never permitted to know anything about the provenance of the photograph because they never knew of the phone issues Ms Higgins had told Network Ten about nor did they know anything about the "unanswerable questions" that could have affected Ms Higgins' credibility.

The obstruction allegations and Ms Higgins' account of treatment by Senator Reynolds and Ms Brown

216. A central theme of the program (evident from Line 2 of Schedule A) was the blockades or roadblocks Ms Higgins experienced in proceeding with her police complaint.

217. As detailed below, Network Ten understood the importance of a strong explanation as to why Ms Higgins did not proceed with her police complaint because that would affect her credibility. The 'obstruction allegation' provided to the journalists - and then passed to the viewers – fulfilled this purpose.

218. The obstruction allegation included the alleged pressure by Senator Reynolds and Ms Brown on Ms Higgins not to report the assault in the immediate aftermath; the threat to Ms Higgins' continuing employment if she did report it; the treatment of Ms Higgins by Ms Brown via the 'Star chamber' process; the involvement of all those key individuals in a "systemic cover-up"; and the withholding of the Parliament House CCTV footage, apparently by the Executive Government of the day.

219. On the obstruction allegation, on 5 December 2023, Ms Higgins was asked by his Honour the actual words spoken or things done that obstructed Ms Higgins' and, with respect, Ms Higgins struggled to articulate any coherent allegation as to anything the two women had said or done in terms of obstructing her desire to pursue a police complaint (T1031-1033).

220. The obstruction allegation was first raised by Ms Higgins **timeline document** (Ex R11 CB332). Relevantly that document contained this information:

(a) In relation to Meeting 2 (which according to Ms Higgins is to be understood as the 28 March 2019 meeting: T833 L27) Ms Higgins indicated that Ms Brown had "stated the AFP unit in PH had been informed and would like to speak with me" (T834 L8).

(b) In relation to Meeting 3 with Brown and Reynolds (which as a matter of fact occurred on 1 April 2019) Ms Higgins said "they both repeated that if I chose to report that incident to the authorities that they would be supportive"

(c) In relation to Meeting 4 with Ms Brown (the evidence has not established the precise date of this meeting) Ms Higgins said: "I was given 2 options. 1. I could go home to the Gold Coast for the duration of the election campaign but that this would likely impact my ability to reapply for a job in the future.2. I could stay onboard and go to Perth WA for the campaign."

221. Also of note was the heading for the document annexed to the timeline described as Article D which was the 13 April 2019 letter in which Ms Higgins withdrew her police complaint. The heading is "Pausing active case with AFP *following internal pressure* to go to Perth". (emphasis added).

222. In the **27 January 2021** meeting, the relevant passages include the following allegations (page numbers are reference to CB1114, aide-memoire to exhibit 36), which should all be in the light of the concession at p6126 to both Mr Llewellyn and Ms Wilkinson by Ms Higgins that all government staffers were all going to lose their jobs once an election was called:

(a) Ms Higgins in the course of describing the events at the second meeting with Ms Brown (or at any rate a meeting held prior to the joint meeting with Senator Reynolds) attributed this to Ms Brown (p6111):

> But she said if you choose to proceed with police proceedings, we wouldn't stop you. And I remember thinking that's nice. Yeah and that was one thing she said to me and then that line, that very specifically crafted line, was said again by Reynolds. That exact same line". (emphasis added)

(b) Ms Higgins indicated that after the budget was handed down (being 3 April 2019) the following was attributed to Ms Brown (p6125):

> Fiona was putting a lot of pressure on me to go ok, we'll pay you out. You can go home if you want for the election. We'll pay you out….I would just have to go home…..I was like OK so if I go what happens at the end? How do I come back? And she said well you wouldn't. And that was when I, that's when I fully internalised that if I went down that path, I wouldn't be coming back.

(c) At p6126 Ms Wilkinson asks "So, I'm just trying to work out if she basically gave you no reason why you would no longer have a job?"

(d) Ms Higgins response was that she "didn't feel as if [she] was given a reason". She then said "she just wasn't promising for a pre-empted employment contract that existed in the future. So she didn't say I wouldn't, once again she's been around the block for decades." That response is interesting not just because it tends to suggest that Ms Brown never actually said "well you wouldn't" but also because Ms Higgins reveals a glimmer of something closer to the truth – that because of the imminent election, she was in fact certain to lose her job and would have to reapply in any event (Ms Higgins had already said slightly earlier on p6127 - "we'd all have to re-sign new contracts anyway"). Indeed, objectively speaking, the suggestion that a senior public servant would say such a thing to a woman who had just made a rape allegation ought at the very least to have appeared peculiar. But Ms Wilkinson and Mr Llewellyn accepted everything that was said on this topic.

(e) At p6133 Ms Higgins gave another version which was that Senator Reynolds said that if Ms Higgins wished, "the police was feasible."

(f) At p6166-6167 Ms Wilkinson returned to the topic. She invited Ms Higgins to confirm "You were told you'd lose your job if you proceeded with police

charges" and Ms Higgins replied "Not explicitly but it was clear. If you go home, if you take a payout, you can proceed with this. We're not going to stop you but you just don't have a job."

(g) Ms Wilkinson then asked at page 6166 "And so what were the options if you didn't press charges?" and Ms Higgins replied "You would have a job." Mr Llewellyn, apparently unconscious of the irony lacing his own words, says "It's a terrific excuse because everyone's jobs were up."

(h) At p6167 Mr Sharaz inquires of his partner as to the response when Ms Higgins asked Ms Brown what would happen if she took time off and just came back. Ms Higgins replies "No she kind of like trailed off and was kind of like well you don't come back."

(i) Ms Wilkinson's remark at the end of this exchange indicates just how captured she is by her source at this point. She is not challenging her – she is not gently probing her – she is barracking. She says "Yeah they just cut you off at the knees every time they could."

223. In the **2 February 2021** recording of the interview the following allegations were made with respect to the obstruction allegation (page numbers are reference to CB377, aide-memoire to Ex 37):

(a) at p3501, Ms Higgins initially gave a version resembling what was in her timeline document stating that Ms Reynolds was apologetic and "then pretty quickly the conversation turned to the police. And if I chose to go the police, *we would support you*." (emphasis added). Ms Higgins qualified this by describing it as a "ticking a box moment" and then alleged "and then successively all their actions following that, made it very clear that that wasn't anything that was actually a real feasible thing for me to do." Ms Higgins was not asked what actually comprised those "actions". Nor was she asked why it was she apparently came to hold a belief which was close to the opposite of what she was being told.

(b) Later, on the same page, Ms Wilkinson asked "Was there any mention of police being called in and this becoming a full investigation." Ms Higgins replied "No

it was very much it felt like it was like, if it was like an independent side project of mine. If you choose to we won't stop you essentially." That does not sit comfortably with the reference in the Timeline to the fact that before the meeting with Senator Reynolds and Ms Brown, Ms Brown had actually stated that the AFP unit in Parliament House had been informed and would like to speak with Ms Higgins. Nor does it sit comfortably with the other references to offers of support.

(c) Then, on p3502, the contradictions come into sharper focus. Ms Wilkinson specifically asks "Were they the words they used, If you go the police we won't stop you?" Ms Higgins replied "Yeah I think so, I mean it was they weren't supporting or encouraging me. They didn't tell me you should go to the police we will support you, like let's do this…" That is significant for two reasons:

(i) within two minutes or so Ms Higgins has explicitly moved from saying that she was told she would be supported to saying that did not happen;

(ii) on 27 January 2021 Ms Higgins had described the "we wouldn't stop you" (see above) formulation as a specifically crafted line. In this interview that previous certainty collapses into confused recollections and speculation and uncertainty.

(d) At p3508 Ms Higgins attributed the "well you wouldn't" statement to Ms Brown as something said in response to Ms Higgins' inquiry about a return to work if she elected to return home. This statement found its way into the program (L121-123).

(e) At p3511 Ms Wilkinson asked Ms Higgins "Why did you decide not to pursue the case with the AFP at that point?" and Ms Higgins replied "Because we were already coming up with so many blockades and I realised my job was on the line." That line also found its way into the program (L132-133). It is significant because Ms Higgins is directly blaming a threat to her employment as a reason for her decision not to pursue the police case. She never actually pointed the journalists to a statement or an action that could support that claim.

(f) Very shortly later, on the same page, Ms Wilkinson again asks if Ms Higgins felt pressure not to proceed with the police case. At this point, Ms Higgins proffered a different explanation concerning the existence of a "culture of silence" and did not mention Senator Reynolds or Ms Brown. This also was published in the programme, at L134-135).

(g) Finally, at p3531-3532, in answer to a question about how she felt about her treatment by those in positions of power at Parliament House Ms Higgins gave an answer including these words "And they intentionally made me feel as if I was going to lose my job so I wouldn't go to the police". That statement was not interrogated. As discussed above, as at late March and April 2019 it was a mathematical certainty that Ms Higgins would lose her job when the election as called along with all the other staffers. The journalists knew this because Ms Higgins had told them that in the first meeting on 27 January 2021 (at CB1114 p6126) and Mr Llewelyn even refers to that in that same first meeting at CB1114 p6166 "everyone's jobs are up" and see also T1591 L6-9) and for Ms Wilkinson's knowledge see T1779 L6-8).

224. On **6 February 2021** Mr Meakin sent an email to Ms Binnie and then Mr Llewellyn following his review of the interview (see Ex R386 p3681 CB 427). He observed:

> 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 for the change of heart?

225. Mr Llewellyn replied (Ex R387 CB 428) "*Yes I reckon once you see the way B says all this stuff you'll have a far better idea of he feel and shifts in tone*."

226. That is with respect a response without substance. Mr Meakin has raised an issue obvious from the face of the interview that afflicted the credibility of Ms Higgins and Mr Llewellyn in effect said "if you see more context you will understand." The problem is that the additional context (the Timeline and the 27 January 2021 interview) only increased the extent of the contradictions as detailed above. Mr Llewellyn at T1612 L27-1614 L12 could not give a coherent explanation of his reply to Mr Meakin nor say anything of substance beyond that he believed they had discussed the matter over the phone. His evidence on this topic reflects poorly on his credit.

227. Ms Wilkinson fully appreciated the degree to which the failure to press charges in a timely manner was critical to Ms Higgins' credit. In a message exchange on 26 January 2021, the day prior to the long first face to face meeting, Ms Wilkinson had asked Ms Thornton whether she wanted anything raised. See Ex R189-R191 p2928 CB 210-212. Ms Thornton replied "I *guess for me is clarity on what was said by who and to whom in terms of Brittany not pressing charges and whether theres a paper trail or notes or witnesses to anything to corroborate that part of it*."

228. Ms Wilkinson did as she was asked, at CB1114 p6247, prompting Ms Higgins with the following: "*the answer you really need to think about it…why didn't you press the charges*?". Ms Wilkinson then hints that Ms Higgins should speak about the culture and how someone who had reached the top of the mountain would not wish to leave. Network Ten knew that a credible explanation for the failure to press charges in 2019 was critical. What had been broadcast as the reason was the pressure from Senator Reynold and Ms Brown and Ms Higgins' dream job being on the line. That allegation however was never fully tested and, as shown above, was riddled with inconsistences.

229. A further important piece of evidence that Network Ten had on this point is discussed below but, just briefly, is the response received from Mr Carswell the government spokesman. The written response received by Network Ten on 2.17pm on **Monday 15 February 2021** (Ex R810; CB858) attached a screenshot of a whatsapp exchange between Ms Brown and Ms Higgins. Ms Higgins said in her message: "Thank-you! I wanted to state this in person but – I cannot overstate how much I've valued your support and advice throughout this period. You've been absolutely incredible and I'm so appreciative." (p4430).

230. Likewise, the attached email from Ms Barons to Ms Brown clearly detailed that Ms Brown had communicated clear messages of support to Ms Higgins of Ms Brown and Senator Reynolds and that that support would be ongoing if Ms Higgins chose to pursue a complaint (p4428).

231. The evidence from Mr Llewelyn and Ms Wilkinson on the above allegation of lack of support was interesting.

232. For example, despite the clear import of the programme being that Ms Higgins did not pursue the police complaint due to pressure brought to bear on her because her job was

at risk if she did (see L2; L132-135), Ms Wilkinson actually believed that the pressure the broadcast referenced arose or emanated from within Ms Higgins herself (see e.g. T1870 L7-13) and that was the impression conveyed by the program. Ms Wilkinson also acknowledged that she did in fact perceive a distinction between what Ms Higgins felt and the words actually spoken to her. She described this as "reading between the lines" because "that's what we tend to do as journalists to try and understand when you're interviewing somebody." (T1781 L24-38). In other words, she was confident intuiting what had really happened – fully understanding that what Ms Higgins was saying was probably unreliable. At T1798 L4-6 Ms Wilkinson ultimately disagreed that the programme was alleging Senator Reynolds and Ms Brown applied pressure to Ms Higgins not to go to the police. The beliefs and states of mind revealed by this body of evidence are so unreasonable that by themselves they vitiate any prospect of the respondents discharging their onus.

233. Mr Llewelyn's take on the inaccuracies of the accounts and the lack of any evidence other than from Ms Higgins as to the pressure brought to bear was simply that:

> Ms Brown is a very smart, clever, respected operator and so is Minister Reynolds. They wouldn't say something overly like that and that's why, you know, we've inquired and we've listened carefully to how it was explained. (T1607 L43 -1608 L2).

234. An additional element to the obstruction allegation was an allegation that Ms Brown (a "terrifying individual" (aide-memoire to Ex 36, CB1114 p6146)) somehow continued to loom large over Ms Higgins well after the alleged incident. This was apparently done by Ms Brown using her position on something referred to as the '**star chamber'** to reduce Ms Higgins' salary and seniority when Ms Higgins took a job with Senator Cash. Whilst this was not broadcast it was another example of what could only be described as a fanciful and conspiratorial view by Ms Higgins that was not tested by Network Ten.

235. For example, when asked if it was all nonsense, Ms Wilkinson said "I've got no idea" and when asked if she was sceptical of those claims Ms Wilkinson said "I wasn't in a position to find out any further detail". Ms Wilkinson then conceded that she wasn't sure if it was true but that that did not affect her assessment of Ms Higgins' credibility (T1782 L29-43).

236. Mr Llewelyn's attempts to explain away Ms Higgins' claims about Ms Brown and the Star Chamber could only be categorised as unresponsive and insincere (see e.g. T1530-1531).

237. Finally, a core component of the obstruction allegation related to **the CCTV issue**.

238. The first relevant evidence on this point is in Ms Higgins' **timeline document**. In that document it was clear that her police complaint had been withdrawn on 13 April 2019 (see Ex R11, CB332, Article D, p3346).

239. Then, in the first meeting on **27 January 2021**, Ms Higgins raises a claim that the AFP unit in Belconnen (which would be the SACAT Team) were "already starting to get push back in terms of being able to retrieve footage" and that the police office "had already hit that wall" (aide-memoire to Ex 36, CB1114, p6121). Then Ms Higgins says the department that holds the CCTV (Department of Parliamentary Services (**DPS**)) does not have to release the footage as "its entirely at their discretion. They don't have to do anything."

240. Ms Wilkinson then asks a pertinent question at p6125: *So given that Fiona was giving you a psychologist you could speak to and the EAP and all of that, did you, when you discovered that there were these blockages to get in the CCTV, did you ask would it be possible to see the footage? Did you ask her? Or Linda Reynolds?*

241. Ms Higgins' answer was "No… I wanted to keep it under wraps until I could figure out or ascertain what my prospects were."

242. It is relevant that the two senior people Ms Higgins had been dealing with were on this version not asked to assist Ms Higgins or even the police, to see the CCTV. Of course at other points Ms Higgins claimed Ms Brown refused to let her view the CCTV despite repeated requests (see for instance aide memoire to Ex 37, CB377 p3497).

243. In the **2 February 2021** interview at aide memoire to Ex 37,CB377 p3496 Ms Higgins stated she had asked to see the CCTV footage and was "*weirdly fixated on it personally*." She also stated that "*I knew Fiona had seen it, I knew that sort of, one of my other colleagues had seen it from Defence*". That was broadcast, as was Ms Higgins then saying that it was a betrayal for Ms Brown to withhold the CCTV footage from Ms Higgins (see e.g. L89-93). Pausing there, the notion that an Acting Chief of Staff (who left her position on 5 April

2019, which was prior to the external AFP at Belconnen meeting with Ms Higgins) of an Executive government department, would have any sway over DPS decisions with respect to CCTV footage (especially after Ms Higgins said DPS had complete "discretion") is simply another example of Ms Higgins' fanciful claims that should have lead to serious questions being asked of her credibility by Network Ten. However, no such questions were ever asked.

244. Ms Higgins then said at p3499 that she did not specifically ask the police unit within Parliament House for the CCTV but that she had assumed they had seen the CCTV because they knew "facts and figures" and the time and "logins" of her and Mr Lehrmann's entry into Parliament House. Her assumption that the police at Parliament House had seen the video did not find its way into the program.

245. At p3505 during the course of the interview Ms Higgins again stated that the AFP officer from Belconnen had raised the fact that she was having difficulty with Parliament House obtaining copies of the footage.

246. Ms Wilkinson asked whether Ms Higgins knew "*who was knocking back the AFP back in getting that CCTV?*" and Ms Higgins replied she did not know to whom the police officer had spoken. Ms Higgins then agreed with a suggestion that the police officer had elevated the issue of access to the CCTV. This culminated in Ms Wilkinson putting the (somewhat extreme) proposition "*So footage that could have gone some way to supporting your allegation of rape was not available to you and was not available to the Federal Police*". Ms Higgins agreed.

247. Finally, at p3507 Ms Higgin expressed the view that she would never see the footage and referenced the view of a friend who works in policing. She said "*he sort of politely brought me back to reality and said that he assumed it was quietly destroyed at some point. It's yeah, it was lost*." That view was not challenged. Ms Higgins was in effect alleging a conspiracy to destroy evidence related to a serious crime, presumably as part of the wider "systemic cover-up". Ms Higgins was never interrogated on this rather extreme conclusion or what could possibly have supported it apart from the unnamed friend's opinion.

248. As detailed above, Ms Wilkinson and Mr Llewellyn knew that Ms Higgins had withdrawn her police complaint on 13 April 2019 due to their reading of the timeline

document. The point is that the period during which the police complaint was actually extant was so brief that any suggestion of a considered withholding of CCTV footage was simply improbable. That does not seem to have even occurred to Mr Llewellyn or Ms Wilkinson.

249. Even though it was clear that Ms Higgins appeared to be suggesting the Executive government was blocking DPS from releasing CCTV footage to the AFP, when questioned about this Ms Wilkinson said these claims were "concerning". She did not concede that these claims were peculiar or that they sounded a bit like a conspiracy (T1821 L10-14).

250. Mr Llewelyn in his affidavit said that Ms Higgins "called off the police investigation because [SACAT] had told her they had hit roadblocks with obtaining the CCTV footage from Parliament house" (at [127(f)].

Treatment by Senator Cash and re-instating the police complaint

251. At L139 of the broadcast Network Ten begin by implying Senator Cash lied about the time she found out the specifics of Ms Higgins rape allegation. Ms Wilkinson then inquires as to the words of advice Senator Cash gave Ms Higgins about the trauma she was going through and Ms Higgins says (at L141):

> Yeah. I was having difficulties actually coming through the entrance of Parliament House. It was that, that same entrance where the incident happened and so I felt, every time I'd walk through it I'd get quite panicky and I sort of, I said that I was having difficulties just coming in and at that point she was like "well you, you're just going to have to sort of suck it up" essentially. And it was, it's that same idea of "you deal with it, or you leave.

252. Firstly, these words had not been put to Senator Cash (see email sent by Network Ten at Ex R625 CB670). Secondly Mr Llewellyn had listened to a secretly recorded call of Senator Cash and Daniel Try talking with Ms Higgins (phone call, Ex 64; CB327; see also T1557 L27-29). In this call, Senator Cash and Mr Try were both effusive in their praise of Ms Higgins, were trying to do everything they could to keep her employed with them, and Senator Cash offered for Ms Higgins to work from home and never have to come through the Ministerial Wing security entrance again.

253. Mr Llewellyn listened to this recording and therefore must have known there was at least some doubt as to whether Senator Cash would say the words published as part of

the broadcast. His answers to questions on this topic were, again, unresponsive (see e.g. T1559 L29-43).

254. Another element to the factual preparation was whether or not Ms Higgins had reinstated her **police complaint**. The evidence on this point leans heavily towards the inference that Ms Higgins' actions in reinstating her police complaint were due to the pressure by Mr Llewellyn to give the story some credence and/or as a requirement from Network Ten to go to air.

255. On 5 February 2021 at 1.10pm, Mr Sharaz says to Mr Llewellyn "is the police the last thing you need". Mr Sharaz was not called to give evidence so it is not possible to test what he meant by that. The clear inference though is that Mr Llewellyn had demanded Ms Higgins restart the police complaint so the Project could have some confirmation and/or statement prior to publication. In response to the message Mr Llewellyn says "essentially yes" (see Ex R214 p2985; CB236).

256. Further messages were exchanged were Mr Sharaz reported back to Mr Llewellyn that they had gone to the police, had "kinda" got the officer over the line, but that Mr Llewellyn could now follow up to get a 'comment' that the investigation was legitimate. See Ex R214, CB236 p2985 and Ex R292, p3240; CB320.

257. At this stage it appears not only that Mr Sharaz and Ms Higgins' had a coordinated media plan as to when certain events would happen but that Network Ten had intervened to arrange a police complaint to suit its own timetable. The fact Ms Higgins had not voluntarily returned to police and only returned after the application of pressure by Llewellyn should have been another 'alarm bell' for Network Ten.

258. Mr Llewellyn agreed that Network Ten was coordinating the visit to the police in concert with the plan for the broadcast. As he put it Network Ten "needed to contact the police" (T1538 L1-L5).

Requests for comment and treatment of responses

259. According to Mr Llewellyn, the reason why Network Ten undertook the task of sending out emails with questions was to 'cover [them] off for defamation'. Further, if any of the email recipients agreed to an interview they were only going to be asked questions

to which Network Ten already knew the answer. (see email Ex R541; CB585 from Mr Llewellyn to Ms Wilkinson on 11 February 2021, the day before the requests were sent.) There was no genuine desire to engage with anyone other than Ms Higgins in terms of content for the broadcast.

260. The emails were sent at approximately 2.45pm on the Friday prior to the broadcast with a deadline of 10am Monday. Mr Llewellyn had earlier tried to make the 'send time' at 4.30pm on Friday (see Ex R583 CB627 p4061) however he did not get his way.

261. Ms Wilkinson was kept well informed as to when the requests were being planned to be sent (see e.g Ex R447; CB489 and T1854 L11-20).

262. In terms of the research as to the correct contact details for the applicant. Mr Llewellyn appeared to solely rely on Mr Sharaz for the email addresses, after being told by Mr Sharaz not to ask him where he got them from (Ex R214; CB236 p2987). Mr Llewellyn did not obtain any email address for Mr Lehrmann's current employer despite knowing Mr Lehrmann had moved on from the Parker and Partners/Ogilvy PR role.

263. Mr Llewellyn did not use the information he possessed about Mr Lehrmann's previous employer to see if he could get any forwarding address details for a new employer, even when Mr Sharaz (Ex R214, p2987; CB236, 2987 at 2.56pm) told him that "LinkedIn doesn't have the first employer listed any more but they can tell you where he went?"

264. With respect to the Hotmail address that was used on Friday afternoon for Mr Lehrmann, Mr Llewellyn admitted that he had no idea how frequently Mr Lehrmann used that email address (T1652 L5-6).

265. With respect to the mobile number used to try and contact Mr Lehrmann, the evidence is that after receiving information from Mr Sharaz, Mr Llewellyn found a mobile number for Mr Lehrmann on a press release that was from 23 October 2018. At that time Mr Lehrmann worked for Senator Reynolds when the Senator was the Assistant Minister for Home Affairs. Mr Llewelyn sent a sms to that number on Friday afternoon and tried to ring that number on Monday morning in circumstances when Mr Llewellyn had not received any response.

266. Mr Llewellyn's evidence is that he did not consider it likely that the mobile number was connected to a government issued phone. This was in spite of the fact that the number appeared on a government issued press release or that Mr Lehrmann would have had to return that device when he left his government role (T1634 L19-20). That evidence should be rejected. Further, when Mr Llewellyn rang the number on Monday morning and there was no voicemail, he did not consider that it was strange that there was no voicemail functionality, because "people hate voicemail", and secondly, he was only "ringing him out of a courtesy" (T1634 L36-37).

267. Mr Llewellyn's evidence was that he did not consider trying to contact Mr Lehrmann on LinkedIn because he believed the account to be inactive (see e.g. T1652 L18-19) and he held the view that it would have been inappropriate to contact Mr Lehrmann on other social media (T1626 L18-19). As discussed above his evidence as to a belief in the inactivity of the account is inconsistent with his email to the team warning them not to click on Mr Lehrman's account in case he received a notification.

268. In fact, at one point Mr Llewellyn expressed the view that as the promotional material for the broadcast appeared on Samantha Maiden's news.com.au article, Mr Lehrmann could have contacted Network Ten himself "all that day" (T1653 L3-5). That is not a view that assists in the respondents' contention that their conduct in publishing was reasonable in the circumstances.

269. The other emails were sent out at approximately the same time and Mr Llewelyn even spoke with or exchanged sms messages with certain contacts (see e.g. Mr Carswell cb763).

270. Mr Carswell provided plenty of information on 'background'. Ms Wilkinson and Mr Meakin agreed this meant that the information could be used (see e.g. T1725 L19-27 Wilkinson; T1960 L15-16 Meakin, but compare this to Mr Llewellyn's quite unbelievable answer on this point at T1662 L6-L33).

271. Mr Carswell's replies to the email with questions are of significance. See Ex R296, p3312, Ex R716 p4464; CB329 p. 3312, CB763 p. 4464, 4466, Ex R810, p4428; CB858 p. 4428. The last of these was an email which attached two contemporaneous documents that directly contradicted Ms Higgins' claims, as discussed above; namely the Barons email and the screenshot of the whatsapp exchange between Ms Higgins and Ms Brown.

272. At L107 Network Ten inserted a summary of the government's response. That, firstly, was at the beginning of the segment. As discussed below, Mr Lehrmann says that that meant the government's response was materially undercut by what followed. This is clearly what Mr Meakin, with whom this idea originated, intended. See Ex R718, p4270; CB765 p. 4270. Secondly, the use of the word "insists" is clearly used to make it seem the government 'doth protest too much'.

273. It is notable that the only reporting of a response from Senator Cash in the program is the single sentence at the end of Line 139. The full response was provided by Mr Creighton on the Monday at 10.43am to the Project (Ex R755; CB803). Senator Cash did not have the opportunity to directly address the words she is said to have used to Ms Higgins because those were not in the email for comment sent to Senator Cash. Therefore, there is no direct rebuttal of the very serious allegations against Senator Cash; namely that she supposedly told a rape victim to 'suck it up'. Network Ten's approach and editing in this regard is telling.

274. Also, as discussed above, the various responses from the AFP had manifestly cleared up any suggestion the CCTV footage had been withheld, destroyed, blocked, etc, from any investigation. See Ex R772 p4376, Ex R296 p3317. See CB820 p. 4376, CB329 p. 3317 and 3318, Ex R792 p4395, Ex R849 p4481; CB840 p. 4395, CB897 p. 4481.

275. There is no evidence that any of these responses which called into question many aspects of Ms Higgins' claims were ever put to Ms Higgins or that she was approached in any manner for the purpose of checks or further inquiries.

276. In the end however, the reality of any significant changes happening to the edit, regardless of what information Network Ten might have received, was best summed up by Mr Meakin's evidence who said at T1958 L34-37:

> Did you think at that point that it was important for someone to go back and talk to Ms Higgins again?---I didn't – that didn't occur to me, no. I mean, we – we had already done the interview with her, and I – I don't think there was much prospect of doing another one.

277. In short, the commercial imperative to air on Monday evening, required by the coordinated media plan, meant that there was no way the Project broadcast (exhaustively edited and crafted for weeks) was not going to air that evening. Network Ten had waited for Ms Maiden to publish – and "hype" their broadcast – and they had

no intention of losing their exclusive or the benefit of the carefully planned schedule they had crafted. See Ex R419 p3731.

278. Finally, two important edits should be highlighted.

279. Firstly, the broadcast as aired materially changed one of Ms Higgins' answers. In the 2 February 2021 interview at CB377 (aide memoire to Ex 37) at page 3477-3478 Ms Wilkinson asked "*Did any of those security guards ask if you were ok?*", to which Ms Higgins replied, "*No, no. I mean besides the one who called into the office in the morning who said, is everyone ok in there. That was it.*" In the final broadcast, all that remained after Network Ten's editing of the interview was Ms Higgins saying "no, no". At L48 to L49, Ms Wilkinson asked "*Did any of those security guards ask if you were okay?*", to which Ms Higgins now replied simply "*No… no*".

280. Ms Wilkinson said in her evidence that she was "disappointed to see" this editing out of the full sentence (T1883 L10). Again, it was a purposeful edit to make Ms Higgins seem more alone, vulnerable and to portray the government machine as woeful and in breach of their duty of care. The edit is particularly egregious because Mr Llewellyn and Ms Wilkinson knew that Ms Higgins had actually told them on 27 January 2021 that her reply to this inquiry by the security guard had been "fine"; see CB1114, p6084.

281. Secondly, another edit also lead to an incorrect impression. This was the blurring of sections of a text message from Ms Brown to Ms Higgins. The full text message is Ex R11 CB332, p3350. It clearly offers Ms Higgins the chance to bring her father to the meeting with Senator Reynolds.

282. On any view that shows someone who is behaving in a caring and considerate manner towards Ms Higgins. It is scarcely probative of the fact that she is planning some kind of ambush or inappropriate behaviour towards Ms Higgins at the meeting with the Minister the following day.

283. Of that text message, the broadcast only showed the sentence (at L91A) *"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".*

284. The evidence from Mr Llewellyn suggested the other sections of that message were not

relevant. In questioning, he disagreed that the blurring of the section where Ms Brown invited Ms Higgins' father gave a misleading impression to the viewers (T1571 L38-40). That answer should be rejected.

F.3 Publication

285. When the Programme was published, only one change was made due to the materials provided by Mr Carswell on 14-15 February 2021. At line 107, the respondents provided a summary of a statement from a Government spokesman to the effect that Senator Reynolds and Ms Brown had encouraged Ms Higgins to speak to the police, and that Ms Higgins was guaranteed there would be no impact on her career.

286. That statement was undercut by the following segment regarding what Ms Higgins said happened to her. Mr Meakin suggested this to avoid the government getting "*the final word*": Ex R718; CB 765. For example at line 109, Ms Wilkinson said "*the alleged assault left [Ms Higgins] feeling she had to choose between her career and seeking justice*". The segment then went on to air further claims (eg lines 123, 133-135, 138) that attacked what the Government spokesman had been reported as saying.

287. At line 167, the Programme reported that the respondents had approached "*all the people named in our story*" and that all requests for interviews were declined.

288. This was not true. For example, Senator Cash was approached but was not asked if she was willing to be interviewed: see Ex R625, Ex R758; CB670, 806 p. 4341. More importantly, the ordinary reasonable viewer would have understood that Mr Lehrmann was being referred to when it said "*all the people named in our story*". Mr Lehrmann's position as Ms Higgins' alleged rapist was so central that even if he was not named, viewers would assume he was included in that statement. This tended to further emphasise his guilt.

289. Mr Meakin understood that this is what was conveyed: Tcpt 1987.28-33:

> …you understood that that first sentence means that, "We of course approached all the people named in our story and all our requests for interviews were declined," was that it was intended to cover and refer to Mr Lehrmann? --- Yes, it was intended to refer to him, even though he wasn't named in the story, and yes, that's a – that's a point I acknowledge grammatically.

290. At the end of the Programme, Ms Wilkinson said "*[b]ut there is some good news for Brittany tonight, after almost two years, Parliament House authorities have finally told us the CCTV will be available to investigators*". This was similar to a form suggested by Mr Meakin that afternoon: Ex R834 p4458; CB882. It is unclear who added the words "*after two years*" and "*finally*".

291. What this conveyed to the viewer was that, until then, the CCTV footage had not been available to investigators and that it was only due to the publicity brought by the Programme that such footage was being released. This suggestion was contradicted by the information received by the respondents from DPS and the police (e.g. Ex R849; CB897). In fact, it had been available to investigators since 2019, and the initial investigators had actually viewed the footage on the 16 April 2019.

292. The incorrect statement by Ms Wilkinson concluding the Programme tended to give further credence to Ms Higgins' claims generally, specifically as to the CCTV, and also supported the consistent theme of the obstruction allegation and the cover up of Ms Higgins' rape allegation.

G. EVENTS FOLLOWING PUBLICATION OF THE PROJECT

293. On 17 August 2021, Mr Lehrmann was charged in the ACT Magistrates Court with one count of engaging in sexual intercourse with Ms Higgins without her consent, and being reckless as to whether she had consented. On the same day, Mr Lehrmann was publicly named by mainstream media outlets as the person accused by Ms Higgins.

294. The trial was originally fixed to commence in the Supreme Court of the ACT on 27 June 2022 before McCallum CJ.

295. On 19 June 2022, eight days before the criminal trial was due to commence, the Logie Awards took place. The respondents were nominated for and won a Silver Logie for the Programme. Ms Wilkinson accepted the award on behalf of her team.

296. Knowing that they had been nominated and that there was a possibility they would win, Ms Wilkinson prepared a speech: Exhibit 12. The obvious import of the speech, on any sensible understanding of it, was that Ms Higgins was credible and that she should be believed – and therefore, inescapably, that her allegations were true. Ms Wilkinson's

attempts to deny that this is what she was effectively saying were unimpressive, and reflected poorly on her insight: Tcpt 1729.26-1731.14.

297. Ms Wilkinson's only answer to the proposition that this was something she knew she ought not have said so publicly, eight days before a criminal trial of those allegations was due to commence, was that she did not know that she should not have done it "*because I sought advice before I got up on that stage*": Tcpt 1731.18-22. ~~The content of the advice has not been disclosed.~~

297A. During the hearing of the cross-claim further evidence was adduced. This evidence discloses that various employees of the first respondent reviewed the Logies speech from a legal and editorial point of view, approved the speech, and approved the second respondent giving the speech (see e.g. Ex. X1 pages 83-96). Additionally, the first respondent approved the giving of the speech after it had been given (Ex. X1 page 91). This evidence gives rise to several further considerations.

297B. The first consideration is that the receipt of legal and editorial approval from the first respondent does not absolve the second respondent of responsibility. Her actions remain ill advised, reckless and prejudicial to the Applicant's right to a fair trial. The Logies speech which the second respondent composed, delivered and took responsibility for (T1730 L24-25), destroyed the distinction between an untested allegation and the fact of guilt to such an extent that McCallum CJ used it as a basis to order a temporary stay of the Applicant's criminal trial (see *R v* ***Lehrmann (No 3)*** [2022] ACTSC 145). At [29] McCallum CJ held that "*the distinction between an untested allegation and the fact of guilt has been lost*" and at [30]:

> *The public at large has been given to believe that guilt is established. The importance of the rule of law has been set at nil.*

297C. Furthermore, the second respondent is an experienced and accomplished journalist who at the time of making the speech was aware that she may be called as a "*key witness*" for the Crown (see e.g. Wilkinson Affidavit 16 January 2024 [6]-[7]; **Smithies Affidavit** 25 January 2024 [25]-[27]; *Lehrmann (No 3)* at [19] and [32]) and has been familiar with the rules of *sub judice* contempt since early in her days as a journalist (T1726 L38-39). The risk of the speech (in the terms drafted and delivered) prejudicing the Applicant's right to a fair trial ought to have been obvious to any journalist with only the most basic of experience.

298. As mentioned above, on 21 June 2022, McCallum CJ vacated the trial as a result of public commentary about Ms Higgins' allegations, including the Logies speech by Ms Wilkinson.

299. The trial ultimately commenced before McCallum CJ on 4 October 2022. The jury retired on 19 October 2022.

300. On 27 October 2022, the jury was discharged as a result of juror misconduct. Straight after that, Ms Higgins made a speech to the gathered media outside the court house: Tcpt 875.23; Exhibit 51. She did this in circumstances where she knew that there was going to be a re-trial: Tcpt 1016.14-22. She later republished the substance of the speech on social media: Tcpt 1019.42-47.

301. One of the particular claims Ms Higgins made during the speech was (Tcpt 1020.4)

> I was required to surrender my telephones, my passwords, messages, photos and data. He was not required to produce his telephone, his passwords, messages, photo and his data.

As the Court knows, this statement was factually incorrect. Mr Lehrmann's phone was subjected to the same forensic analysis as hers. In cross-examination, Ms Higgins asserted that it was what she honestly believed at the time, but she conceded that nobody told her that at the time. She could not offer any sensible explanation for what had led her to a belief that Mr Lehrmann's phone had not been examined, particularly in light of the fact that she had been told by police during her second record of interview (on 26 May 2021) that they had downloaded the contents of Mr Lehrmann's phone and accessed an email from him to her: Tcpt 1020.12-24; 1022.29-41.

302. On 2 December 2022, the Director of Public Prosecutions publicly announced that he did not intend to proceed with the prosecution.

H. EVENTS RELEVANT TO DAMAGES

303. It is common ground between the parties that:

(a) the Programme had an average national audience of about 726,728 people, with substantial numbers of viewers in every major region of Australia;

(b) the Programme was accessible on the 10 Play website between 15 February and 16 May 2021, during which time it received about 17,215 views; and

(c) the Programme was accessible on YouTube between 15 February and 7 August 2021, during which time it had about 188,902 views.

(Statement of Agreed Facts at [11]-[21]; CB:D tab 1108, pages 6010-6011).

304. It is true that, because Mr Lehrmann was not named in the Programme, the relevant audience for the purposes of assessing damages is not the hundreds of thousands of people who watched the Programme, but the number who reasonably identified him in it. For the reasons given below in Part I.2, however, the Court would conclude that the number of people who are likely to have identified Mr Lehrmann was extensive and was not confined to a narrow circle of people within Parliament or political circles who knew him personally.

305. Mr Lehrmann watched the Programme on the night it went to air. He describes feeling overwhelmed, shaken, upset and at times angry at the false allegations made against him: Affidavit of Lehrmann (28.08.2023) at [14]. He was shocked, because nobody had ever made such an allegation to him before: at [15]. He was staggered that, as he understood it, the respondents had not contacted him prior to publishing the claims: at [16]. He felt that he had lost his networks and his career. He felt helpless, lonely and isolated: at [17]-[18].

306. He had thoughts of suicide on the night of 15 February 2021, which continued the next day: at [17]. On 16 February 2021, he was admitted to Royal North Shore Hospital for psychiatric care. He was discharged the next day and then admitted to the Northside Clinic for a further two weeks of psychiatric care: at [19]-[21].

307. Relatively soon after the broadcast, Mr Lehrmann noticed that many people who had

previously been his friends began cutting off contact with him, and he was ejected from social media groups in which he had previously been welcome: Tcpt 77.20-81.20; Affidavit of Lehrmann (28.08.2023) at [26]; Exhibits 9, 10, 11.

308. On 18 June 2021, British American Tobacco terminated Mr Lehrmann's employment, telling him that the reason was the allegations against him: at [34].

I. IDENTIFICATION

I.1 Relevant principles

309. The issue in relation to identification is encapsulated by the following statement of Jordan CJ in *Consolidated Trust Co Ltd v Browne* (1948) 48 SR (NSW) 86 at 89:

> If, however, the matter complained of is not ex facie defamatory, or does not refer by name to the person alleged to be defamed, and the defamatory character which is attributed to the matter, or the identity of the person defamed, would be apparent only to persons who had knowledge of special circumstances, it is necessary, in order to prove publication, to prove that it was published to a person or persons who had knowledge of those circumstances.

This statement was approved in *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 639 per Mason and Jacobs JJ (Gibbs and Stephen JJ agreeing).

310. How does one establish that the defamatory matter was published to persons who had the special knowledge which permitted identification of the plaintiff? In this case the Court has the benefit of evidence from witnesses who watched the Programme and identified Mr Lehrmann as the subject of the allegations by reason of what they knew or found out. Proof of identification, however, need not depend on the acceptance of witness evidence: *Vlasic v Federal Capital Press of Australia Pty Ltd* (1976) 9 ACTR 1 at 10 per Blackburn J. Examples of other bases on which an inference of identification could be drawn were given by Mason P in *Channel Seven Sydney Pty Ltd v Parras* [2002] NSWCA 202 at [57]:

> Another indirect way of satisfying the relevant principle without calling individual readers is where the plaintiff is in a position to give evidence of being contacted by people in circumstances showing that such contact was obviously a response to what they read in the publication which did not, ex hypothesi, expressly refer to the plaintiff. A variant is evidence of talk amongst readers or viewers that is indicative of the identification having been made. The court must conclude that such evidence is capable of supporting the inference that the responses to the matter complained of showed that the persons concerned understood it to refer to the plaintiff.

311. It is not necessary, in order for there to be identification, that viewers or readers already have the requisite knowledge when they first view or read the publication: *Fairfax Media Publications Pty Ltd v Pedavoli* (2015) 91 NSWLR 485 at [81] per Simpson JA (McColl JA agreeing). Identifying knowledge can be acquired subsequently, whether or not the defamatory matter expressly invites its audience to consult an external source of information. At [78] in *Pedavoli*, Simpson JA held (emphasis added):

> It is not… necessary, in order for subsequently acquired information to permit identification of a plaintiff, that a publication contain within it an express or implicit invitation to the recipient to have resort to some particular source of external information, although, where that has happened, the case is clear, as in *Baltinos* and *Strasberg*; nor is it necessary that subsequent identification be that of the original publisher. **In virtually every case where identification is in issue, it may be supposed (depending, perhaps, at least in part on the level of salaciousness, or gravity of the allegations) that recipients will seek (with a greater or lesser degree of vigour) to identify the subject**.

312. As her Honour observed at [76]:

> It is a natural human response, when confronted with allegations against an unnamed person, to enquire as to the identity of that person. That may be done in the ways alluded to above – by enquiries of those who might be supposed to have the relevant information – or, in the 21st century, by access to electronic media, or by a variety of other ways.

313. These passages have recently been cited and followed by the Victorian Court of Appeal in *Hoser v Pelley (No. 3)* [2023] VSCA 257 at [242] per Elliott AJA (McLeish and Walker JJA agreeing) as authority for the proposition that:

> If serious allegations are made about an unnamed person, ordinarily it may be assumed that enquiries would be made as to that person's identity, including from information published before or after the publication by sources other than the publisher.

314. Identification by means of external information is controlled by a test of reasonableness, which was authoritatively stated by Isaacs J in *David Syme & Co v Canavan* (1918) 25 CLR 234 at 238 as follows:

> The test of whether words that do not specifically name the plaintiff refer to him or not is this: Are they such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to?

The purpose of the reasonableness requirement is as a limitation on the potentially broad scope of a publisher's liability, given the objective nature of liability for defamation, under which it is irrelevant whether the publisher intended to refer to the plaintiff, or even whether the publisher knew of the plaintiff's existence at all. The reasonableness

test protects the publisher from liability where the plaintiff has been associated with the defamatory matter on eccentric or irrational grounds: *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1242-1243 per Lord Reid.

315. The standards of reasonableness required under this test are not high: *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348 at 364 per Hutley JA. It is accepted that readers or viewers will employ "*a certain amount of loose thinking*" and do not exercise the critical scrutiny of a lawyer: *Morgan* at 1245 per Lord Reid. The ordinary reasonable person may draw "*rather far-fetched inferences*": *Morgan* at 1244 per Lord Reid. He or she consumes the matter "*casually and not expecting a high degree of accuracy*": *Morgan* at 1270 per Lord Pearson. The process of reasoning does not need to be clear or precise and can be "*well short of intractable*": *Gardener v Nationwide News Pty Ltd* [2007] NSWCA 10 at [44] per Bryson JA (Mason P and Tobias JA agreeing). See also *World Hosts* at 641 per Mason and Jacobs JJ (Gibbs and Stephen JJ agreeing).

316. Summarising these principles, Samuels JA observed in *Steele* at 373 that:

> It is evident that what is primarily in issue is the reasonableness of the conclusion to which the reader comes, rather than his possession a priori of the attributes employed to define him. To speak of a reasonable inference drawn by a reasonable reader may be circuitous since the impression made by the article tends to establish the nature of the qualities brought to its scrutiny. If there are no rational grounds for the inference sought to be pressed, then, ex hypothesi, the reader did not, on the relevant occasion, muster the attributes which he was bound to bring to his hypothetical task.

317. All of these authorities were reviewed in *Gardener* at [43]-[50] per Bryson JA (Mason P and Tobias JA agreeing), a case on which Ms Wilkinson relied in her written opening. At [46], his Honour concluded that "*Any purpose for establishing that the identification was reasonable which can be identified from the reasoning of Samuels JA is well satisfied if it is shown that the identification was correct*". At [47], he explained:

> There is in my opinion no reason in principle why, when deciding the question whether the identification was reasonable, the incontrovertible fact that the identification was correct is not relevant. That it was correct is so predominant a matter in assessing reasonableness that I find it difficult to understand why it was thought necessary to ask the jury to answer Question 2 [i.e. "*has the plaintiff established that such identification by that person was reasonable?*"]. For a schedule or check list of the elements of the cause of action, Question 2 is a relevant matter; on the facts of the present litigation I do not see how it is possible to infuse reality into the issue of reasonableness of identification of the appellant as the person referred to in the first article.

On the facts of *Gardener*, the identification of the plaintiff was confirmed by a second

article published by the defendant the following day, but it is apparent from [46] that the foregoing conclusions did not depend on this fact.

I.2 Whether Mr Lehrmann was reasonably identified

318. The real dispute in relation to identification in this case seems to turn not on whether at least one person identified Mr Lehrmann, so as to perfect the cause of action, but on the extent to which he was identified, which is relevant to damages (and to Ms Wilkinson's defence of common law qualified privilege, although that defence is misconceived in Mr Lehrmann's submission – see Part L.3 below).

319. The Programme conveyed the following information about the alleged perpetrator of the rape (line references are to the aide-memoire to Exhibit 1):

(a) he was a "*senior male advisor*" to Senator Reynolds: lines 7-8

(b) he had previously worked for her in the Home Affairs portfolio: line 10

(c) he attended a drinks event with Ms Higgins and other contacts and colleagues in Defence on 22 March 2019: lines 11-13

(d) the senior male colleague was called into a meeting with Fiona Brown on the following Tuesday, after which he started packing up his things: lines 52-55

(e) after leaving Senator Reynolds' employment, the senior male advisor obtained a good job in Sydney: lines 156-157.

320. The Court is entitled to infer, even in the absence of any particular evidence, that there are certain people who must have watched the Programme and must have known, or found out soon afterwards, who the alleged perpetrator was. Because Ms Higgins' allegations constituted a major political scandal, many Ministers and other Members of Parliament on both sides of the aisle must have watched it. At least on the Government side, the identity of Mr Lehrmann must have been generally known to Ministers and MPs through internal discussions. If they did not already know, they would soon have found out because it was necessary for them to know, as the allegations were a major political issue for the Government. For the same reason, senior staffers such as media advisors must have known, because they needed to know for their job, indeed various

of the emails sent by Mr Llewellyn on the afternoon of Friday 12 February 2021 all named Mr Lehrmann as being, effectively, the alleged rapist; Exhibits R621, 623, 624, 625 and 626.

321. If they did not already know, virtually all staffers on both sides of politics may be assumed to have possessed immediate curiosity as to the identity of the perpetrator. This is borne out by the witness evidence.

322. Karly Abbott, a former advisor to Ministers Steve Ciobo and Michaelia Cash who worked at Parliament between 2011 and 2020, gave evidence that she watched the Programme on 15 February 2021: Affidavit of Karly Abbott (27.07.2023) at [8]. Her evidence was that she identified Mr Lehrmann as the subject of the allegations because:

(a) She knew that Mr Lehrmann was an advisor to Senator Reynolds, and although he was not a "*senior advisor*", he was senior to Ms Higgins: at [9(a)]

(b) She knew that Mr Lehrmann had previously worked for Senator Reynolds in the Home Affairs portfolio: at [9(b)]

(c) She knew from a conversation in July 2019 that "*There was an incident involving Brittany and Bruce in the office, and Bruce was fired*": at [9(c)-(d)]

(d) She knew that Mr Lehrmann was worked in Sydney for a public relations and communications firm: at [9(d)]

323. Ms Abbott gave evidence that she was sent the Samantha Maiden article by Ben Dillaway, and that when she read it, she connected it with the conversation she had had in July 2019 and inferred that the allegations concerned Mr Lehrmann: Tcpt 42.6-43.31. She also gave evidence that she had a conversation with Mr Dillaway in which he said, concerning the Maiden article, "*This is Bruce*": Affidavit of Karly Abbott (27.07.2023) at [12]; corrected at Tcpt 37.5.

324. It makes no difference that the Ms Abbott had already worked out the identity from the Maiden article, or that the conversation with Mr Dillaway was apropos the article rather than the Programme. It simply means that Ms Abbott already knew who the perpetrator was when she sat down to watch the Programme: Tcpt 48.45.

325. Ms Abbott gave evidence that there were a lot of conversations and exchanges of text messages on 15 February 2021 amongst political staffers and other participants in the Canberra rumour mill about the identity of the perpetrator: Tcpt 47.19-48.1. The cross-examiner put to Ms Abbott that lots of potential culprits were being suggested in these discussions, but she clarified that "*I actually don't believe that there was any other specific names mentioned to me, but just a 'Do you know who this is?' Or…*": Tcpt 47.42-44. Ms Abbott trailed off or was cut off after the "*Or*", but in the context of the rest of her evidence, it is clear that her point was that either people did not know who the culprit was, or Mr Lehrmann's name was discussed. Her evidence that she did not recall "*any other specific names mentioned*" must mean any other names besides Mr Lehrmann. Once again, it is beside the point that these conversations were apropos the Maiden article rather than the Programme.

326. David McDonald, a friend of Mr Lehrmann's family living in regional Queensland, gave evidence that he watched the Programme on 15 February 2021 with his wife and said to her, "*This has to be about Bruce*": Affidavit of David McDonald (27.07.2023) at [5], [7]. He came to that conclusion because he knew that Mr Lehrmann used to work as an advisor to Senator Reynolds, he had previously worked with her in the Home Affairs portfolio, and he had ceased working with her in early 2019 and had moved to work in Sydney: at [6].

327. Mr McDonald was challenged in cross-examination on the fact that the perpetrator was actually described in the Programme as a "*senior*" advisor, but this detail does not seem to have registered with him and he only remembered the Programme saying that the perpetrator was a male advisor to Senator Reynolds: Tcpt 56.26-39.

328. Mr McDonald also gave evidence that he discussed the Programme with his neighbour a day or two later and said "*it looks like Bruce is in a bit of strife*": Affidavit of David McDonald (27.07.2023) at [9].

329. Kathleen Quinn, a former advisor to Ministers Steve Ciobo and Melissa Price between 2015 and 2020, gave evidence that she watched the Programme and concluded that the alleged perpetrator was Mr Lehrmann because he was an advisor to Senator Reynolds who was senior to Ms Higgins; he had previously worked with Senator Reynolds in the Home Affairs portfolio; and he had ceased working for her in about March 2019 and

was now working in Sydney for British American Tobacco: Affidavit of Kathleen Quinn (28.07.2023) at [5]-[6].

330. In cross-examination, Ms Quinn agreed that she was also aware prior to the Programme, via Ms Abbott, of "*a rumour that there had been a security incident in the office, and that was why Bruce had left*": Tcpt 113.11-42. She also agreed that she had discussed the Maiden article, and the fact that it was about Mr Lehrmann, with Ms Abbott prior to the broadcast: Tcpt 114.34-116.5.

331. Ms Quinn also gave evidence of being in Canberra on 17-18 February 2021, where Ms Higgins' allegations were "*the hot topic of discussion amongst staffers at APH*": at [8]. She recalled conversations with close to a dozen such people over a couple of days, and remembered them saying "*That Bruce was the person that had been identified in The Project broadcast and asking my opinion of his character and whether or not I had ever experienced anything untoward from him*": Tcpt 112.3-13.

332. Nicole Hamer watched the Programme when it went to air and knew, from information she already had, that the alleged perpetrator was Mr Lehrmann: Tcpt 1064.5, 1066.3. She recalled discussions amongst people at Parliament House and staffers during the course of the day about the upcoming program, and she said that in some of those discussions, Mr Lehrmann was named: Tcpt 1065.41-45. She did not understand that there was any other person who fit the description of the culprit given in the Programme: Tcpt 1066.6. She did not recall having any specific discussions in the wake of the broadcast, but she was sure that she discussed it, in terms of how to handle the media strategy for Senator Reynolds: Tcpt 1066.13. Outside the direct staff of the Reynolds office, she was aware that people were talking about the story and asking who the culprit could be, and she was aware that Mr Lehrmann's name was being thrown around: Tcpt 1066.18-28. In re-examination, it was put to Ms Hamer that there was speculation about who the culprit might be and that different names were mentioned. She accepted that this was possible, but said that she only remembers Mr Lehrmann's name being passed around: Tcpt 1069.32-41.

333. Austin Wenke gave evidence that he read the Maiden article on the morning of 15 February 2021 when it was published. In the wake of the article, he said, there was "*a bit of chatter within Parliament House*" about the story: Tcpt 1125.11-22. He reflected

on the information contained in the story and came to the conclusion that the allegations concerned Mr Lehrmann. He did not recall thinking of anyone else it could have been: Tcpt 1125.24-45. That evening, he watched some (but not all) of the Programme, in light of the view he had already formed about the identity of the perpetrator: Tcpt 1126.7-12. Although he did not personally have discussions with anyone about the allegations following the broadcast, he was aware of them taking place. He agreed that it was fair to characterise the identity of the perpetrator as an "*open secret*" within Parliament House at that time: Tcpt 1126.14-22.

334. Nikita Irvine gave evidence that following the Programme, she got asked about it by who people who knew she had worked in the office at the relevant time – not people in Parliament House or people in that circle, but military people. She said that she did not answer these questions, although she herself knew that the alleged perpetrator was Mr Lehrmann: Tcpt 1207.23-36.

335. It is significant that several witnesses gave evidence of discussions, gossip and rumours about the identity of the perpetrator, both before the Programme went to air or after the broadcast. The witnesses remembered Mr Lehrmann's name being "*thrown around*" in these discussions, but did not recall any other names mentioned (although Ms Hamer accepted that it was possible that other names were mentioned). Tellingly, Mr Wenke agreed that Mr Lehrmann's identity as the alleged culprit was an "*open secret*" around Parliament House in the aftermath of the Programme. Nor, however, were these discussions confined to Parliament House and political staffer circles; Ms Irvine gave evidence that it was being discussed among her military friends too.

336. The fact that such gossip and rumour was taking place demonstrates the point made by Simpson JA in *Pedavoli* at [78], that in a controversial case such as this, recipients will likely make efforts to find out the identity of the unnamed subject (noting also the continuing publication of the Programme via the 10 Play and YouTube platforms). As a result of such discussions, people who did not already know or believe that Mr Lehrmann was the alleged culprit, or the facts on which that identification was based, are likely to have learned about it, and the circle of people with the knowledge necessary to identify him in the Programme would have expanded accordingly.

337. It makes no difference whether the discussions happened before or after the broadcast

of the Programme. If they took place before the broadcast, apropos the Maiden article, it means that when those people sat down to watch the Programme that evening (as many would have done, given (a) the level of interest in the allegations and (b) the fact that the Maiden article expressly referred to the upcoming Programme), they had already turned their minds to the identity of the culprit and had formed a view as to who it was. If the discussions took place after the Programme, *Pedavoli* at [78]-[81] per Simpson JA (McColl JA agreeing) confirms that subsequently acquired information can permit the identification of an unnamed plaintiff.

338. In addition to the witness evidence, the Court also has evidence of the kind referred to by Mason P in *Parras* at [57].

(a) Mr Lehrmann's evidence was that at about 2pm on 15 February 2021, he was contacted by his supervisor at BAT, who told him that he had received an email from a journalist at *The Australian* identifying him as the man "*the subject of media reports today about Ms Higgins*": Affidavit of Lehrmann (28.08.2023) at [12]. For the reasons already given, it makes no difference that this happened before the broadcast of the Programme. It simply confirms that his identity as the alleged culprit was already circulating by the time it went to air.

(b) Exhibit 8 is a bundle of messages from four friends or acquaintances of Mr Lehrmann, each of which was sent after the publication of the Programme. In the case of three of the acquaintances – Tim Shaw, Katie Pow and Sebastian Blackler – it is notable that each of them had not messaged Mr Lehrmann for several months (or in Ms Pow's case for two and a half years) prior.

(c) Exhibits 9, 10 and 11 are screenshots showing Mr Lehrmann being ejected from social media groups to which he had belonged in the days after the publication of the Programme. See also Affidavit of Lehrmann (28.08.2023) at [26]. Mr Lehrmann explained what happened at Tcpt 77.20-81.20. He gave evidence that a number of the people who were formerly in these groups, as well as others, ceased being "friends" with him on social media at the same time (i.e. in the week after the Programme): Tcpt 78.10, 80.14-20.

Although Exhibits 8, 9, 10 and 11 do not mention the Programme, given the timing, and in conjunction with the other evidence before the Court, it should be inferred that

it was more probably than not prompted at least in part by the Programme.

339. Exhibit R11 is the timeline document created by Ms Higgins. It names Mr Lehrmann as "*Perpetrator*": CB:D tab 332, page 3339. In cross-examination, Ms Higgins agreed that the timeline was distributed widely to journalists on the day the Programme went to air: Tcpt 840.10-15. She said that Mr Sharaz sent it to "*like, half the press gallery*": Tcpt 840.35. The consequence of this act alone is that half the Canberra press gallery knew that Mr Lehrmann was the alleged perpetrator by the time of the broadcast. More probably than not, given their profession, the majority of those journalists would have watched the Programme when it went to air.

340. The Court also has evidence of publications online in the immediate aftermath of the broadcast of the Programme which named Mr Lehrmann as the accused rapist:

(a) Exhibit 3 is an article published on 17 February 2021 on the website *True Crime News Weekly* titled "UNMASKED FOR THE FIRST TIME AFTER TWO YEARS! Meet the Liberal Party toff at centre of alleged Parliament House 'security breach' which left young woman traumatised". It names Mr Lehrmann multiple times, including in the by-line, and includes several photographs of him. It references the Programme rather than the Samantha Maiden article. The details it notes are that the perpetrator was a "*more senior colleague*", that the incident occurred in the context of a "*work-related social outing*" where Ms Higgins was "*plied with alcohol*", and that soon after the incident, the colleague, "*another adviser*", was "*allowed to resign over a so-called 'security breach'*." It details Mr Lehrmann's work history from his LinkedIn profile and notes that he left his position with Senator Reynolds in March 2019, "*the same month the incident involving Ms Higgins occurred*".

(b) Exhibits 4, 5 and 6 are articles published on the website *Kangaroo Court of Australia* on 19, 23 and 27 February 2021. Each of the articles names Mr Lehrmann as the perpetrator and includes photographs of him. Exhibit 4 identifies the *True Crime News Weekly* article as the source of the identification of Mr Lehrmann. Mr Dowling states in Exhibit 4 that he spoke to the publisher of *True Crime News Weekly*, "*who says he has several sources who have confirmed that it is Bruce Lehrmann*".

341. These articles were evidently read by numerous people – Exhibit 3 has 13 comments, each from different people; Exhibit 4 has 16 "replies" (which seem to be the same as comments); Exhibit 5 has 19 replies; and Exhibit 6 has 2 replies. These are, of course, only the readers who took the time to comment on the articles. The likelihood is that they were read by significantly more people than that. Direct evidence of this likelihood, in the case of Exhibit 3, is discussed below.

342. Serkan Öztürk, the publisher of Exhibit 3, tweeted about the identity of the perpetrator, and then tweeted Exhibit 3 itself, across four tweets on 17 February 2021 (Exhibit 7):

(a) The first tweet received 32 comments, 82 retweets and 198 likes;

(b) The second tweet received 9 comments, 68 retweets and 204 likes;

(c) The third tweet received 27 comments, 49 retweets and 148 likes;

(d) The fourth tweet, the article itself, received 84 retweets, 12 quotes, 177 likes and 10 bookmarks.

Again, these numbers represent only the Twitter users who took the time to comment, retweet or like. The likelihood is that the tweets were read by many other users who did not take any of these actions, but nevertheless consumed the information in them.

343. The number of comments and retweets on these tweets is, like the evidence from some of the witnesses about rumour and gossip in the aftermath of the Maiden article and the Programme, demonstrative of the point made by Simpson JA in *Pedavoli* at [78]. The discussion on Twitter exposed by Exhibit 7 is evidence of people attempting to ascertain the identity of the perpetrator. Discussion on social media, or articles published online such as Exhibits 3, 4, 5 and 6, is precisely the type of material her Honour envisaged a naturally curious viewer or reader would have recourse to in the 21st century to ascertain the identity of an unnamed subject in a defamatory publication: *Pedavoli* at [76].

344. Further, given the number of retweets and comments, it ought to be inferred that this discussion would have come to the attention of a significantly wider circle of people than the bare numbers of comments, retweets and likes indicated in Exhibit 7. The Court has observed in previous cases that Twitter operates like a "*firehose*", which is to say that by its very design, it encourages the dissemination by repetition of messages

at great velocity to an ever-expanding circle of people. It is the modern day embodiment of the "*grapevine effect*": *Tribe v Simmons (No. 2)* [2021] FCA 1164 at [23]-[24]; *Kumova v Davison (No. 2)* [2023] FCA 1 at [319].

345. Mr Lehrmann also recalled seeing other tweets in the days after the Programme which named him as the subject of the allegations, although copies of those tweets are not in evidence: Affidavit of Lehrmann (28.08.2023) at [23]. The weight which can be placed on this evidence in isolation may be limited, but it is consistent with all of the other evidence summarised above that people would be discussing who the perpetrator was on a forum such as Twitter. His name was, as Mr Wenke stated, an "*open secret*" in certain circles and was being openly tweeted by Mr Öztürk, and in turn retweeted by Mr Öztürk's followers. Against that background, there is nothing implausible about Mr Lehrmann's evidence that he saw other people tweeting about his identity in this period.

346. It remains to consider whether the identification of Mr Lehrmann in the Programme, which was evidently made by quite a number of people – either prior to, at the time of the broadcast or soon afterwards – was reasonable.

347. As the Court of Appeal recognised in *Gardener v Nationwide News Pty Ltd* [2007] NSWCA 10 at [46]-[47] per Bryson JA (Mason P and Tobias JA agreeing), the question of whether the identification of Mr Lehrmann was "*reasonable*" is a frankly arid and artificial one in circumstances where it was unquestionably correct. The question of reasonableness should be approached with this in mind. The analysis should also be framed by the principle that the standard of reasonableness expected in this context is not high: *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348 at 364 per Hutley JA.

348. One reason the respondents seem to say that the identification of Mr Lehrmann was not reasonable is that the Programme described the culprit as a "*senior*" advisor, whereas Mr Lehrmann was not senior. This argument is devoid of merit, for several reasons.

349. First, the argument places a great deal of emphasis on what was, ultimately, only a single word. The description of the culprit as "*senior*" apparently did not even register with Mr McDonald, who only remembered the Programme saying that the culprit was a male advisor to Senator Reynolds: Tcpt 56.26-39. There is nothing unreasonable about this. The reasonable viewer is not presumed to be particularly careful or attentive to detail: *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1270 per Lord Pearson.

350. Second, to the extent that viewers did notice a discrepancy between the description of the culprit as "*senior*" and their knowledge that Mr Lehrmann was not especially senior, there was a readily available rational explanation. Several of the witnesses explained that they took the references to a senior advisor to mean an advisor who was more senior than Ms Higgins. This was a perfectly reasonable way to understand the Programme, and as a matter of fact, it was actually the correct way to understand the Programme.

351. Third, even if it went unexplained, this factual discrepancy was not an impediment to reasonable identification of Mr Lehrmann. The facts of *Morgan* demonstrate the point. In that case, the suburb of London in which the offence was alleged to have taken place was inconsistent with Mr Morgan being the culprit. As Lord Reid put it at 1245:

> The article refers to a house in Finchley. The appellant's flat is in Cricklewood some three miles away, though Finchley Road is only a mile away. Is the sensible reader bound to say to himself, this can't refer to Morgan, or can he say, we all know that newspaper articles, though giving a good general impression, are often inaccurate in detail as is inevitable when stories have to be written at speed?

The sensible reader, as the House of Lords concluded, was not bound to say to himself "*this can't refer to Morgan*" on account of the discrepancy as to the suburb: at 1246 per Lord Reid, 1269-1270 per Lord Pearson. The same is true in this case.

352. There was also a suggestion in Network Ten's written opening submissions that any identification based on the online sources such as the *True Crime News Weekly* or *Kangaroo Court of Australia* articles was not reasonable because ordinary readers would not have understood these as reputable or reliable sources of information: CB:D tab 1105, pages 5984-5985. This argument is also without merit. Whatever else might be said about, for example, *Kangaroo Court of Australia*, the fact is that in this instance, they were accurate. The *True Crime News Weekly* article is detailed and supported by information from Mr Lehrmann's LinkedIn profile, which lends credibility. The fact is that people obviously did take at least the *True Crime News Weekly* article seriously, because it was liked and retweeted hundreds of times.

353. There is an irony in Network Ten's submission that the identification of Mr Lehrmann was unreasonable. Mr Llewellyn said (Affidavit of Angus Llewellyn (21.09.2023) at [167(a)]) (emphasis added):

> A decision was made that we would not name him. We came up with terms or labels to use

> to refer to him, including "senior male advisor", "senior male colleague", "senior colleague" or "senior staffer. In deciding these terms, **we were very conscious that we did not want to inadvertently identify the wrong person as being the alleged perpetrator. We had to give sufficient detail to exclude other males who worked in Linda Reynolds' office at the relevant time**.

His evidence at Tcpt 1655.42, although confused, was to the effect that the use of the word "*senior*" was intended to achieve the exclusion of the wrong persons.

354. A publisher's intention to refer or not refer to a particular person is not in itself relevant on the question of identification: *Morgan* at 1242 per Lord Reid. However, as noted above, the purpose of the reasonableness test is as a limit on the scope of the publisher's liability, to prevent him or her being held liable for idiosyncratic and unreasonable conclusions drawn by readers or viewers. Network Ten's unreasonableness submission is ironic in circumstances where the identification, so far from being unpredictable or irrational, was contemplated by Network Ten.

355. Only one other male staffer, Jesse Wotton, followed Senator Reynolds from Home Affairs to Defence Industries: Tcpt 180.13-14; 1062.11; 1092.11. In February 2021, he worked for a Western Australian Senator in Perth and not in Sydney. Although his LinkedIn views spiked in the days after the Programme (Affidavit of Jesse Wotton (28.09.2023) at [49]), he gave telling evidence at Tcpt 109.33-37 about whether he did anything to address a concern about whether people might think he was the culprit:

> I felt no I didn't. I am not quite sure what I would have done. I was quite confident in the fact that people that knew me well – firstly that it would have been explained to them if they had any doubt about who it was – that's the first point – and I believe that they would have known me well enough or were in a position to find out should they make their own inquiries.

Mr Wotton's evidence suggests that Network Ten's intention was made good.

356. The Court should find that Mr Lehrmann was identified in the Programme by a large, indeterminate number of people, including Parliament House political and staffer circles and the Canberra press gallery, but extending beyond that due to the publication of articles revealing his identity online, discussion on Twitter, and rumour. The Court should conclude that the identification of him was reasonable.

J. JUSTIFICATION – *Defamation Act 2005* s 25

J.1 Relevant principles

357. The relevant principles of the justification defence are sufficiently set out in the parties' opening submissions. The Court should approach the fact-finding exercise involved in determining whether the carried imputations are substantially true in accordance with the principles set out in Part B of the submissions above.

J.2 Whether Mr Lehrmann raped Ms Higgins in Parliament House in 2019

358. This section is intended to be read in conjunction with oral closing submissions made by Mr Whybrow during the trial and the submissions above as to the events at the relevant dates and the credit submissions of Ms Higgins.

359. Mr Lehrmann did not rape Ms Higgins. There was no sexual activity at all. It is correct that Ms Higgins was found asleep on the couch naked.

360. This was despite Ms Higgins at various times having given different versions and evidence as to not being naked either during the alleged sexual assault, or in the morning:

(a) [Note: context is during alleged assault] "[And your dress, do you remember anything about how your dress was?] My dress was still on my body, um, but it'd had just been really scrunched up, so it was around my waist. [And what about underpants?] No, I wasn't wearing any. [Okay. So the dress was around your waist. Is that right? And scrunched?] Yes. (Ex. R884: ROI #1, A259-262, CB934, p4714);

(b) [Note: context is Mr Lehrmann had left] "[And then what happened?] I passed out again. [And what about your dress…] I don't remember. I don't feel like I fixed myself or anything. I think I just passed out again. (Ex. R884: ROI #1, A303-4, CB934, p4718);

(c) [when found by guard] "…I was in the Minister's Office half dressed" (Ex 36: The Project interview #1, Part 1, 0:38:02.8, CB1114, p6083);

(d) "I'd been found half dressed by a security guard" (Ex 36: The Project interview #1, Part 1, 0:52:15.4, CB1114, p6095);

(e) "[When you woke up in the morning…were you aware at the time that, you know, clothes had been removed; or partly removed?] Yeah. So, I was wearing this white cocktail dress and it was up around my waist. It was dishevelled around the top, like it was like my straps were half off …it was obvious that, yeah, I was undressed. [So, he'd removed your panties?] Yeah. [And] [Yeah. My dress was up. [Half of this and half of that] …I was exposed from the belly button down, essentially" (Ex 36**:** The Project interview #1, Part 3, 1:26:49.4 – 1:28:01.0, CB1114, p6265 – 6266);

(f) [When woke] "My dress was up around my waist, the straps were kind of down… I was pretty dishevelled" (Ex 37: The Project interview #2, at 36:05:4, CB377, p3476);

(g) [When woke] "…my near nakedness shocked me. My white dress hung loosely around my mid-section like a belt. I tried hopelessly to regain the modesty I realised had been lost. I pulled my dress down and adjusted the straps…my stomach lurched. I threw myself in the direction of the Minister's private bathroom…I had cut my knee…somehow. I watched woozily as fresh blood seeped from the wound…I dropped back on the floor, desperately clutching the toilet as I wretched…I looked down at my white dress, stained and marked…." (Ex 40: BH's book, CB953, p4862)

361. Despite the above versions, there is otherwise no evidence as to why or how Ms Higgins was found asleep on the couch naked. Ms Higgins did however accept that it was possible that she had removed her dress herself:

> *Q:And you, I suggest, took your dress off before you lay down on the couch?---I don't know how or exactly where my dress ended up.*
> *Q:You accept that that's a possibility that you took your dress off before you lay down on the couch?---It's just not something that would ever happen, so – I don't know that that's not true, but I don't recall, and - - -*
> *Q: Sure? -------- it just seems so – it – it – I don't recall.* [Tcpt958 L28]

362. One rational inference as to why Ms Higgins was found asleep on the couch naked is that it could simply be because she decided to remove her dress before she lay down on the couch as she may have wanted or tried to avoid vomiting on her dress, and then passed out asleep. The taking place of any sexual activity would also be contrary to the observation of Ms Anderson that Ms Higgins' make-up appeared intact (see T1167 L10-23 and Anderson affidavit [56]), noting that Ms Higgins had referred to her make- up and potential vomiting whilst at 88mph at Tcpt619 L33:

> *And apart from sitting in the booth, what – did you do anything else while at 88mph?---Yes. I – I was on the dance floor. I – I remember going to the bathroom and cleaning myself up, because I was unwell. I don't know if I vomited or if I was just cleaning up my make up, but I was unwell at one point, or I felt like I was going – had the potential to be unwell.*

363. Subject to the submissions at [152] above, the Applicant nevertheless notes what the High Court held in relation to circumstantial cases and rational inferences in *R v Baden-*

Clay [2016] HCA35;(2016)258 CLR 308 at [46] – [47]:

> The principles concerning cases that turn upon circumstantial evidence are well settled. In *Barca v The Queen*, Gibbs, Stephen and Mason JJ said:
>
> > "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v The King*. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v The Queen*; see also *Thomas v The Queen*."
>
> For an inference to be reasonable, it "must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence" (emphasis added). Further, "in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence" (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal.

364. The only direct evidence of sexual activity is Ms Higgins' own account but that is not an account of consensual sex activity. There could of course be other explanations such as removing the dress because it simply made her feel more comfortable - the difficulty is that Ms Higgins' own quite detailed and florid narratives about the dress still being on or partly on make it especially difficult to come to any confident view about the reason for her nakedness. On her account it is a rape. For the reasons advanced below and elsewhere in these submissions her evidence should be rejected and it should be found that the Respondents have failed to establish the defence of justification.

The respondents' changing case

365. At T2225 L7, Dr Collins for the respondents said:

> Now, on our hypothesis, two 23-year-olds have been out drinking all night. Mr Lehrmann is attracted to Ms Higgins. They've been drinking. He has caused her to skol. They've touched and pashed while they're at 88mph. Mr Lehrmann has got a girlfriend at home. Ms Higgins has got a housemate. What place do they have access to? They've got access to Parliament House.

366. Firstly, this is a change of case. No evidence was lead from Ms Higgins that she wanted to have sex with Mr Lehrmann, that she could not go home to do so, that that is why

she willingly went to Parliament House (noting up until now it has always been Mr Lehrmann who forced her or suggested to go to Parliament House) or that they even kissed at 88mph.

367. Notwithstanding that, this new case has to ask this Court to positively find that both Mr Lehrmann and Ms Higgins believed it was easier for them to get into Parliament House by lying via the intercom, go through security scanning, be led up to the suite by a security guard with CCTV cameras filming them, and then to have sex in the Minister's office, rather than just go to Ms Higgins' house. It would not be lost on the Court that Ms Higgins said she has a "housemate"…not a "roommate". She did not share a bedroom with anyone. Further, at that time of night the idea that any housemate might be standing at the door critically analysing who Ms Higgins was bringing home is fanciful. Is it really to be believed that it was easier to go back to Parliament House than Ms Higgins' home if they wanted to have sex?

Motive as to complaint

368. The Respondents have 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. They appear to argue in response that Ms Higgins' job was not at risk based on Ms Brown's evidence.

369. However, that misses two fundamental points. Firstly, Ms Higgins' did not know her job was no longer at risk on the Thursday after the alleged incident, and secondly, there is no evidence that Ms Higgins did not view the circumstances of being found passed out in the Minister's office as highly damaging to her reputation and career prospects such that she needed to construct a different narrative to rehabilitate her reputation. For example, Ms Brown tells her that the "breach' would need to be escalated to the Prime Minister's office (Brown affidavit [60]). That is serious and career limiting even if Ms Higgins knew or considered that her actual employment was not a risk.

370. On the issue of whether she thought her job was at risk; the following references to Ms Higgins various prior statements are instructive:

(i) "I immediately thought I was going to be sacked" (Ex36 The Project interview #1, Part 1, 0:46:59.2, CB1114, p6090)

(ii) "It felt like she was going to fire me" (Ex36 The Project interview #1, Part 1, 0:49:31.8, CB1114, p6093)

(iii) "[You thought 'I'm about to be fired'?] Yep. Yeah" (Ex36 The Project interview #1, Part 1, 1:00.12.9 – 1:00:24.4, CB1114, p6101)

(iv) "[You thought you were going to be sacked?] Yeah" (Ex36 The Project interview #1, Part 2, 0:03:43.4 – 0:03:48.4, CB1114, p6106)

(v) "I think she would have fired me on the basis I'd breached Ministerial standards and there was plausible deniability that 'oh yeah, she was in Parliament House drunk late at night' (Ex36 The Project interview #1, Part 2, 0:13:57.8, CB Tab 1114, p6113)

(vi) "I definitely thought I was going to lose my job" (Ex37: The Project interview #2, 0:41:01.9, CB377, p3479)

(vii) "I just thought I was going to be fired" (Ex37:The Project interview #2, 0:55:27.5, CB377, p3488)

(viii) "I was going to be fired" (Ex37:The Project interview #2, CB377, 0:56:21.4, p3488)

(ix) "I felt stressed that I was about to be fired" (R884: ROI #1, A369 CB934, p4724) and "…stressed, I was under a lot of duress" R884: (ROI #1, A 369 and A 372, CB934, p4724)

(x) "The resignation of knowing I was likely going to be fired, signing the Ministerial Code of conduct …" (Ex40: BH's draft book, CB953, p4845)

(xi) "…if I disclosed what had happened, I was scared I was going to lose my job…I was still sort of deciding what course of action I would take…" (R885: ROI #2, A266, CB964, p5047)

(xii) "He kind of walked quite quickly into his back corner and seemed to collect his things" (R v Lehrmann BH XN at T149 L8 – L9, CB1123, p6461)

(xiii) "[You had seen Mr Lehrmann effectively to your mind sacked?] Yes… [And you were called in to what you anticipated would be a meeting where you might

also be terminated] Yes. (Ex71: R v Lehrmann, BH XXN T269 L19 – L25, CB1123, p6561

371. The first point to note, as if it needs any elaboration, is the Respondents bear the onus to prove a rape occurred. That is the central issue in this trial and has to be determined in accordance with the fact-finding principles outlined above.

372. There is no independent evidence for a rape. There is no rape examination, no doctors' reports, no witnesses. There is a photograph of a bruise (Ex44). The objective evidence in this matter is that that photo was in existence at the earliest on 19 January 2021 (Ex R883)-the day after Mr Sharaz contacts Ms Wilkinson. Mr Lehrmann submits that due to the inability for this Court to test the provenance of that photo, including whether it is even Ms Higgins' leg, no weight at all should be placed on the photo in determining whether a rape occurred. The bruise photo submissions are developed further below.

373. Notwithstanding the Respondents bear the onus, Mr Lehrmann submits that the evidence establishes that Ms Higgins was not sexually assaulted nor that any sexual activity took place at all for the following reasons.

374. The events as described in D and E above all provide strong evidence to find that Ms Higgins was trying to hide the fact that she had passed out drunk in Senator Reynolds' office and that is why she began to construct a narrative that eventually lead her down a path she had to continue to walk.

Pressure not to pursue complaint

375. This is dealt with more extensively in Section F and K.3 Reasonableness but in short, there was never any evidence of any concrete actions or words spoken that could reasonably have led Ms Higgins to believe she could not pursue a complaint due to any form of pressure.

The dress

376. Any evidence that is supposedly corroborative of a rape occurring based on Ms Higgins' evidence regarding the dress she wore that night should be rejected. Her answers when confronted with the fact she wore the dress just a matter of weeks later at a party for Senator Reynolds and that same evening pro-actively sent a 'selfie' to Mr Dillaway

wearing the dress (see e.g. Ex 40, Ex 41; CB99, 100, 101) were simply fanciful. In Ms Higgins' mind that dress represented nothing more than another big night out.

The welfare check

377. The evidence of the state of Ms Higgins during the night was that she was in no distress and Ms Higgins make-up was perfectly fine (see e.g. T1167 L10-23 and cf Ms Higgins' evidence at T619 L33-37). By 9am Ms Higgins was aware that security knew she was still there because they called into the office asking if everyone was ok and Ms Higgins replied 'fine'.

The bruise photo

378. This piece of evidence requires particular and independent consideration. The following are a detailed list of the inaccuracies and inconsistencies regarding Ms Higgins' evidence of the bruise photo. For this reason, no weight should be put on the photo. It is not evidence of any rape occurring.

(i) "The photograph of the bruise on my leg… the photograph … shows the bruise on my leg that was caused by Bruce Lehrmann during the rape and sexual assault that occurred…Took with iPhone on 3 April 2019" (Stat Dec, Ex R532, CB574)

(ii) David Sharaz "I'm sure you'll tell Lisa, you've got a photo of a bruise" (The Project Interview #1, Ex36, Part 2, 0:13:36.5, CB1114, p6189)

(iii) "had his leg on my thigh… a lot of pain because his leg was on my thigh" (The Project Interview #1, Part 2, Ex36, 1:19:31.1, CB1114 p6257)

(iv) "I've, on my phone, a photo of my leg… 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". (The Project Interview #1, Part 3,Ex36, 1:23:37.6, CB1114, p6261)

(v) "…a lot of my thigh had this weird big bruise on it on the basis where it was a positioned" (The Project interview #1, Part 3, Ex36, 1:24:03.8, CB1114, p6261)

(vi) "[Photo] [So you took that when you were in the office, just when it happened, or a couple of days later?] A couple of days after" (The Project interview #1, Part 3, Ex36, 1:24:28.5 – 1:24:34.8, CB1114, p6261 - p6262)

(vii) "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, largescale bruise, it was on my thigh…. [yeah, so that's like -] it was the whole leg, but it was, because it was really pressed – [because I can see the line there] yeah. And it wasn't like a deep purple, but it was just this weird – [oh right] pressure bruise" … "[so that would be -] I think he was – [presumably his knew -] yeah, on my thigh. [and probably his shin] [shin] yeah pushing down"(The Project Interview #1, Part 2, Ex36,0:24:04.3, CB1114, p6263)

(viii) "[you have a photo that you took of a bruise that developed from that night. What does that photograph show?] Where his leg pinned me down" (Ex37,The Project interview #2, 0:32:42.3, CB377, p3474)

(ix) Q268: Okay. And you said that his - sorry, was it his leg was on your? A:Yeah, so, he's outside knee had sort of pinned my leg open. Q269: Mm-hmm. A: Um, so I was kind of in the corner of the couch exposed with his inside leg kind of pinning me into the corner. So, I was kind of pushed up and he was on top of me. Q270: Yep. And what about his hands, do you remember where they were? A: I think he was holding himself up on the couch, on the side, he wasn't holding like - he wasn't holding like my chest or anything down, but he was - he was over the top of me, like he was holding onto the couch. (Ms Higgins' ROI #1, A268-270, Ex R884, CB934, p471);

(x) Q284: Now you said that his knee was pinning you on your leg down and you were in the corner of the couch. Is that right? A: Yep. Q285: Okay. I guess from my mind, are you able to describe whereabouts a little bit clearer for me, you know, whether you could point on your leg? A: Yep. Um, so, my outside leg was sort of pinned down. Q286: Mm-hmm. A: My head was up against sort of the corner of the couch and I was sort of jammed in the corner between the main cushion and side cushion. So, I was kind of pinned up in the corner. Um, and he was sort of holding onto the couch over me, um, just sort of propping me up into that corner where there was enough sort of to hold me in, um, and having sex with me. (Ms Higgins' ROI #1, A268-270, Ex R884 CB934, p471);

(xi) "[Photo] My outside leg, my left leg. [When did you take that photo?] "…around 5 [days after the assault]" (R v Lehrmann, BH XN at T128 L41 – T129 L10, Ex 71, CB1123, p6441)

(xii) "[Are you accepting that the photograph shows your right leg] it does" (R v Lehrmann, BH SN at T129 L37, Ex 71 CB1123, p6441)

(xiii) "[You never mentioned that bruise or the photograph…to the police officers on 1 or 8 April 2019] Yes, that rings true" (R v Lehrmann, BH XXN T623 L13 – L16, Ex 71, CB1123, p6608)

(xiv) "[In your evidence last week you said you took that photograph five days later. Do you accept that if you took it on 3 April, it would have been about 12 or 13 days later?] Yes. I just remember it being Budget week and the actual week and the actual date …I don't really recall specifically. Etc." (R v Lehrmann, T623 L18- L22, Ex 71, CB1123, p6608);

(xv) "During the week beginning 1 April 2019, Ms Higgins took a photograph of her thigh which had been bruised as a result of the pressure applied to it by Mr Lehrmann when he sexually assaulted her'" [First Respondent's defence, CB3 [95]];

(xvi) So, Ms Higgins, can I move on then from the Monday, 1 April. Do you – sorry. When you were ultimately seen by the team from The Project, you showed them a photograph of your right thigh?---Yes. Yes. Are you able to tell his Honour the origins of that photograph?---Yes, of course. I took it the day after budget, and I took it after things started going wrong with the office. I went into the bathroom and I took a photo, because I could see – or, I could feel that things were going wrong, and I – I felt like I needed proof. And so I took a photo of my leg - - - So can - - -?--- - - - to validate or to – to help corroborate my experience, because I could feel that things were starting to go wrong with – with work. (Transcript, 29 November 2023, T670 L23-34);

(xvii) When did you have this conversation in which you had been offered the option between going to Western Australia and continuing with the team or going to the Gold Coast and .....?---It was – I believe it was the day – it was the day I took the photo. So I think it was 3 April. Okay. And what's the – what's the

relationship between that conversation and the taking of the photo?---I took the photo after the conversation. And where were you when you took the photo?---In the bathroom closest to the Minister's suite. There's one kind of just diagonal across the way. I think I was in the second stall. Okay. And well, I will show you the photo. It's in volume 11. And if you go in volume 11 to tabs 986 and then 987?---Yes. (Transcript, 29 November 2023, T671 L28-41);

(xviii) And where were they taken [referring to the photo]?---In the bathroom stall. And it looks like you're using a mobile phone, is it?---Yes.Yes. And what are we seeing in the first photo? We're on page 5294?---It's my leg and I have turned up the contrast so you can see the bruise more. And what do you say caused that bruise?---I wasn't sure about what it was. I thought it could have been either the assault or tripping up the stairs. But I wasn't exactly sure. But I thought it at least helped. And on the next page – sorry, next tab, which is page 5295?---That's the reverse cropped in version, where you can see less of my body. But it's the same photo. So it's the same photo, just a different - - -?---Yes. Different aspect…. I see. And so this photograph would have been taken on which phone?---I'm not sure. I took it and sent it to myself on WhatsApp. So it would have been between the two. DR COLLINS: Why did you send it to yourself on WhatsApp?---I was scared about the party implications. I don't know. Whether it was warranted or not, I felt scared. So I wanted to have it on WhatsApp, as opposed to on the actual device. And apart from sending it to yourself on WhatsApp, did you – did you do anything else with the photo at that time?---No. (Transcript, 29 November 2023, T672 L4-43);

379. If this photograph was evidence of a rape then it is beyond plausible that the victim would not use every means to secure that photo, by maybe emailing it to one's self, saving it on a computer hard drive, printing it in hard copy and storing it, sending it to a friend or, giving it to the police when asked multiple times for evidence.

380. The relevant circumstances include the following:

(a) There is no evidence the photograph existed prior to 19 January 2021 (see ExR883 and R v Lehrmann, Tcpt662 L31-45, Ex67, p6441)

(b) The evidence is that no reference to a bruise or a photograph of a bruise was ever

located on Ms Higgins phone prior to that time. (R v Lehrmann, Tcpt662 L31-45, Ex67, p6441)

(c) She did not mention a bruise when she spoke to the police on 1 or 8 April 2019. (R v Lehrmann, Tcpt623 L313-16, Ex71, CB1123, p6441). The bruise photograph first emerged at a time when (as discussed above in the evidence in Part F), Ms Higgins and Mr Sharaz were claiming Ms Higgins had recently lost all the data on her phone including the photographs after it had completely died. This is discussed in greater detail in Parts F and K3.

(d) Ms Higgins at various times gave different versions and evidence as to when the photograph was taken_ "[…just when it happened, or a couple of days later?] A couple of days later": (The Project interview #1, Part 3, Ex36,1:24:28.5 – 1:24:34.8, CB1114, p6261 - 6262), "around five days" after the alleged assault: R v Lehrmann, Tcpt129 L4-10, Ex71, CB1123, on 3 April 2019 (Ms Higgins' statutory declaration (R463, p3794 CB 505) and Tcpt860.44-861.40;

(e) During her first AFP Record of Interview, Ms Higgins said that it was her "outside" leg that which had been pinned down during the alleged assault: ROI#1, ExR884, A268-270, CB934, p471);

(f) At the criminal trial Ms Higgins initially gave evidence that the bruise was on her "outside…left leg", but when it turned out to be on right left, she then said it was her right leg (R v Lehrmann, Tcpt128 -129 L37, Ex71, CB1123, p6441 and 6608)

(g) At this trial Ms Higgins said after she gave evidence in the criminal trial she reflected on the fact that the bruise depicted in the photograph may have been caused by a fall Tcpt 769.19-29; 863.1-865.6

381. The changing narratives and evidence given on this photo make it inescapable that the photograph was put forward by Ms Higgins in circumstances where she either knew it had nothing to do with any alleged assault, or strongly suspected it didn't. Whether or not the photo was purposefully created to prosecute, in every sense, a claim of rape, firstly via the Project broadcast, when Ms Higgins knew she had no other contemporaneous evidence or was otherwise picked up to this end, is unclear.

382. The putting forward of this photograph as corroborative evidence of a sexual assault is by itself reason sufficient to disbelieve Ms Higgins' allegations. If as submitted above she knew or suspected this photograph had no connection to an event on 23 March 2019 when she put it forward to media and police in 2021, the most plausible inference is she did so because she knew there had been no assault. Even if that is wrong, and there is a more benign reason, how can the Respondents succeed on pressing down the scales on a rape allegation when the complainant has been complicit in putting forward a photograph as corroborative evidence when she knew or suspected it was nothing of the kind?

The question of consent in the context of intoxication

382A. At [1050] of the 1RS and [115], [475] and [477]-[479] of the 2RS a submission is made that if the Court were satisfied that sexual intercourse took place then it constituted rape on the basis that Mr Lehrmann's conduct was reckless as to consent because he observed Ms Higgins drinking throughout the night (1RS) and, additionally, he observed Ms Higgins' inability to put on her shoes at security (2RS). (The 2RS also says that Mr Lehrmann "saw her fall over" ([2RS[475]). Presumably this is a reference to Ms Higgins' allegedly falling over at 88MPH and referred to as indicative that Mr Lehrmann knew Ms Higgins was extremely intoxicated. Mr Lehrmann categorically denied having seen Ms Higgins fall over (see T296 L11-23)).

382B. This submission as to recklessness should not be accepted. For the Court to find Mr Lehrmann 'raped' Ms Higgins on this basis, i.e. her intoxication vitiated any ostensible consent, the Court would first have to make findings that sexual intercourse took place and when any such sexual intercourse occurred.

382C. As developed in the ACS and in these Reply submissions, Mr Lehrmann submits that the evidence cannot sustain a positive finding that any sexual activity took place. However, if the Court did find that sexual intercourse took place, the Court would then have to find, as an established fact, that at that time of the sexual intercourse, Ms Higgins was so intoxicated as to be unable to consent to sexual activity.

382D. The Court would also need to make a positive finding that Mr Lehrmann himself, at that time, either knew or believed Mr Higgins was incapable of consenting to sexual activity, or that he adverted to that possibility but nonetheless proceeded to engage in sexual activity.

382E. In Mr Lehrmann's submission, even with the benefit of expert evidence on the subject and a detailed review of the available CCTV, the evidence simply does not permit a positive finding of fact that Ms Higgins intoxication was, at any relevant time, such that she could not consent to sexual activity. There is also no reliable evidence as to how much (if any) alcohol Ms Higgins consumed at 88mph.

382F. Further, whilst there is a relatively confined period in which any sexual activity might have occurred, there is no cogent and reliable evidence as to Mr Lehrmann's state of mind at the time of any such sexual activity in relation to his knowledge, belief or advertence as to Ms Higgins' level of inebriation and ability to consent sufficient to permit the requisite finding of fact necessary to establish that rape or sexual intercourse without consent on the basis of intoxication occurred.

382G. Finally, Ms Wilkinson appears to submit that Mr Lehrmann "rushing out [from APH] is consistent with" a state of mind of lack of consent. The submission is unsupported by any evidence, transcript or exhibit references. It is difficult to understand the submission that Mr Lehrmann's "rushing out" is in some way consistent with a guilty mind, when it is apparently uncontroversial (a) that he had already booked an Uber, and was going to meet it when he left APH (see 1RS [466]); and (b) he had by that time missed a number of calls from his then-girlfriend. If he was rushing, the wish not to keep the Uber driver waiting, or to get home in circumstances where he had missed calls from his girlfriend, are at least equally plausible and likely explanations.

Whether sexual activity, consensual or otherwise, took place

382H. The first respondent submits that it is open to the Court to find that consensual sexual intercourse took place between Mr Lehrmann and Ms Higgins (see e.g. 1RS [1161] – [1162]).

382I. In response, Mr Lehmann submits that there is an insufficient evidentiary basis for a positive finding to be made that any sexual intercourse, consensual or otherwise, took place. This point is made in Mr Lehrmann's written closing submissions (**ACS**) (see e.g. [153]) but warrants further remark given the emphasis the Respondents seek to place on this issue.

382J. Mr Lehrmann maintains he did not rape Ms Higgins nor engage in any sexual activity with Ms Higgins. Even if the Court were to reject or put to one side Mr Lehrmann's evidence as to what occurred within the Minister's private office, the Court could not be

satisfied that the Respondents have discharged their onus and established any sexual activity, consensual or otherwise, took place for several reasons.

382K. Firstly, because of the lack of positive, objective, credible, reliable and independent evidence supporting such a finding, and, secondly, because there are simply too many other plausible possibilities as to what may have happened in the Minister's private office, and as to why Ms Higgins was found naked in that office, to permit the Court to make any conclusion as to what took place.

382L. For example, at paragraph [362] of the ACS, it was indicated that one plausible explanation for why Ms Higgins was observed naked by Ms Anderson was Ms Higgins decided to remove her dress before she laid down on the couch, as she may have felt sick and did not want to risk vomiting on her dress, and after lying down she then passed out asleep.

382M. Another explanation is Ms Higgins may have vomited on her dress at some point and took it off before lying down on the Minister's couch, and then passed out or fell asleep. In the morning she may or may not have attempted to wash off her dress in Minister Reynolds' bathroom, perhaps explaining why she took the jacket from Minister Reynolds' office (see T633 L43-47 and T634 L1) when she left APH to cover up her dress. In that regard, Ms Higgins told FA Thelning that she had 'got sick' and had seen "dark stains" all over her "shirt/top dress, dark stains" (see FA Thelning's official AFP Diary at R77, CB71, p2332). Even in Ms Higgins' draft book chapter she stated that she had "*wretched*' in the Minister's bathroom, after which she had looked down at her white dress, which was "*stained and marked*" (see Ex40, CB953 at p4862).

382N. The critical point is there are a number of plausible explanations for why Ms Higgins, being affected by alcohol, took off her dress and lay down naked on the Minister's couch. The existence of these plausible alternative explanations, coupled with a lack of independent reliable evidence to support the Respondents' submissions, makes any positive finding to the requisite standard that sexual activity took place, consensual or otherwise, unable to be supported by the evidence. Mr Lehrmann submits that the facts and circumstances of this case are archetypal of a '*Palmanova*' situation – where no one hypotheses emerges as more likely to be correct than all of the other possibilities considered together.

The discharge of the respondents' onus of proof

382O. The first respondent contends that the Court would conclude that Mr Lehrmann's case theory is implausible, and in effect, that in light of rejecting Mr Lehrmann's case theory as implausible, the Court would conclude that the Respondents have discharged their onus of proof: see for example 1RS [108(b)], [525], [575], [621], [656] and [737].

382P. There is no requirement upon a party not bearing an onus of proof to provide a "case theory". While Mr Lehrmann may have made submissions as to various plausible explanations or motives arising from the evidence that does not affect the burden on the Respondents.

382Q. It can be accepted that, while Mr Lehrmann bears no onus of proof in relation to the defence of justification, it is relevant that he did go into evidence and advance a version of events. As the Victorian Court of Appeal said in *Eumeralla Estate Pty Ltd v Chen* [2022] VSCA 78 at [54]:

> It is of course true – by definition – that the party that bears the onus must discharge that onus. But, as Santamaria JA observed in Melbourne Orthopaedic Group Pty Ltd v Stamford Aus-Trade & Press Pty Ltd [[2015] VSCA 150 at [109], Ashley JA and Digby AJA agreeing], "it is proper for a judge to assess which of several competing hypotheses is to be preferred provided the court always keeps in mind upon whom the onus lies". In considering whether a party has discharged its onus, it will often be appropriate, or even necessary, for the judge to determine whether the alternative version of events put forward by the opposing party is to be accepted; for if that alternative version of events were to be positively accepted, then plainly the party that bore the onus would not have discharged it.

382R. It is necessary to consider in a little more detail, however, what this means in application to the present case.

382S. For the reasons developed at ACS [47]-[58], to find that Mr Lehrmann raped Ms Higgins, the Court must feel actual persuasion that that occurred, and actual persuasion is not attained independently of the seriousness of the allegation, its unlikelihood, and the gravity of the consequences flowing from the finding sought.

382T. In *Re B (Children)* [2009] AC 11 at [2], Lord Hoffman observed that:

> If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is

> returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

382U. If the Court finds Mr Lehrmann's account implausible, that would not make Ms Higgins's version of events more persuasive in its own right. It might remove a barrier to the acceptance of particular aspects of Ms Higgins' version of events, but it would not make inevitable the conclusion that it is more probable than not that Mr Lehrmann raped her and that the Respondents have discharged their onus: *Chen v Zhang* [2009] NSWCA 202 at [50]-[51] per Sackville AJA (Campbell JA and Handley AJA agreeing).

382V. The reason why rejection of Mr Lehrmann's account does not, in itself, necessitate that conclusion is that, between the two of them, their versions of events do not account for a range of other possibilities which present themselves on the facts as a matter of common sense. Mr Lehrmann denied that any sexual activity at all took place, whereas Ms Higgins alleged that he had intercourse with her whilst she was unconscious and that it was rape. Between those two poles lies a range of possibilities, including various permutations of consensual sexual activity (including anything from kissing or touching to sexual intercourse), or sex which was at law not consensual but which Mr Lehrmann's believed was consensual. Indeed, consistent with the rejection of the version of both individuals, the Court could also entertain scenarios where no sexual contact occurred despite a prior intention to engage in such activity on the part of either or both of them. Although such hypotheses were not explored in evidence, as a matter of ordinary human experience they naturally arise as possibilities and they must be considered: *Martin v Osborne* (1936) 55 CLR 367 at 381 per Evatt J; *Jones v Sutherland Shire Council* [1979] 2 NSWLR 206 at 222-223 per Mahoney JA; *Palmanova Pty Ltd v Commonwealth of Australia* [2023] FCA 1391 at [23].

382W. This point was illustrated by Perram J in *Palmanova* at [20]-[22]. In that exotic case, the Commonwealth seized an archaeological artefact imported into Australia under the Protection of Movable Cultural Heritage Act 1986, on the basis that it was a "protected object of a foreign country", specifically Bolivia. This required proof that the artefact was removed from Bolivia after 1906. There were numerous possibilities as to how the artefact got from the ruins of the city of Tiwanaku, where it was presumed to have been made, to Buenos Aires, where it first surfaced in the 1950s. His Honour observed:

> In a civil case where a party seeks to prove a fact indirectly from other circumstances this will involve demonstrating that the hypothesis that the fact occurred is more likely than not. In such a case the Court does not ask whether each of the posited

> circumstances individually proves that the hypothesis of the occurrence of the fact is more likely than not but rather whether all of the circumstances when considered together do so. Thus one does not ask whether the mere fact of Dr Casanova's archaeological expedition to Tiwanaku in 1934 shows that it is more likely than not that the Artefact was removed after 1906. Rather, one considers together all of the circumstances and asks whether it is more likely than not that the Artefact was removed from Bolivia after 1906. …
>
> The multiple competing hypotheses which must be assessed in this case give rise to a need for special care. Where there are only two competing hypotheses that between them account for the universe of possibilities open on the evidence, a court's satisfaction that one is more likely than the other will entail that the occurrence of the fact supported by the more likely hypothesis is proved on the civil standard. Whilst it is important not to approach the civil standard in an excessively arithmetical way in terms of numeric probabilities it can be useful to do so to illustrate some consequences in a circumstantial case where multiple hypotheses are in competition with each other. For example, where there are only two competing hypotheses and one is more probable than the other then it must follow that the more likely one is more likely than not. … But the logic of this breaks down where there are three or more competing hypotheses. … Thus the court will only be satisfied that a fact is established if the hypothesis supporting it is more likely than all of the others considered together... In particular, the mere fact that one of the hypotheses emerges as more likely than each of the others will not suffice, it must be more likely than all of them.
>
> In this case, for example, the Commonwealth's hypothesis is that the Artefact was removed from Bolivia after 1906 either because it was excavated in 1934 by Dr Casanova or because it was looted in or around 1950 as an unexpected consequence of Picasso's Primitivism Period. It is not enough for the Commonwealth to show that the hypothesis that the Artefact was removed from Bolivia after 1906 is more likely than each of the hypotheses that the Artefact was taken from Bolivia before 1906 by the Tiwanaku themselves, or exchanged with the Wari or carried away by whatever means by the Incas, the Aztecs, treasure hunters, archaeologists or other collectors. It must show that the hypothesis of removal after 1906 is more likely than all of these other pre-1906 removal hypotheses raised by the evidence put together.

See also at [24] per Perram J.

382X. Rejection of Mr Lehrmann's version of events as implausible would dispose of one of the proffered hypotheses about what occurred on the night of 22 March 2019, but it would not account for other available hypotheses inconsistent with the allegation of rape. For the Court to make the finding sought by the Respondents, it must be actually

persuaded that the hypothesis that Mr Lehrmann had intercourse with Ms Higgins knowing she was not consenting is more probable than all the available competing hypotheses, not merely that it is more probable than Mr Lehrmann's evidence that there was no sexual activity at all.

383. All the evidence above and covered in sections C, D and E lead to the conclusion that this Court could not be satisfied that the Respondents have discharged their onus in establishing a rape occurred. Therefore the defence of justification must fail. We also submit that the evidence cannot establish that any sexual activity between Mr Lehrmann and Ms Higgins occurred.

J.3 Whether carried imputations are substantially true

384. The pleaded imputations, which are each admitted to be carried by Network Ten, are:

(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; and

(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.

385. Ms Wilkinson's position is that the four imputations pleaded by Mr Lehrmann do not differ in substance, and that the Programme carried a single imputation, that Mr Lehrmann raped Ms Higgins in Parliament House: CB:A tab 4, page 72.

386. In Mr Lehrmann's submission, there are differences between the imputations in terms

of their level of seriousness, albeit relatively small ones in the scheme of such a serious general allegation, which will be the subject of a submission in relation to damages. For example, the ordinary reasonable person might think that for Mr Lehrmann to continue raping Ms Higgins after she had pleaded multiple times for him to stop (Imputation B) was especially heinous, and more so than the bare fact of rape (Imputation A), which might be committed simply by being recklessly indifferent to whether or not there was consent. The ordinary reasonable person might also think that for him to leave her half-naked on the couch afterwards (Imputation D) was callous, in a way which aggravates the sting of the imputation somewhat.

387. Be that as it may, if the Court does not find that Mr Lehrmann raped Ms Higgins in Senator Reynolds' office, either because it finds that rape did not happen or because it concludes that it is unable to reach a state of reasonable satisfaction either way, the inevitable consequence is that the defence of justification must fail for each of the imputations. This is because the proposition that Mr Lehrmann raped Ms Higgins is central to the sting of each of the imputations. None of the imputations can be substantially true unless that element is found to be true.

K. STATUTORY QUALIFIED PRIVILEGE – *Defamation Act 2005* s 30

K.1 Relevant principles

388. The elements of the defence as set out in s 30(1) of the Act are:

> **30 Defence of qualified privilege for provision of certain information**
>
> (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the ***recipient***) if the defendant proves that –
>
> (a) the recipient has an interest or apparent interest in having information on some subject, and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

389. Only element (c) is controversial. As is made clear below, Mr Lehrmann concedes that the respondents have made out elements (a) and (b).

390. The context and purpose of s 30 is relevant to how the reasonableness criterion should

be construed and applied. As a privilege defence, s 30 provides a policy-based exemption from liability for the publication of defamatory matter, without the defendant bearing any onus to prove that what it published was substantially true. Further, unlike common law qualified privilege, s 30 also affords a defence for publications to the world at large, for example in the media. A privilege which protects the publication of false statements of fact to a mass audience is not only a significant intrusion into the rights of individuals, who may suffer serious reputational damage with no chance of redress; it also carries the risk of detriment to the public interest, in that it may facilitate the publication of false or misleading information on issues of public significance: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568, 572; see also *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201 per Lord Nicholls, 238-239 per Lord Hobhouse.

391. Because the defence does not require the defendant to prove that the matter published is substantially true, it presupposes that there may be significant factual inaccuracies in what is published. That being so, the truth or falsity of the factual assertions in the matter is not in itself relevant to the defence: *Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2023] FCA 47 at [239]-[265] per Katzmann J. However, the fact that the defence may operate to excuse the publication of factually inaccurate, defamatory and damaging material to a mass audience is what informs the caution courts have generally exercised before recognising a publisher's conduct as sufficiently "*reasonable*" to attract the defence: see *Austin v Mirror Newspapers Ltd* [1986] 1 AC 299 at 313E, 317B-D, 318D-F; *Duma (No. 3)* at [216] per Katzmann J; *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336 at [154]-[156] per Rares J (Wigney J agreeing); *Bailey v WIN Television NSW Pty Ltd* (2020) 104 NSWLR 541 at [72]-[73] per Simpson AJA (Meagher and White JJA agreeing).

392. Whether the defendant's conduct in publishing the defamatory matter was reasonable is to be considered in all the circumstances of the case. The circumstances to be taken into account for the purposes of determining reasonableness are neither prescribed nor limited by the Act. Although a list of relevant considerations is set out in s 30(3), they are only factors which a court "*may*" take into account, and it is evident from s 30(3)(j) that the list is not exhaustive. Courts at first instance and on appeal have repeatedly stated that s 30(3) is not a checklist and that the considerations listed in it are not a series

of hurdles which must be satisfied in every case: *Feldman v Polaris Media Pty Ltd* (2020) 102 NSWLR 733 at [100]-[104] per White JA; *Bailey* at [89] per Simpson AJA (Meagher and White JJA agreeing); *Google Inc v Duffy* (2017) 129 SASR 304 at [476] per Peek J; *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33 at [228] per White J. The proper analysis of reasonableness is "*Broad, bespoke and evaluative*": *Palmer v McGowan (No. 5)* [2022] FCA 893 at [216] per Lee J.

393. However, just as it would be wrong to reject a s 30 defence because the defendant had not satisfied every element in s 30(3) like a series of hurdles, it would also be erroneous to conclude the defence is made out simply by mechanically checking off the "*boxes*" in s 30(3)(a)-(j). Reasonableness is context-dependent, and in context, some factors may have more importance than others. As Giles JA (Sheller and Powell JJA agreeing) observed in *Evatt v Nationwide News Pty Ltd* [1999] NSWCA 99 at [39]:

> It is for the defendant to establish that its conduct was reasonable. While regard must be had to all the circumstances in which the matter was published, it may be that the deficiency in the defendant's conduct in a particular respect was so marked that, viewed with the other circumstances, the deficiency in that respect means that the conduct can not be found to have been reasonable.

See also *Duma (No. 3)* at [222] per Katzmann J.

394. What matters is not just whether the defendant did the things which s 30(3) indicates are important, such as distinguishing allegations from proven facts (s 30(3)(d)), seeking comment from the plaintiff (s 30(3)(h)), and taking other steps to verify the information published (s 30(3)(i)), but the manner in which the defendant did those things, and what flowed from the steps taken by the defendant. For example, a defendant who prophylactically uses words such as "*alleged*" or "*allegations*" to characterise the factual claims in the matter might be said to have taken steps to distinguish allegations from proven facts, in terms of s 30(3)(d), but if the overall thrust of the matter is that the allegations are credible and ought to be believed, little weight could be given to the publisher's mere use of words such as "*alleged*" or "*allegations*". What matters for s 30(3)(i) is not just whether the defendant took steps to verify the information published, but whether the defendant made proper adjustments to the matter in light of what he or she learned as a result of taking those steps to verify. A defendant who chooses to ignore what he or she discovers could not be said to have behaved reasonably simply because he or she went through the motions of conducting checks and making enquiries.

395. How, and not simply whether, the defendant did the things indicated in s 30(3) is particularly pertinent in relation to the steps taken to seek comment from the plaintiff prior to publication. Seeking and publishing a response from the plaintiff has been regarded as an important factor (see *Lange* at 574), but consider why it is important. Fairness is not the only reason. Seeking the plaintiff's response is likely also to be a crucial step in verifying the information in the matter. This is implied by the words "*any other steps*" in s 30(3)(i), indicating that s 30(3)(h) is also a "*step to verify the information*" in the matter, and as Rares J observed in *Herron v HarperCollins Publishers Australia Pty Ltd* (2022) 292 FCR 336 at [188]:

> The purpose of seeking such a response can be seen by analogy with Dixon CJ's observation in *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9 at 20:
>
> > The difficulty is that the Court itself can never be certain that it knows all the circumstances. More often than not, one may be sure that the Court knows few of them. **Experience of forensic contests should confirm the truth of the common saying that one story is good until another is told** …
>
> (emphasis added)

As such, it is relevant to consider not just whether the publisher's conduct in seeking comment from the person defamed was reasonable from the perspective of fairness to the person defamed, but also whether it reflected a reasonable attempt to verify the defamatory allegations conveyed by the matter.

396. In general, the more serious the imputation conveyed, the greater is the obligation on the defendant to ensure that its conduct in publishing the matter was reasonable: *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [109] per Wigney J; *Palmer (No. 5)* at [184] per Lee J. Conversely, it is not the case that greater public interest in the subject matter of the publication warrants a laxer approach to the assessment of reasonableness: compare *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [346]-[347] per Lee J.

K.2 Interest

397. Mr Lehrmann concedes that viewers of the Programme had an interest or apparent interest in having information on the subjects particularised in Annexure B para 1 of Network Ten's Defence (CB:A tab 3, page 53) and para 13 of Ms Wilkinson's Defence (CB:A tab 4, page 80). He concedes that the respondents published the Programme in

the course of giving viewers information on those subjects.

398. It follows that Mr Lehrmann concedes that the respondents have made out the elements of the defence in ss 30(1)(a)-(b) of the Act.

K.3 Reasonableness

Introduction

399. In Mr Lehrmann's submission, the Court would conclude that the persons relevant to Network Ten's state of mind (Mr Llewellyn, Ms Wilkinson, and to a lesser extent Mr Meakin) and Ms Wilkinson behaved unreasonably in publishing the Programme on 15 February 2021.

400. The respondents had strong indications of the unreliability of their main source, Ms Higgins. The journalists either wished these problems away or failed to make inquiries and appropriately test and challenge her version of events. The attempt to contact Mr Lehrmann for comment was a fiasco. Ultimately, the other requests for comment went out so late that the respondents did not have time to react in any meaningful way to the contrary information which began to trickle in late on Sunday, 14 February 2021, and into the Monday. As broadcast, the Programme was misleading on substantial matters, and the respondents either knew this, or ought to have known it, but failed to recognise it because of their personal investment in the story and their lack of insight.

The respondents' assessment of Ms Higgins' credibility

<u>The bruise photograph</u>

401. The explanation Ms Higgins gave Mr Llewellyn and Ms Wilkinson as to the manner in which she lost material on her phone, as well as the circumstances in which selected items such as the bruise photograph somewhat survived, was plainly implausible.

402. The respondents saw the bruise photograph as a rather important aspect of Ms Higgins' story. It was (they thought) tangible, corroborating evidence – a visible mark left on Ms Higgins by the alleged rape. Mr Bendall cited it specifically as a factor that caused him to form a positive view as to Ms Higgins' credibility: Affidavit of Christopher Bendall (28.07.2023) at [73]; CB:C tab 1072, page 5508. Mr Llewellyn described the photograph as "key information": Affidavit of Angus Llewellyn (21.09.2023) at [277]; CB:C tab 1079, page 5632. They should be taken at their word.

403. Yet, from the outset, Mr Llewellyn and Ms Wilkinson were suspicious of Ms Higgins on this issue. From the number of times Ms Wilkinson returned to this topic at the 27 January 2021 meeting alone, it is apparent that she found it all but incomprehensible. In her evidence at Tcpt 1734.27-33, she conceded that "*I couldn't follow what she was saying*" and "*I found it confusing*".

404. Notwithstanding their well-warranted confusion about this aspect of Ms Higgins' story, which they believed to be important, it is apparent from the transcript and the recording of the 27 January 2021 meeting that neither Mr Llewellyn nor Ms Wilkinson:

(a) Asked to see the original native file, which would have contained metadata showing, for example, when it was taken.

(b) Made any enquiry as to whether the original file even existed.

(c) Probed Ms Higgins in any serious way on which this photograph had somehow survived the mysterious technological problem that had engulfed her phone, even though other material had been lost. The same goes for the other selected screenshots which were attached to the timeline.

(d) Asked if there was any possibility that the bruise was caused by something other than Ms Higgins' leg being pinned down during the alleged rape.

405. These were obvious and simple questions to ask in circumstances where the journalists' suspicions were piqued by the strangeness of Ms Higgins' story about the photo. The serious concern both Mr Llewellyn and Ms Wilkinson shared about this issue is made plain by their 31 January 2021 message exchange: Ex R294-R295, CB:B tabs 322-323.

406. Notwithstanding these proper concerns, Mr Llewellyn for his part held the view that it was best "*to avoid the topic as it raises unanswerable questions and weakens rather than strengthens her very strong claims by adding unnecessary doubt where there currently isn't any*": Ex R295, CB:B tab 323, page 3249. From whose perspective, it might be asked, was the doubt raised by the questionable nature of this photograph "*unnecessary*"? Mr Llewellyn's message is a quite remarkable admission of an intent to suppress doubts and ignore inconvenient weaknesses in Ms Higgins' account.

407. In cross-examination, Mr Llewellyn had no explanation for his comment about "*unanswerable questions*" or for his plainly expressed desire to sweep a topic which damaged Ms Higgins' credibility under the carpet. The explanation in his affidavit at [152] (CB:C tab 1079, page 5616), to the effect that he believed the survival of the bruise photograph was explainable because a few other screenshots of emails and messages also survived, is especially weak. A journalist less captured by their source, and less desperate for their exclusive story, might have thought that the source had rather obviously curated the material she wished to be available to her chosen media vehicle and accompanied this with a fairly unconvincing excuse for the unavailability of other material.

408. The explanation given by Ms Wilkinson in her affidavit at [94], that in her mind these maters ceased being an issue when Mr Llewellyn explained to her that the loss of data was caused by transfers between multiple mobile phones, was unsatisfactory.

409. If true, it is at best an example of Ms Wilkinson's propensity to abdicate responsibility in the manner described in Part A above. Ms Higgins's story about the photograph was plainly implausible and Ms Wilkinson herself was plainly concerned about it. A tale about losing data by transferring things between multiple mobile phones was hardly much more convincing. It was not good enough for Ms Wilkinson just to go along with Mr Llewellyn's nonchalant response to the issue. If she was concerned about the issue (as she rightly was), the reasonable thing for her to do as a senior journalist was to try to get to the bottom of it. She did not.

410. But the Court should not accept the explanation. Mr Llewellyn himself did not say as much in his affidavit, and was equivocal in his evidence about what he told Ms Wilkinson (and actually said he did not know if Ms Higgins ever said as much to him): Tcpt 1501.26-1504.23. There is no note or email or contemporaneous document of any kind to back up the "*multiple mobile phones*" story. It should be regarded as new.

411. The interview conducted by Ms Wilkinson on 2 February 2023 was consistent with Ms Higgins' original, and fanciful, narrative about the Government hacking or wiping her phone. Ms Higgins actually verified this account in a statutory declaration on 10 February 2023. The same problem discussed in the message exchange between Ms

Wilkinson and Mr Llewellyn on 31 January 2021 was allowed to continue unresolved. Ms Higgins apparently never went to Vodafone or provided any explanation. Far from probing or testing Ms Higgins' fanciful claims, Ms Wilkinson simply repeats them in a perfunctory way and Ms Higgins gives brief responses that accord with what she has said earlier. The only inference to be drawn is that Ms Wilkinson was content to go along with Mr Llewellyn's proposal to "*avoid the topic*".

412. The 31 January 2021 message exchange exposes the true state of mind of Ms Wilkinson and Mr Llewellyn. They had substantial doubts about the credibility of their complainant on this point, a point which they considered important. The real vice is what happened next. They did not make further inquiries. They did not check if she had visited Vodafone. They did not ask about her repeated alterations in terms of the date the photograph was taken. Save for one brief exchange in the interview, they just pushed the whole issue to one side. No inquiries were made. Nothing was done.

413. Their conduct was worse than a mere failure to investigate. Not only did they not pursue the doubts they held about the photograph; they presented it to their viewers as physical evidence corroborating Ms Higgins' claims (lines 35-37), without conveying to their viewers that there was any reason to doubt it, even though they themselves knew that there was. That is not just unreasonable behaviour by a journalist. It is quite disgraceful.

Allegations about Ms Brown and Senator Reynolds

414. Ms Higgins' account of what Ms Brown and Senator Reynolds said and did in March-April 2019 is replete with inconsistencies and implausibilities.

415. In relation to going to the police, she moved from attributing a carefully crafted "*we wouldn't stop you*" to Senator Reynolds and Ms Brown, to at times saying that she was offered support, to at times saying that she was not offered support and that she was made to feel that going to the police was not an option. The suite of answers and claims during the 2 February 2021 interview at aide memoire to Ex 37, CB:B tab 377, pages 3500-3501 is particularly incoherent.

416. At times her allegations rose as high as to say that Ms Brown was quite clear to her that if she went to the police she would not have a job, and that if she did not go the police she would have a job. At other times she conceded that all ministerial staffers were

destined to lose their jobs anyway once the election was called, and was more equivocal as to what Ms Brown actually said.

417. Ms Higgins was never probed on these obvious inconsistencies. Mr Meakin picked them up in an email on 6 February 2021, but his concern was immediately dismissed by Mr Llewellyn: Ex R387, CB~~:B tab~~ 428. It was a serious allegation on its face, and not very likely, that a senior government staffer and Minister of the Crown would actually say to someone who had just made an allegation of sexual assault that she would not have a job if she pursued a police complaint. This claim by Ms Higgins, however, sailed right through the fact checking process and into the Programme without ever being properly tested.

418. Once again, it is not just that the respondents failed to test properly an unconvincing aspect of Ms Higgins' story. Allegations about the attitude of Ms Brown and Senator Reynolds, pressure supposedly placed on Ms Higgins not to pursue a police complaint, and the threat to her job were not just included in the Programme but given substantial prominence. These were in no way marginal aspects of the story. The Government response was important because it was presented as a reason why Ms Higgins did not pursue a police complaint in 2019, which might be seen as important to the credibility of the sexual assault allegation she made publicly in 2021. It was also a significant aspect of the public interest in the story.

419. Ms Higgins' claims about how she and the police were denied access to the CCTV footage were also, on their face, most implausible. She believed that the CCTV had been destroyed as part of a conspiracy: see especially the 2 February 2021 interview at page 3507. It was a belief without rational foundation. Once again, however, she was not tested. This deficiency became more unreasonable when the actual responses from the Department of Parliamentary Services and the police concerning the CCTV issue arrived on 15 February 2021. That issue is discussed below.

420. It should be borne in mind that from reading the timeline, Ms Wilkinson and Mr Llewellyn knew that Ms Higgins had withdrawn her police complaint on 13 April 2019: Ex R11, CB:B tab 332, page 3346. It is also apparent from page 3344 that Mr Llewellyn and Ms Wilkinson knew that Ms Higgins was in contact with the Parliament House AFP by 2 April 2019, and that as of that date, she had not yet made contact with the external

AFP. As a matter of fact, this occurred on 8 April 2019. The point is that the period during which the police complaint was actually extant was so brief that any suggestion of a considered withholding of CCTV footage was simply improbable. The narrative about police roadblocks and obstructions was implausible. That does not seem to have even occurred to Mr Llewellyn or Ms Wilkinson.

The "Star Chamber"

421. The evidence emerging from the timeline and the 27 January 2021 meeting is discussed in Part F above. The suggestion that Ms Brown and/or the Liberal Party, operating through the so-called Star Chamber, determined as part of some kind of response to Ms Higgins' allegations to approve her job offer but dock her pay and change her job title is totally implausible. It is another matter that should have alerted Wilkinson and Llewellyn to the unreliability of their source.

The return to the police

422. The message exchanges discussed above in Part F make it clear that Mr Llewellyn orchestrated Ms Higgins' return to the police on about 5 February 2021. See especially Mr Sharaz's message "*is the police the last thing you need from b*" and Mr Llewellyn's reply "*essentially yes*" at Ex R214, CB:B tab 236, page 2985, and the reports back from Mr Sharaz on the same page and also at Ex R292, CB:B tab 320, page 3420.

423. It is not reasonable behaviour for a journalist to push a source to reactivate a police complaint to suit their broadcasting timetabling, in order to publicise the fact that the complaint has been reactivated.

Ms Higgins' and Mr Sharaz's motives

424. Mr Sharaz's explanation of Ms Higgins' motive (at aide-memoire to Ex 36, CB:B tab 1114, page 6229) was quite different from the motives otherwise put forward by Ms Higgins (CB:B tab 1114, page 6230; aide memoire to Ex 37, CB:B tab 377, page 3538). There does not appear to have been any enquiry about this. This is all the more concerning in the context of Mr Sharaz's apparent political agenda, as discussed in Pat F.1 above.

425. The respondents were on notice that there was at least a distinct possibility that Mr Sharaz and Ms Higgins were motivated by both a desire to harm the Liberal Party and

to damage Mr Lehrmann himself. The evidence suggesting Mr Sharaz and Ms Higgins appeared to be motivated by political considerations would have given any journalist acting reasonably pause to consider whether they were being used and manipulated for an ulterior motive. That does not appear to have happened with Mr Llewelyn and Ms Wilkinson.

Allegations about Senator Cash

426. Ms Higgins alleged that Senator Cash, knowing that Ms Higgins was a victim of assault, said words to the effect of "*you're just going to have to sort of suck it up*" or "*you deal with it or you leave*": see line 141 of the Programme. These and other allegations about Senator Cash were implausible. They were never put to the Senator in those terms and no denial was included for those allegations in the Programme.

427. Mr Llewellyn listened to a secret recording made by Ms Higgins on 5 February 2021, where Senator Cash expressed sympathy on multiple occasions and acted in a manner utterly inconsistent with the Higgins allegations. He does not appear to have tested Ms Higgins on this. It does not seem likely that either Mr Llewellyn or Ms Wilkinson even actually believed these allegations about Senator Cash were true.

Research

428. The preparation and research for the Programme was flawed and misdirected from the start. The process was driven by complete belief in Ms Higgins' claims. The only matter which appears to have been the subject of any scepticism was Ms Higgins' explanations about data loss from her phone and the survival of the bruise photograph, discussed above. The process of investigation and research, such as it was, found itself infected by confirmation biases. There was no genuine desire to test or check Ms Higgins' claims to ensure her story was credible.

429. Over the course of more than three weeks preparation, prior to 12 February 2021, the only two witnesses who were spoken to were the flat-mate Ms Humphries and the rape counsellor Ms Cripps. Ms Humphries did no more than confirm some changed behaviour by Ms Higgins in 2019, which could be just as consistent with the humiliation of being found naked in the Defence Industries Minister's office on a Saturday morning as with being the victim of an assault. Ms Cripps did no more than confirm that Ms

Higgins had at one stage been a client. Otherwise no approaches were made to any colleagues, friends, family members, or any of the other numerous witnesses mentioned in the timeline.

Requests for comment

430. Mr Llewellyn's statement in correspondence with Ms Wilkinson on 11 February 2021, the day before the requests went out, that "*The questions are really to cover us off for defamation"* is telling of his attitude to this part of the process. So does his further acknowledgment that if further interviews did occur then the Project would try to ask questions to which it already know the answers. This all accords with what Llewellyn said to Ms Higgins and Mr Sharaz on 27 January in the presence of Wilkinson: "*And reasonable can be pretty iffy, as long as it's not five minutes before broadcast. And if its ten minutes, we should be okay."* True to form the evidence (Ex R583, CB 627 p. 4061) showed he pushed for the latest time possible for the sending of the requests.

431. The requests were sent out late on Friday afternoon, 12 February 2021, with a 10 am Monday deadline in circumstances where work had begun on the story on 20 January 2021. In fact, as events in fact revealed on the Monday, time was so tight that there was no opportunity to meaningfully consider and investigate the information received. As Mr Meakin acknowledged at T 1958 L 33 there was unlikely to be time to re- interview Ms Higgins and in fact it appears as though the Project did not even bother to contact her in relation to any of the information as it begun to arrive. The program was in an advanced state of preparation. There was no realistic chance that it would be pulled or substantially change following any response from Mr Lehrmann. The process of seeking comment was so delayed that it was flawed and unreasonable from the start.

432. The situation is particularly egregious with Mr Lehrmann. The timeframe as it applied to him was completely unrealistic. It is irrelevant that on the Monday he actually received and accepted advice from various persons that he should not engage with the media. By that stage the Maiden articles had run on news.com.au with a pointer to the Project. Questions were being asked in parliament. The Project was being promoted on social media. The behaviour of Mr Lehrmann and his legal advisers in such a situation cannot be compared to what they might have done if they had been properly approached much earlier with a genuine opportunity to contribute. Mr Lehrmann might for instance

have been able to obtain evidence discrediting the allegations of Ms Higgins including for example from Ms Brown or Ms Reynolds.

433. Mr Llewellyn's use of a Hotmail address and an email for a former employer, both sourced from Mr Sharaz was also unreasonable. Mr Llewellyn knew nothing about the extent to which the Hotmail address was used. His use of a mobile number which had been appended to a October 2018 press release was also completely unsatisfactory given he knew Lehrmann had left the employ of the government more than two years before. Indeed Mr Llewellyn's refusal to use social media (including any of Mr Lehrmann's Facebook, Instagram or LinkedIn accounts - all of which Llewellyn knew about) to contact Mr Lehrmann suggests he had no genuine interest in actually reaching Lehrmann and obtaining a response.

434. There was simply no evidence to suggest that Mr Lehrmann actually received either the 12 or 15 February request for comment via his Hotmail address as the respondents allege. No challenge was made to his evidence about the frequency with which he reviewed his Hotmail account (Aff [15a] CB 1071 p. 5489). No evidence was adduced concerning any behaviour whatsoever that he had any idea of the tsunami hurtling in his direction until the first message with Mr Hughes at 10.29 am on Monday 15 February (p33455 in fact 11.29 am with the time difference).

435. The respondents attempted to suggest that because they were not naming Mr Lehrmann their obligation to contact him and seek a response was somehow materially reduced (see for instance Llewellyn Aff. [323] CB 1079 p. 5636). Mr Llewellyn's remark at the 27 January 2021 meeting "*but my feeling is that if we didn't name him, and still, we may as well have named him. Because so many people would be able to identify him from the position and that kind of stuff*" gives the lie to this. So does his concession in his affidavit at 167a (CB 1079 p. 5618) that specific attempts were made to exclude persons other than Mr Lehrmann from being identified.

436. The considerable identifying information broadcast by the respondents (going well beyond the information broadcast by Ms Maiden) increased the obligation upon them to obtain reliable contact information and to provide Mr Lehrmann with proper time to respond. there were 2 people in that room – and a token effort to reach out to the alleged perpetrator at the eleventh hour is fundamentally inconsistent with reasonableness.

There was no genuine desire to actually hear and take account of anything Mr Lehrmann had to say.

Responses to requests for comment and editing of Programme

437. Mr Llewellyn received significant information from Mr Carswell on behalf of the government. It included material quite contradictory of Ms Higgins' allegations. It also included 2 contemporaneous documents (the Barons email and the 7 June 2019 Brown/Higgins message exchange) in circumstances where hitherto the only contemporaneous material in Ten's possession had been supplied by Mr Sharaz and Ms Higgins. Those documents also suggested that fundamental aspects of Ms Higgins' account were incorrect.

438. Nothing was done with the information. It was not even informally checked with Ms Higgins. She was not even asked whether she possessed the message exchange with Ms Brown or anything similar. No further investigation resulted. There was no attempt to recut the interview with Ms Higgins. Ultimately an extremely brief and bland summary was inserted at Line 107 of Schedule A, the overall effect of which was arguably to enhance Ms Higgins' allegations. Certainly Mr Meakin had cautioned against overemphasizing the material by including it at the end of the broadcast (Ex R718, CB 765 p. 4270). The unreasonable nature of Ten's response is of course exacerbated by the fact that Higgins' allegations against Ms Brown and Senator Reynolds were already on their face so unsatisfactory and silly.

439. The treatment of the responses from the DPS and the police proved to be similarly shambolic. Ten was told by both organisations that the CCTV had been viewed by internal AFP in 2019 and had been stored since with a view to being made available for any investigation by ACT police. An ACT police officer explicitly told Mr Llewellyn she didn't believe there had been any conspiracy. The information supplied was quite inconsistent with Ms Higgins' quite absurd speculations and fantasies about the CCTV.

440. And yet once again, the new information was not even put to Ms Higgins. Mr Llewellyn took the completely unjustified view that it sounded like the DPS were "*covering themselves*". That belief could only have derived from a stubborn dependence on Ms Higgins and a state of mind that absolutely refused to believe she might not be telling the truth – or might be exaggerating – or might be unreliable. It was an irrational and

unreasonable point of view. In fact, what the DPS confirmed was rather obvious – that there had not been some kind of nefarious action to actually destroy or bury or conceal CCTV footage from the Australian Parliament House. Yet Mr Llewellyn's immediate instinct was to disbelieve the DPS.

441. Subsequent information provided by the DPS concerning the critical dates (namely that a request to view the footage was made on 3 April, followed by an approval on 11 April and an actual view on 16 April 2019) also pointed up the improbability of Higgins' allegations. It was plain from her Timeline that she had actually withdrawn her police complaint on 13 April 2019. The point is that the timeframe provided by the DPS is utterly inconsistent with a situation where ACT police had been telling Ms Higgins (in their first and only meeting on 8 April 2019) that they were being obstructed in efforts to obtain the CCTV footage. Her complaint to the ACT police was barely extant for a week (in actual fact just 5 days). This should have been obvious to Mr Llewellyn.

442. The program actually put to air allegations at Schedule A Line 84-89 that Ms Higgins had asked at least half a dozen times to see the CCTV and then at Lines 113-116 that the (ACT or outside) police had "immediately" raised the fact they were having difficulty getting copies of the CCTV footage and that this had been elevated to her superior and it had still not happened. In circumstances where Ms Higgins had withdrawn her complaint by 13 April 2019 the timeframe in which all of this could have happened is quite implausible. Yet the Project did nothing and changed nothing.

443. Ultimately the line inserted at the end of the program concerning the CCTV (purportedly in summary of the new information provided by the DPS) was completely misleading. Parliament House authorities had not "finally" told Ten that CCTV would be available to investigators. Ten knew it had always been available.

444. The obduracy of the Project's position is emphasised by Mr Llewellyn's evidence that after broadcast he retained a belief that the program "*allowed her [Higgins] to restart a stunted police investigation once the CCTV footage was released*." That is a conclusion simply unavailable to him on the plain statements provided by both the DPS and the Act police which corroborated one another. Mr Llewellyn knew the footage would be available irrespective of whether the Project aired.

445. The unavailability of CCTV was one of the roadblocks cited by Ms Higgins in terms of

the withdrawal of her police complaint (see for instance Line 113-116 and 133 of Schedule A) as was the suggestion that her job was on the line. By airtime, the journalists knew there was real doubt as to both whether it was true that CCTV had been unavailable to police and whether Ms Higgins' job had ever been on the line. Yet no changes were made to the parts of the program containing Ms Higgins' allegations to address these issues. No inquiries were made. Instead, the quite hopeless changes at Lines 107 and 167 were all that was added.

446. Three other matters reflect poorly on whoever was responsible for the editing of the program:

(a) A section where Ms Higgins discussed the conduct of the security guards edited out the fact that one of the guards had actually asked whether she was ok. Earlier on 27 January she had stated that when this request was made she had replied she was "fine" (aide-memoire to Ex 36, CB 1114 p. 6084). Viewers were not told this. Ms Wilkinson said she was disappointed when shown this evidence. See T1880 L24-T1883 L 14, aide memoire to Ex 37, CB 377p. 3477 and Schedule A Line 46-49. This is consistent with a pattern of editing the program to support Ms Higgins' allegations (including by the use of music which is by turns ominous and mawkishly sentimental) in every way possible.

(b) An SMS message of 31 March 2019 between Ms Brown and Ms Higgins described at 91A of Schedule A edited out an invitation by Ms Brown to Higgins to ask her father to the meeting on 1 April 2019 with Senator Reynolds. That was obviously contrary to the narrative advanced by Ms Higgins about her mistreatment at the meeting. It was relevant information that should have been provided to viewers and the redaction deprived viewers of knowing something about brown that was quite contrary to the flavour of Ms Higgins' allegations about Ms Brown. Mr Llewellyn denied this was a relevant matter (T1570 L35-T1571 L22 especially "*I mean why would I*?"

(c) At the conclusion of the program at Line 167 of Schedule A reference was made to approaches to all of the people named in the story and the fact that requests for interviews were declined. As to Senator Cash, despite Mr Meakin's request that she be asked (Ex R455, CB 497), she was not in fact asked for an interview. This statement was simply false insofar as it pertained to her. On a fair reading most viewers would have assumed it applied to him (and gave the

false impression that he had received a request for an interview and declined the interview).

Ms Wilkinson's position

447. Any submission that Ms Wilkinson's position can be somehow carved off from the unreasonableness of the other journalists (and particularly Mr Llewellyn) should be rejected.

448. On the day of broadcast the executive producer described Ms Wilkinson as responsible for "*developing conducting and delivering this story".* Ms Wilkinson accepted the accuracy of that description at T1726 L11. As discussed above she was fully aware of Ms Higgins' credibility problems including those raised by her accounts of the loss of data from the phone, the bruise photograph, the accounts of Senator Reynolds and Ms Brown, the star chamber and the motive issues. She knew about and acquiesced to the timing of the requests for comment (Aff para 112-113 CB 1075 p. 5566). She was kept informed of Mr Llewellyn's research (Aff [76]-[77], [105], CB 1075 p. 5565), According to her she was also kept abreast of the responses as they came in on 14-15 February (Aff [125] CB 1075 p. 5569). Whilst Mr Llewellyn may bear the responsibility for the use of faulty contact details for Mr Lehrmann, otherwise Ms Wilkinson should be accorded her share of the blame for all the other problems.

449. Ms Wilkinson denied any commercial motivation; T1760 L 43. It appears that at least to some extent she was also motivated by the same desire to cause a problem for the Liberal party and/or certain members such as Senator Reynolds (see e.g. Ms Wilkinson saying about Senator Reynolds "I've so got her in my sights now" (aide-memoire to Ex 36, CB 1114 p. 6229), the "lying through her teeth" comment (Ex R203, CB 225 p. 2965 and T 1871) and her belief they was a systemic cover up beginning in the Prime Minister's Office (T1769-1770 and 1777). Those were not appropriate states of mind for a journalist publishing a story of this nature to hold.

450. Ms Wilkinson also:

(a) Understood the importance of Ms Higgins' explanation for not pressing charges in 2019. She understood that it would bear on her credibility and indeed upon

the whole foundation of the program. See the correspondence with Ms Thornton at Ex R189-R191, CB 210-212 and the question and subsequent exchange with Ms Higgins on 27 January at aide-memoire to Ex 36, CB1114 p. 6247 "*the answer you really need to think about it…why didn't you press the charges*?"

(b) Understood the important of obtaining information from corroborating witnesses and on 30 January 2021 had asked Mr Llewellyn if any such witness was "*over the line*" other than the flatmate. See Ex R203, CB225 p. 2958 and T1827 L27- 47.

(c) Acknowledged and accepted the fairly token nature of the comment process. She replied "Cool understood" in relation to the "*cover us off for defamation*" email by Llewellyn (Ex R545, CB 589 p. 4005, T1862-1863)

451. Another matter specifically reflecting upon Ms Wilkinson's unreasonableness is her view (Aff [106] CB 1075 p. 5565) that Ms Brown suspected Mr Lehrmann had raped Ms Higgins and that a security matter was not the true reason for his dismissal. In support of that view she cited the differential treatment – Lehrmann being terminated and Higgins being allowed to stay. Of course, Ms Wlikinson had no idea whether other issues might have contributed to Ms Brown's request for Mr Lehrmann to leave including for instance an earlier security breach. She did not even know about Mr Lehrmann's career plans.

452. Ms Wilkinson's view as expressed at [116] of her affidavit (CB 1075 p. 5567) to the effect that she believe that only persons who knew about the allegations would identify Ms Higgins is also a manifestly unreasonable view. See T1856-1857.She must have known that people who knew the identifying facts published by the Project would include those who did not know about the allegations.

452A. During closing oral submissions of the cross-claim, Senior Counsel for Ms Wilkinson made some brief remarks about the second respondent's reasonableness for the purpose of the s30 defence (see T2649-2652). In essence it appears that the second respondent, relies on an attempt to plead certain particulars in a draft defence circulated earlier in 2023. The first respondent apparently required the removal of a few sentences from the draft referring to the seeking and provision of legal advice in relation to the program. The second respondent relies on the material struck through by the first respondent as bolstering her reasonableness in the context of the Section 30 Defence.

452B. Firstly, it is trite to observe that a particular in a defence might not be established during a proceeding. The mere fact of *attempting* to plead something, in short, means little.

452C. Secondly, and more importantly, even assuming the broadcast and the allegations within were 'legalled' or signed off or reviewed by lawyers at an advanced stage, and that the second respondent received assurances as part of that process, that does nothing to reduce the magnitude of the second respondent's unreasonableness. The scope of her unreasonable conduct is canvassed in these submissions in detail and was also addressed in oral submissions at T2439 L8-34. Two general matters are worth emphasising:

a) the second respondent accepted that she developed, conducted and delivered the story (T1726 L3-11) – from the first email from Mr Sharaz to the broadcast of the programme, it was the second respondent's story. So much can also be inferred from the fact that the first respondent chose her to accept the Logies award and give a speech; and

b) to the extent she did rely on her producer, Mr Llewellyn, the second respondent, through her Senior Counsel in oral closing submissions, endorsed everything Mr Llewellyn had done with respect to the programme and did not accept that Mr Llewellyn had made any mistakes nor that any mistakes impacting the reasonableness defence had occurred (T2455 L33-37). If Mr Llewellyn acted unreasonably then so did the Second Respondent. They stand or fall together.

Even assuming fulsome and competent work from the legal team, this cannot somehow sanitise the grave errors of process and judgment committed by the Second Respondent and Mr Llewellyn.

The claim for privilege

453. The journalists' affidavits contain various references to consulting lawyers and relying on legal advice. The discovery is packed with redactions and dozens, probably hundreds of such redactions have found their way into documents tendered in evidence. Privilege has not been waived in any respect.

454. The legal advice was provided by Ms Smithies and Mr Farley, Network Ten's own lawyers. The legal advice is internal. The conduct and advice of Mr Farley and Ms Smithies is by itself fundamentally an instance of the conduct caught by the reasonableness test ("*conduct of the defendant in publishing the matter is reasonable in the circumstances*"). The Court cannot test that conduct. The legal advice itself may have been unreasonable. The Court's inability to test that conduct is a separate reason why the defence should fail. The respondents are unable to discharge their onus when they claim privilege in this way.

455. As to the witnesses who say their state of mind was shaped or influenced by legal advice, once again the Court is not able to make a finding as to their state of mind on such issues. The advice having not been disclosed, it is simply an unknown. There is a vacuum in the evidence on this topic. It is not a matter of a witness seeking judicial approval for reasonable conduct by simply saying they followed legal advice - as if advice is some sort of unqualified set of geographic directions. Legal advice is rarely if ever that precise. It often speaks of levels of risk. It often makes suggestions about things that may or could be done. The Court cannot know any of this.

456. The Court should not take the step of inferring what the logical legal advice ought to have been or may expected to have been. It remains an unknown. The reasons for the absence of any waiver also remain an unknown.

L. OTHER DEFENCES

L.1 Justification at common law

L.1.1 Relevant principles and why pleaded and pressed

457. Although the subheading above para 13 of Network Ten's Defence (CB:A tab 3, page 37) refers to the defence of justification at common law, it is not apparent from the body of the plea that Network Ten contends that the common law defence operates in any different way than the statutory defence. Network Ten's written opening submissions also proceed on the basis that the principles governing the common law and statutory defences are the same (CB:D tab 1105, pages 5985-5986).

458. If Network Ten asserts in its closing submissions that the common law defence operates

differently in some way, Mr Lehrmann will address the submission in reply.

L.1.2 Whether defence established

459. To the extent it is pressed as a separate defence, the common law justification defence rises or falls with the defence under s 25 of the Act. It should be rejected for the reasons given above in relation to s 25.

L.2 *Lange* qualified privilege

L.2.1 Relevant principles and why pleaded and pressed

460. The case stated for the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 involved two questions – whether paragraph 10 of the ABC's defence was bad in law, and whether paragraph 6 of the defence was bad in law. These pleas were as follows (at 551):

(a) Paragraph 10 alleged that the matter "*was published pursuant to a freedom guaranteed by the Commonwealth Constitution to publish material*" in the course of discussion of government and political affairs; that it was published in the course of such discussion; and that the ABC was unaware of the falsity of the matter, did not publish it recklessly, and that the publication was reasonable.

(b) Paragraph 6 asserted a defence of common law qualified privilege. The basis of the ABC's duty to publish and recipients' reciprocal duty or interest to receive the publication was alleged to be the fact that it concerned a matter of public interest and was published in the course of political discussion.

Curiously, although *Lange* was a New South Wales case, it does not appear from the report that the ABC attempted to plead a defence pursuant to s 22 of the *Defamation Act 1974* (NSW). It apparently relied only on the purported Constitutional defence and the common law defence of qualified privilege.

461. Paragraph 10 was held to be bad because the Constitutional implication of freedom of communication about government and political matters does not confer private rights or defences: at 575. It is a limitation on legislative and executive power and a control on the development of the common law, but not a source of private right: at 560, 566.

462. As to paragraph 6, the Court held that the common law of defamation unduly burdened freedom of communication about government or political matters because the common law defence of qualified privilege did not afford a defence in the nature of privilege for the publication of defamatory statements to a mass audience. It held that common law qualified privilege should be developed to recognise an occasion of privilege for the publication of matter on political affairs to a mass audience. The basis for this expanded occasion of privilege was the recognition that each member of the Australian community should be deemed to have an interest in sharing and receiving information on government and political matters: at 568-571.

463. As the Court identified at 572, the "*real question*" concerned the conditions on which this extended category of qualified privilege should depend. It held that "*a requirement of reasonableness as contained in s 22 of the Defamation Act, which goes beyond mere honesty*" was reasonably appropriate and adapted to the protection of reputation and not inconsistent with the Constitutional requirement: at 575-573.

464. In the result, the Court held that the plea in paragraph 6 was not bad in law, but that the particulars given by the ABC did not bring the publication within the defence because they did not address the reasonableness requirement: at 575-576.

465. In response to a question from the Court, Dr Collins KC said in opening that Network Ten does make a formal submission that the requirement of reasonableness in *Lange* has "*gone off the rails*": Tcpt 553.8-13. Network Ten's written submissions, however, do not identify how reasonableness in the *Lange* defence might be construed differently from reasonableness in the s 30 defence. In its opening outline, Network Ten merely submitted that the "*general approach*" of "*equating*" the notion of reasonableness under *Lange* with that applicable to the statutory defences had led to an "*often microscopic and overly burdensome analysis of pre-publication conduct*": CB:D tab 1105, page 5995. It made no separate submission in relation to why its conduct was reasonable for the purposes of the *Lange* defence, instead simply referring to its submissions in relation to s 30 reasonableness: CB:D tab 1105, page 5996.

466. It is not really correct to say that courts have "*equated*" the notion of reasonableness under *Lange* with that applicable to the statutory defences. Rather, the High Court specifically selected the reasonableness element in s 22 of the 1974 NSW Act, which

in turn became the requirement in s 30(1)(c) of the 2005 Act, as the appropriate criterion for the new defence: *Lange* at 572-573. In other words, it was by design that the *Lange* defence operated on the same standard of reasonableness as the statutory defences.

467. In considering the idea that the "*assimilation*" of the reasonableness element in *Lange* with that of the statutory defences somehow represents a perversion of the *Lange* defence, it is important to recall that the High Court in *Lange* was of the view that s 22 of the 1974 NSW Act was consistent with the implied freedom. At 569 the Court said:

> **Without the statutory defence of qualified privilege**, it is clear enough that the law of defamation, as it has traditionally been understood in New South Wales, would impose an undue burden on the required freedom of communication under the Constitution. This is because, **apart from the statutory defence**, the law as so understood arguably provides no appropriate defence for a person who mistakenly but honestly publishes government or political matter to a large audience.

(Emphasis added). At 575, the Court concluded:

> Moreover, even without the common law extension, s 22 of the *Defamation Act* ensures that the New South Wales law of defamation does not place an undue burden on communications falling within the protection of the Constitution.

The Court also said at 575:

> For the reasons we have given… the New South Wales law of defamation places no undue burden on the freedom of communication required by the Constitution. In so far as the amended defence relies on the common law of qualified privilege to defend the publication, different considerations apply.

468. It is true that when *Lange* was decided, s 22 did not include the list of relevant factors in s 22(2A): *Palmer v McGowan (No. 5)* [2022] FCA 893 at [214]-[216]. It is, however, apparent from the description of reasonable conduct in *Lange* at 574 that the matters relevant to assessing whether the publisher's conduct was reasonable for the purposes of the *Lange* defence are consistent with the factors in s 22(2A). Moreover, as discussed in greater detail above, the fact that the statutory defences include a list of relevant considerations does not mean that the proper analysis of reasonableness under those defences is (or should be) any less broad, evaluative or context-sensitive. If the list of relevant considerations is applied in a rigid way or as a checklist, that is an incorrect application of the statutory defence.

469. Although the adoption of the reasonableness criterion resulted in a defence which was

functionally equivalent to s 22 of the 1974 NSW Act, the significance of *Lange* was that at the time it was decided, other jurisdictions in Australia did not have a comparable defence. The *Lange* defence may have had no real work to do in New South Wales, over and above s 22, but it did serve a purpose elsewhere. Now that each jurisdiction has the defence in s 30 of the 2005 Act, the *Lange* defence arguably has been denuded of any real utility (cf. *Palmer (No. 5)* at [221]), but this only reflects the fact that the *Lange* defence was the product of the particular procedural context in which the case was stated for the High Court and the pertaining historical circumstances. Through legislative reform, Australian defamation law has now grown past those circumstances.

470. Network Ten appears to accept that if its conduct was unreasonable for the purposes of s 30, the *Lange* defence must also fail: Tcpt 553.6.

L.2.2 Availability of defence to Network Ten

471. It can be accepted that some of the subjects identified in Annexure B para 1 of Network Ten's Defence (CB:A tab 3, page 53) are relevant to government or political affairs.

472. As to the issue of reasonableness, however, the defence rises or falls with the defence under s 30 of the Act, as Network Ten concedes is the case: Tcpt 553.6. For the reasons given in relation to the statutory defence, Network Ten's conduct in publishing the Programme was not reasonable and the defence should be rejected.

L.3 Common law qualified privilege

L.3.1 Relevant principles and why pleaded and pressed

473. An occasion of qualified privilege arises at common law when the publisher makes the publication in the course of a duty (whether legal, social or moral) or interest in doing so, and the persons to whom the matter is published have a corresponding interest or duty to receive such a publication: *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at [9]-[10] per Gleeson CJ, Hayne and Heydon JJ.

474. The kind of interest necessary to engage the defence is a "*special*" interest, over and above the general or public interest in the particular topic: *Andreyevich v Kosovich* (1947) 47 SR (NSW) 357 at 363 per Jordan CJ; *Daily Examiner Pty Ltd v Mundine* [2012] NSWCA 195 at [107]-[108]; *Stoltenberg v Bolton* [2020] NSWCA 45 at [162]-

[168] per Gleeson JA (Macfarlan and Brereton JJA agreeing). As Higgins J explained in *Howe & McColough v Lees* (1910) 11 CLR 361 at 398, "*interest*" in this context means interest "*as a matter of substance apart from its mere quality as news*".

475. This distinction is illustrated by *Andreyevich v Kosovich*. The defendant published an article in a Croatian language newspaper imputing that the plaintiff was disloyal to the Yugoslav national liberation movement and was a fascist. The defendant moved that a verdict for him be directed on the grounds that the matter was published on an occasion of qualified privilege. The trial judge refused to give this direction, and on appeal, Jordan CJ (Street J agreeing) upheld the decision. As Jordan CJ explained at 364:

> The article was published at a time when the Allies were at war with Germany, and guerrilla forces in Yugoslavia were rendering good service to the allied cause… The course of events in Yugoslavia was therefore a matter which every citizen of every allied country might well regard as one of great interest and it would naturally be one of specially keen interest to persons of Yugoslav derivation in allied countries… But, so far as such persons in New South Wales were concerned, they were so interested only in the same sense that Jews in this State might, at the present time, be expected to be more or less keenly interested in the state of affairs in Palestine, or Chinese here expected to be interested in the conflict raging in China between the National Government and the Communist armies. But an "interest" of this kind could not, for example, justify a Jew with Zionist sympathies in singling out a Jew who did not share in these sympathies, and for this reason deluging him with a flood of calumny. Similarly, a Chinese with Communist sympathies could not be justified in publicly calumniating another Chinese because his sympathies were with the National Government. The reason is that no one could reasonably hold it to be expedient in the interest of the people of New South Wales as a whole that "interest" of the kind indicated should justify the publication of such calumny with impunity. Nor would it, in my opinion, make any difference if in the former case the defamatory matter was published in Hebrew and in the latter in Chinese.

476. The need for a special interest, over and above the general or public interest in the topic, also implies that a journalist has no legally relevant duty or interest to publish merely by virtue of his or her role as a journalist or because of the public interest in the story: *Morosi v Mirror Newspapers Ltd* [1977] 2 NSWLR 749 at 792. As Brennan J held in *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 250:

> A newspaper has no duty to communicate defamatory matter to its readers merely because they will be interested to read it; there must be some legal, social or moral duty to publish it for the welfare of society.
>
> The law draws a distinction between "the right which the publisher of a newspaper has, in common with all Her Majesty's subjects, to report truthfully and comment fairly upon matters of public interest [and] a duty of the sort which gives rise to an occasion of qualified privilege" [citing *Globe & Mail Ltd v Boland* (1980) 22 DLR (2d) at 280-281].

477. These reasons explain why the defence of common law qualified privilege is, except in

unusual circumstances, not available for publications to the world at large, such as in the media: *Lange* at 572.

478. The difficulties confronting a media publisher who seeks to rely on common law qualified privilege are demonstrated by the facts of *Daily Examiner Pty Ltd v Mundine* [2012] NSWCA 195. The defendants were a newspaper which circulated largely but not exclusively in the Clarence Valley area and the author of the matter, Mr Brown, an Aboriginal affairs advocate and a field officer for the Aboriginal Legal Service. The matter concerned the alleged inadequacy of health and social services for the Aboriginal community in the Clarence Valley. Mr Brown contended that he had a duty to speak out because of his role as an Aboriginal affairs advocate and officer of the Aboriginal Legal Service, and that readers had an interest because the subject matter was clearly of public concern in the Clarence Valley: at [45]. The defendants sought to address the fact that the article's readership was not confined to the Clarence Valley by arguing that the relevant audience for the matter was the limited group of readers who were said to have identified the plaintiff (who was not named) in the matter, and that those persons, by reason of their connections with the Aboriginal Medical Service, had the necessary special interest in the subject matter of the article: at [72].

479. The Court of Appeal rejected the argument that the article was effectively published to only a confined group. Many more people than the fourteen identified in the evidence were likely to have identified the plaintiff in the matter, and there was nothing to suggest that such other persons would have had a relevant interest: at [74]. Moreover, publication to the thousands of other people who read the article was not merely "*incidental*" to the publication to the recipients with knowledge of the plaintiff. As the Court explained at [77]:

> Insofar as the appellants' first argument appears to accept that publication went beyond the group of fourteen persons, so that they focused on the point that publication to "*incidental*" recipients did not destroy the defence of qualified privilege, we do not consider that this advances the newspaper's position. The article was published to the general community, amongst which there was an indeterminate number of people who had the knowledge that allowed them to identify [the plaintiff] as being referred to therein. Merely because some of those persons had an interest that may have attracted qualified privilege did not mean that publication to the others was "*incidental*".

480. The Court upheld the primary judge's conclusion that there was no community of interest between the publishers and the recipients: at [107]-[108]. Aboriginal mental

health and criminality were important topics, but only at the level of general and public interest, and this did not give rise to any duty of the part of the publishers to publish defamatory matter about the plaintiff to an audience of 11,000 people.

L.3.2 Ms Wilkinson's interest in publishing

481. In paragraphs 16.2 and 18.2 of her Defence, Ms Wilkinson characterises her interest in publishing the Programme as stemming from the fact that she "*conducted the interview with [Ms] Higgins and investigated the allegations*", and "*her role investigating [Ms] Higgins' allegations as a journalist*": CB:A tab 4, pages 91-92. Her written opening submissions did not take matters further in terms of identifying any relevant interest on her part: CB:D tab 1106, page 6004.

482. Ms Higgins' allegations were no doubt a matter of considerable public interest, but Ms Wilkinson had no special or particular interest in relation to them over and above their general quality as news. Her profession as a journalist makes no difference because it confers no special rights, duties or interests over and above that of any other citizen.

483. The defence of common law qualified privilege must fail because Ms Wilkinson had no legally relevant duty or interest in publishing the Programme.

L.3.3 Viewers' interest

484. The lack of any relevant interest on the part of Ms Wilkinson makes it unnecessary to consider whether viewers of the Programme had a relevant interest, but insofar as it is necessary to decide, viewers of the Programme did not have a relevant interest.

485. Ms Wilkinson's argument depends on the assumption that all viewers who reasonably identified Mr Lehrmann had a relevant special interest in seeing and assessing the interview with Ms Higgins and receiving information about her allegations: CB:A tab 4, pages 91-92. Like the defence in *Mundine*, however, this argument depends on an artificially narrow view of the range of people who are likely to have identified Mr Lehrmann in the Programme. There is no reason to suppose that everyone who learned that the Programme was of and concerning him necessarily knew him personally or fell within the class of people described in paragraph 18.1 of Ms Wilkinson's Defence: *Mundine* at [74]. The Programme was published to the world at large, and the number

of people capable of identifying Mr Lehrmann was indeterminate. It could not be supposed that they all necessarily had a relevant interest sufficient to create an occasion of privilege: *Mundine* at [77].

L.3.4 Occasion of privilege

486. The Programme was not published on an occasion of qualified privilege at common law because Ms Wilkinson had no legally relevant duty or interest to publish it and, further, the audience of the Programme had no relevant interest in receiving it.

M. DAMAGES AND OTHER RELIEF

M.1 General damages

M.1.1 Relevant principles

487. The principles relevant to the assessment of general damages in a defamation case were sufficiently summarised in the opening written submissions. It is, however, necessary to say something further about "mitigation" of damages.

488. It is not controversial that matters which the Court can properly take into account in "mitigation" of damages include:

(a) Evidence that Mr Lehrmann has received or agreed to receive compensation for defamation in relation to any other matter having the same meaning or effect as that sued upon in this proceeding: *Defamation Act 2005* s 38(1)(e).

(b) Evidence which is properly before the Court on the defence of justification, including in principle any adverse finding the Court makes as to Mr Lehrmann's credibility: *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 at 120.

(c) Evidence of specific facts constituting "*directly relevant background context*" to the publication of the matter: *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 at [42]. This has recently been explained in *Schiff v Nine Network Australia Pty Ltd (No. 4)* [2023] FCA 688 at [5]-[22] per Jackman J and in *Kazal v Thunder Studios Inc (California)* [2023] FCAFC 174 at [243]-[250] per Wheelahan J (Wigney and Abraham JJ agreeing).

It is accepted that the respondents' mitigation pleas engage these principles and rely on matters which can properly be taken into account in assessing damages, although it is not conceded that the mitigatory effect of any of those matters would be substantial in the overall context in which damages are to be assessed. This requires consideration of the nature of "mitigation" in defamation.

489. Properly understood, what is described in defamation practice as mitigation of damages is really an aspect of the single exercise of determining a sum of damages which is appropriate to compensate the plaintiff for the real damage he or she has suffered to his or her reputation, and the associated need to vindicate his or her reputation: *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335 at [154]-[157] per McColl JA; *Kumova v Davison (No. 2)* [2023] FCA 1 at [98] per Lee J. What mitigation of damages is, and what it is not, are illustrated by the following statement of Warby LJ (Andrews and Singh LJJ agreeing) in *Wright v McCormack* [2023] EWCA Civ 892 at [76]:

> The judge in this case did not engage in the prohibited process of ascertaining the damages to which the claimant was entitled and then reducing that figure to reflect the claimant's "litigation misconduct". The judge took account of the claimant's lies and his attempt to deceive the court as part of the process of ascertaining the claimant's entitlement, namely a sum in damages that would be proportionate to the aims of compensating and appropriately vindicating the relevant aspect of the claimant's reputation.

490. This distinction has practical relevance for how the task is performed. The danger of focusing on evidence in mitigation of damages as a distinct issue in the trial, or of seeing the mitigating factors as a series of deductions or "discounts", is that one can miss the wood for the trees. Even when the mitigating factors are numerous and serious, they can only be properly understood in the context of the way in which the plaintiff has been defamed, and they are subordinate to the overall exercise of deciding upon a sum of money which is proportionate to the real damage caused by *that* defamation.

491. To award a plaintiff nominal, or very low, damages on account of mitigating factors implies that his or her true reputation is so compromised by those factors that the defamation caused little or no real damage, such that there is little or nothing left to vindicate: compare *Palmer v McGowan (No. 5)* [2022] FCA 893 at [499].

492. That might be the appropriate conclusion in very specific circumstances. For example, in *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295, McCallum J (as her Honour then was) awarded no damages for the publication of the false claim that Mr Dank had

injected a blood-thinning agent into football players, in circumstances were it was true that he had injected a horse feed supplement (which was not approved for therapeutic use in humans) into the players: at [76].

493. Another example is *Holt v TCN Channel Nine Pty Ltd* [2014] NSWCA 90. The matter in that case was a current affairs programme which concerned the relationship between Mr Holt and his wife, who was dying of cancer. The jury found that the matter carried imputations to the effect that the plaintiff abandoned his wife to die in a hospital instead of letting her return home; that he treated her in an appalling manner, like an animal; and that he wanted his wife to die: at [4]. None of these imputations were proved to be true, and a defence of contextual truth also failed, although the jury found that contextual imputations to the effect that Mr Holt had withheld and misused money paid out to Mrs Holt pursuant to an insurance policy were substantially true: at [6].

494. At trial, Adamson J assessed damages in the sum of $4,500 plus interest: at [7]. In doing so, her Honour took into account findings including that Mr Holt took $75,000 from Mrs Holt's insurance payout and used it to buy a motor boat, which he charmingly named *The Dog House*; left his wife without financial support and forced her to live on the charity of others; hit his wife twice when she was dying of cancer; forced his wife to sleep on the sofa; and collected a carer's pension on the basis that he was caring for his wife and not working, when in fact he was working for cash: at [8]. The Court of Appeal upheld her Honour's assessment. The findings all reflected conduct of Mr Holt towards Mrs Holt which was thoroughly disgraceful, and these findings almost wholly negated any damage he had suffered from the untrue imputations: at [77] per Macfarlan JA held (Gleeson and Sackville JJA agreeing).

495. The radicalness of such outcomes, however, is illustrated by comparison with *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335. Mr Mahommed, a financial adviser and mortgage broker, sued for a current affairs programme and two promotional broadcasts which alleged that he had taken advantage of an elderly client with dementia by borrowing money for his own purposes on the security of the client's properties: at [12]. The matter was found to carry imputations to the effect that Mr Mahommed was "*a thief*", that he had "*ripped off*" or "*swindled*" a "*dementia patient*", and that he was a dishonest financial advisor and mortgage broker: at [13]. Channel Seven pleaded a defence of truth to imputations that Mr Mahommed charged the client outrageous fees

and was a dishonest financial advisor and mortgage broker, and also relied on a defence of contextual truth: at [14]-[15]. In the result, the trial judge found that none of the imputations or contextual imputations were substantially true: at [19]. His Honour awarded total damages of $240,000, including $140,000 for the programme itself. This included an allowance for aggravated damages: at [108]-[109].

496. On appeal, Channel Seven contended that the trial judge had erred by not finding the "*dishonest financial advisor and mortgage broker*" imputation true, by not taking into account adverse credit findings made against Mr Mahommed by another judge of the Court in other proceedings (**the Steele-Smith proceedings**), and by not having regard or sufficient regard to his own findings as to Mr Mahommed's dishonesty, made in the course of determining the truth defence: at [110]. The findings against Mr Mahommed by the trial judge and in the Steele-Smith proceedings were relatively serious: see [82], [97]. These findings related to Mr Mahommed's honesty as a financial advisor.

497. The Court of Appeal held that the "*dishonest financial advisor and mortgage broker*" imputation was substantially true: at [144] per McColl JA (Spigelman CJ, Beazley JA, McClellan CJ at CL and Bergin CJ in Eq agreeing). The Court also held that the Steele-Smith findings out to have been taken into account: at [257]. The considered that the trial judge's awarded of $140,000 for the programme was appropriate, but that it had to be adjusted in light of the finding that the "*dishonest financial advisor and mortgage broker*" imputation was substantially true: at [275]. The Court considered that the appropriate award of damages for the programme, taking into account the truth of this imputation, was $125,000: at [278].

498. So, what happened in *Mahommed* is that in a proceeding which concerned the plaintiff's integrity as a financial advisor, despite a finding that it was true that he was a dishonest financial advisor and mortgage broker, and despite substantial adverse findings as to his credit, he was still awarded substantial damages, with only a 10% reduction to account for the truth of the imputation that he was a dishonest financial advisor and mortgage broker. This outcome can be seen as a reflection of the fact that the law places a high value on reputation: *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195 per Mahoney ACJ; *John Fairfax Publications Pty Ltd v O'Shane (No. 2)* [2005] NSWCA 291 at [3] per Giles JA; *Moit v Bristow* [2005] NSWCA 322 at [120]-[121] per McColl JA (Beazley JA and Campbell AJA agreeing).

499. As McColl JA observed in *Mahommed* at [272]:

> Even though a plaintiff may not come to court with a perfect reputation, s/he does not lose his right to damages. As Greer LJ said in *Hobbs v Tinling & Co Ltd* [1929] 2 KB 1 at 46 "a man with a damaged character is entitled to have his damaged character protected, and if newspapers for their own purposes falsely allege that he has been guilty of crimes and misconduct the jury might well consider that even a man of bad character ought not to have his character made out to be blacker than the proved facts warrant".

The same applies, it is submitted, to a plaintiff who does not have a perfect reputation by the time damages come to be assessed due to conduct in the litigation.

M.1.2 Application

500. The starting point for the assessment of general damages should be the fact that the central allegation, that Mr Lehrmann raped Ms Higgins, is extremely serious. To the mind of the ordinary reasonable person, it is one of the most damning allegations which could be made against a person. The severity of the base allegation is aggravated by the features delineated in the separate imputations pleaded by Mr Lehrmann, such as the claim that he caused her physical injury (although any rape is an act of violence) or the claim that he persisted despite her pleas for him to stop.

501. Damages should also be assessed on the basis that, even though he was not named in the Programme, actionable publication occurred to a wide circle of people, for the reasons given in Part I.2 above. The publication should not be treated as limited to a small number of people personally acquainted with Mr Lehrmann.

502. The evidence relevant to the impact of the Programme on Mr Lehrmann's reputation and the hurt feelings he experienced as a result of it are set out above in Part H. The impact on him, reputationally and personally, has been devastating.

503. Even if the Court formed an adverse view about Ms Lehrmann's credit on other issues, it would accept his evidence of hurt feelings. The reaction he described is entirely plausible. It is entirely natural that a young person accused of such a crime on national television would be extremely upset, frightened, and angry, as he described. This is not a case, like *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [483], [487], where any aspect of Mr Lehrmann's behaviour since the Programme has been inconsistent with that of a person who has suffered seriously hurt feelings.

504. Neither of the respondents pleads that Mr Lehrmann had a general bad reputation prior to the publication. Conversely, it is not suggested that he is like some other defamation plaintiffs who enjoyed a high pre-existing reputation for achievements in public service (*Duma*, *Barilaro*), philanthropy (*Chau Chak Wing*) or the arts (*Rush*).

505. Mr Lehrmann was an ordinary young person just starting out in his career, not much known to anyone outside the circle of his direct acquaintances. This, however, is not an impediment to an award of substantial damages. Indeed, in some ways it makes the damage to Mr Lehrmann worse. On the assumption that the Court accepts Mr Lehrmann's submissions about identification, the Programme had the effect of bringing Mr Lehrmann to the attention of a wide range of people who had never had much reason to know or care who he was (including some who did not know him at all), immediately ruining his reputation within that wider circle of people: compare *Duma v Fairfax Media Publications Pty Ltd (No. 3)* [2023] FCA 47 at [534] per Katzmann J.

506. The need for vindication in this case is very high, and not just because of the serious nature of the allegation. It is a matter of judicial notice that Ms Higgins' allegations against Mr Lehrmann became a subject of national controversy which aroused very strong feelings. For the reasons developed below, it is unlikely that this controversy would have arisen (at least to the extent that it did) but for the broadcasting of Ms Higgins' interview on prime time television in the Programme. An award of damages "*sufficient to convince a bystander of the baselessness of the charge*" in this context must be very substantial: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 per Lord Hailsham; *Moit v Bristow* [2005] NSWCA 322 at [121] per McColl JA.

507. The respondents argue, in effect, that the damage plainly caused to Mr Lehrmann by the publication of Ms Higgins' allegations is not causally attributable to the Programme, but to the Samantha Maiden article, which was published first, and to the supervening criminal proceedings and the media attention following the charges laid on 7 August 2021: Tcpt 555.11-21. This should not be accepted. That Mr Lehrmann's reputation was damaged by the Maiden article and the criminal process is obvious, but the argument that the Programme therefore caused no or little damage is, with respect, jejune, for the following reasons.

508. The significance of the Maiden article being first in time to the causation of loss should

not be overstated. The Programme went to air that same night, so the article only had a head start of a couple of hours. The Programme was also coordinated with the Maiden article. The respondents saw the article as a means to "*build the hype for us having the only interview with the woman at the centre of it all*", with Mr Campbell commenting that it "*solves our promo issue*": Exhibit R419, CB:B tab 461, page 3729; Tcpt 1954.12.

509. More fundamentally, the Programme surpassed the Maiden article in impact because the Programme was based around the interview with Ms Higgins. It must be beyond any real doubt that it was this interview which seared Ms Higgins' allegations into the national consciousness. It was the spectacle and pathos of seeing her tell her story on prime time television which made the case notorious. The article had none of this colour and movement, and this substantially lessened its impact.

510. Similarly, it should be recognised that it was the broadcasting of Ms Higgins' interview on prime time television, more than anything else, which turned the subsequent criminal proceedings into a *cause célèbre*. Sexual assault trials happen day in, day out, and they mostly pass unnoticed. It can be accepted that this case would always have attracted some public interest because the rape was alleged to have happened in Parliament House, but it is difficult to conceive that the case would have attracted such extreme public attention without the ground having been prepared by the Programme.

511. Mr Lehrmann accepts in broad terms that it is open to the Court to take into account the matters relied on by the respondents in mitigation of damages in assessing a sum of damages appropriate to compensate him, but it is submitted that the relevance of those matters to the assessment of damages is rather less than the respondents contend, for the following reasons.

Findings in the course of determining the justification defence

512. Mr Lehrmann accepts that it is open to the Court to make adverse findings about some of his conduct and adverse findings as to his credit. It is accepted that those findings, if they are made, are to his discredit and are relevant to assessing the real damage caused to his reputation by the defamation.

513. Even so, the Court is assessing damages in the context that the respondents published imputations to the effect that Mr Lehrmann raped Ms Higgins in Parliament House, and

they have failed to prove that those imputations are substantially true. In considering what relevance any adverse findings have to the assessment of a proportionate award of damages, those findings have to be considered in context of the very serious nature of the defamation and the resultant high need for vindication. Once that is recognised, it can be seen that the appropriate reduction on account of such findings is relatively small in the context of the overall award.

514. What must be borne in mind is the qualitative difference between any adverse findings the Court might make in the course of determining the justification defence and the untrue allegation of rape, particularly given the way in which that rape was described by the Programme. Recall that important parts of Ms Higgins' allegations were that:

(a) "*I couldn't get him off me*" (implying that she tried): line 28

(b) "*I started crying*": line 28

(c) "*I told him to stop… I felt like it was like on a loop endlessly. Um, at least half a dozen [times]. I was crying the whole way through it*" – line 34.

515. Suppose the Court makes the maximal findings which could in theory be made, short of upholding the justification defence – that intercourse probably happened in Senator Reynolds' suite, and that Ms Higgins was not capable of consenting to it because of her state of intoxication, but that Mr Lehrmann did not have knowledge of her inability to consent. Even findings that extensive should not lead to an award of damages which is less than substantial. The distinction between findings of that kind and a finding that rape occurred (particularly in the manner described in the Programme) is real and significant. Where the allegation is so serious, the distinction should not be elided by a low award of damages which signals that what was published was "*close enough*".

516. Findings that Mr Lehrmann was on occasions dishonest, whether to his employer, the police or this Court, are a serious matter which reflect poorly on him, but they are a very different thing from the allegation that he raped a young woman, and it cannot seriously be suggested that such findings would mean that the publication of the rape allegation, on national television, caused no or little real damage to his true reputation.

Ms Wilkinson's* Burstein *plea

517. The matters relied upon by Ms Wilkinson, on the basis of *Burstein v Times Newspapers Ltd* [2001] 1 WLR 579 are:

(a) Mr Lehrmann took an intoxicated Ms Higgins to Parliament House on 23 March 2019 and had intercourse with her, despite being in a monogamous relationship with a girlfriend, before leaving her naked and intoxicated. This particular is presumably to be assessed on the footing that the Court is not satisfied that the intercourse was non-consensual, or that Mr Lehrmann was unaware that it was non-consensual.

(b) Mr Lehrmann was terminated from his employment for his conduct in committing a security breach on that night.

(c) Mr Lehrmann gave a record of interview to the Australian Federal Police on 19 April 2021 in which he dishonestly denied having intercourse with Ms Higgins on 23 March 2019.

518. It is accepted that each of these are proper matters for a *Burstein* plea, and if the Court found that Mr Lehrmann did have intercourse with Ms Higgins on 23 March 2019, the fact that he did it in spite of being in a relationship, and that he told a lie about it to the AFP, these matters would be relevant to the assessment of damages, as would the termination of his employment for a security breach. However, apart from the telling of a lie to the AFP, it is submitted that these matters would have no significant effect on the assessment of damages.

519. Infidelity in a monogamous relationship is a question of personal morality. It is also something which happens fairly commonly in society. While they might strongly disapprove of it in principle, many people would regard it with indifference when it did not concern a person to whom they were close. Similarly, if Mr Lehrmann left Ms Higgins drunk and naked on the couch it was certainly ungentlemanly, but not much more could be said about it than that. Assuming the intercourse was consensual, neither of these things is unlawful. They could not make any meaningful difference to the huge reputational damage caused by the publication of the untrue allegation of rape.

520. If the Court concludes that Mr Lehrmann did have intercourse with Ms Higgins (albeit intercourse which is not shown to be non-consensual) it is accepted that his denial of

any intercourse when interviewed by the AFP was a lie, and that this is a serious matter which is relevant to assessing damages. It is going too far, however, to characterise it as "*perverting the course of justice*", as Ms Wilkinson does in her Defence.

521. On the thesis that Mr Lehrmann did in fact have intercourse with Ms Higgins, which as above Mr Lehrmann respectfully submits is not a finding available to the Court, it is accepted that dishonest denial of it raised a false issue in the investigation and at the trial which was the cause of wasted time and cost, but the impact of it should not be overstated.

522. If Mr Lehrmann had told the AFP that he did have intercourse with Ms Higgins but that it was consensual (or that he believed that it was), his version of events would still have been fundamentally inconsistent with hers. The police would still have investigated her allegation of lack of consent and she would still have been challenged at the criminal trial (and this trial) on all important aspects of her version of events in order to test her claim of lack of consent.

Settlements with News Life Media Pty Ltd and the ABC

523. What s 38(1)(e) permits the Court to take into account is the receipt or agreement to receive compensation for defamation in proceedings concerning matter having the same meaning of effect. It is accepted that the News Life proceedings and ABC proceedings both concerned matter to the same effect as the Programme, in that Ms Higgins' claim of rape by Mr Lehrmann was central to all three.

524. However, pursuant to those settlements, Mr Lehrmann did not agree to receive or in fact receive *compensation*. On the face of the deeds, the payments to Mr Lehrmann by News Life and the ABC were both by way of a contribution to his costs only: Exhibit R62 (para 2); Exhibit R63 (para 2.1). There is no evidence before the Court that Mr Lehrmann actually received any part of those funds.

525. The purpose of s 38(1)(d) is to prevent a plaintiff from receiving double compensation for the same loss: *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [343] per Wigney J. In circumstances where payment was received by way of a contribution to costs only, there is no double compensation because Mr Lehrmann has not received anything from those settlements to mitigate the harm to his reputation in respect of the

rape allegation, or lessen the need for vindication in respect of it, or mollify his feelings.

526. Even if the Court did not accept this argument, the mitigatory effect of the News Life and ABC settlements would only be small, for the following reasons.

527. First, even if Mr Lehrmann had received funds, it was a term of each of the deeds that the only public statement allowed about the settlements was that News Life and the ABC had made contributions to Mr Lehrmann's legal costs: Exhibit R62 (para 7); Exhibit R63 (para 11.1). The ABC deed expressly permitted it to state that it made no admission of liability and that it had paid no damages or compensation as part of the settlement: Exhibit R63 (para 11.1(a), (c)). Because the payments were characterised publicly as contributions to costs only and there was no apology, admission of liability, or entry of judgment, those settlements did not and could not do anything to vindicate the damage to Mr Lehrmann's reputation. The need for a substantial award of damages to satisfy the purpose of vindicating his reputation remains despite the settlements.

528. A similar issue arose in *Duma v Fairfax Media Publications Pty Ltd (No. 4)* [2023] FCA 159. Mr Duma brought two proceedings against Fairfax. The second proceeding was settled for a confidential sum, with the settlement formalised by orders providing for the entry of judgment in favour of Mr Duma and for Fairfax to pay "*compensation*" in a confidential amount, as well as costs in an agreed sum: at [9]. At [67], Katzmann J observed:

> Since the settlement of the second proceeding did not include an apology and the amount of compensation to be paid was concealed at the respondents' request (confidentiality being a condition of the offer of compromise), it is difficult to see how the receipt of the compensation (or the agreement to receive it) could mitigate damages for harm to Mr Duma's reputation or operate as vindication, even if it mollified his feelings.

Notwithstanding these observations, her Honour varied the award from $545,000 to $465,000. This, however, should be understood in light of the facts that (a) while the amount was confidential, the payment was expressly by way of compensation, not just a contribution to costs; and (b) Mr Duma also had the vindication which went with the public entry of judgment. Neither of those factors are present in this case.

529. Second, in previous cases where similar issues have arisen, deductions made to account for the prior receipt of compensation or damages have been relatively small in the context of the overall judgment sum. What happened in *Duma (No. 4)* has already been

noted. The point is also illustrated by the *Chau* litigation.

530. Dr Chau obtained a settlement of $65,000 and an apology from Nationwide News. He then sued Fairfax. In *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 at [358]-[361], Wigney J assessed damages in the sum of $250,000, but held that they should be reduced by $25,000 on account of the settlement with Nationwide News. Dr Chau then sued the ABC and Fairfax (again) in respect of further publications. In *Chau v Australian Broadcasting Corporation (No. 3)* [2021] FCA 44 at [163]-[166], Rares J assessed damages in the sum of $550,000, but held there should be a "*modest discount*" to account for both the Nationwide News settlement and Wigney J's judgment. His Honour reduced damages by $35,000 to $515,000.

Reply submissions on mitigation and damages

530A. In Section H of the 2RS ('Events of Relevance to Damages'), commencing on page 74, reference is made to numerous other defamatory publications published by third parties about Mr Lehrmann (see e.g. [370], [372]).

530B. A defendant cannot mitigate damages by relying upon evidence of other defamatory publications concerning the plaintiff: *Carson v John Fairfax and Sons Ltd* (1992) 178 CLR 44 at 99 per McHugh J, and *Dingle v Association Newspapers* [1964] AC 371 at 396 per Lord Radcliffe.

530C. During the closing address, the Court asked whether, if it found that sexual activity did occur but fell short of finding that Mr Lehrmann raped Ms Higgins, Mr Lehrmann's false denial of sexual activity would amount to an abuse of process. Senior Counsel for Mr Lehrmann agreed that it would although that vindication for failure to justify the allegations would still be required: T2444 L26-T2445 L1

530D. In the Respondents' oral submissions in reply, it was contended that it followed from this concession that Mr Lehrmann should receive no damages or merely derisory damages: T2446 L42-47. Such an extreme outcome does not follow from Senior Counsel for Mr Lehrmann's accedence to the Court's proposition, for the following reasons.

530E. In *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [467]-[472], the Court recently had occasion to consider the circumstances in which general damages can properly be reduced on account of the plaintiff's conduct in the litigation or concerns about his credit. At [469], the Court identified that disreputable conduct

by the plaintiff is only relevant to the assessment of damages if it is in the same sector of the plaintiff's life as is affected by the defamation.

530F. If the Court finds that Mr Lehrmann engaged in some form of sexual activity with Ms Higgins, and lied about it, there is no dispute that this is germane to the assessment of damages to at least some extent: see ACS [520].

530G. The question presented by the oral submissions in reply, however, is whether the abuse of process concession warrants the conclusion that it would be appropriate to award Mr Lehrmann no damages, or only derisory damages. It is submitted that authority does not support such a conclusion.

530H. Abuses of process can take many forms: *Batistatos v Roads & Traffic Authority of New South Wales* (2006) 226 CLR 256 at [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ. While the categories are not closed, it usually involves one of the following:

(a) the Court's processes being invoked for an illegitimate or improper purpose;

(b) the use of the Court's processes being unjustifiably oppressive to a party or vexatious; or

(c) the relevant use of the Court's processes bringing the administration of justice into disrepute.

See *Melbourne City Investments Pty Ltd v Treasury Wine Estates Ltd* (2016) 243 FCR 474 at [97]-[147] per Foster J; *Perera v GetSwift Ltd* (2018) 263 FCR 92 at [73]-[77].

530I. Given the different circumstances in which abuses of process can arise and the different ways in which the Court's processes can be abused, it is not the case that all abuses of process are necessarily of the same order of magnitude. An abuse of process constituted by commencing proceedings for a collateral or illegitimate purpose, for example, would usually be regarded as a much more serious matter than an abuse of process where the proceedings are unjustifiably oppressive, but were at least commenced properly and for a legitimate purpose. Nor does it follow, it is submitted, that the appropriate response to all abuses of process is the same.

530J. Whatever else might be said of it, one way in which Mr Lehrmann's conduct *cannot* be characterised as an abuse of process is in the sense of invoking the Court's processes for an illegitimate purpose, or to obtain a remedy to which he is not entitled. This is not a case like *Farrow v Nationwide News Pty Ltd* (2017) 95 NSWLR 612, where the

proceedings were an abuse of process because the plaintiff complained of imputations which were plainly true. A finding, contrary to Mr Lehrmann's evidence, that he did engage in some form of consensual sexual activity is clearly and qualitatively different from the allegation of rape. On those findings, it could not be suggested that Mr Lehrmann had no reputation to be further harmed because he had falsely denied that any sexual activity had occurred when the false allegation was that he raped Ms Higgins. The publication of that false allegation gave rise to a genuine and substantial cause of action which he had a legitimate interest in pursuing.

530K. There is a line of English authority to the effect that a court may strike out a plaintiff's genuine claim, even after trial, on the ground of dishonesty. Those authorities do not appear to have been applied in Australia, and the English cases themselves emphasise that it is only in an exceptional case that such a course of action would be proportionate and reasonable. In ***Summers*** *v Fairclough Homes Ltd* [2012] 1 WLR 2004 at [49], for example, the Supreme Court held that:

> The draconian step of striking a claim out is always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial. It is very difficult indeed to think of circumstances in which such a conclusion would be proportionate.

See also at [33], [36] and [61]. The same reasoning is apt on the question of awarding a plaintiff no damages or derisory damages, given that to do so implies that the plaintiff had no reputation to be vindicated and suffered no substantive injury by reason of the defamation: see *Palmer v McGowan (No. 5)* [2022] FCA 893 at [499].

530L. *Summers* was a personal injury case in which the plaintiff claimed to be unable to work and likely to remain so. He sought damages in the order of £800,000. Surveillance evidence obtained by the defendant demonstrated the plaintiff in fact was working, and was engaging in other activities like playing football. The plaintiff's allegation that he was unable to work was fraudulent. The trial judge, however, refused to strike out the whole claim because of this abuse of process, but instead, awarded damages for such injury and loss as he found to be genuine, in the sum of about £90,000. The employer's appeal was dismissed.

530M. *Joseph v Spiller* [2012] EWHC 2958 was a defamation case in which the members of a musical act complained about a posting on a website which described them as "*not professional enough to feature in our portfolio*". A major element of their damages claim was the allegation that they had a booking cancelled because of the defamatory

post. That allegation was entirely fabricated. At [174]-[178], Tugendhat J concluded that the plaintiffs' dishonesty was such that there would be no injustice to them if they were awarded only nominal damages. This was so even though the abuse of process did not affect the whole claim, but only the special damages claim. His Honour held that the court's reasons were sufficient in the circumstances to vindicate the plaintiffs' reputation.

530N. On any view, *Joseph v Spiller* is not analogous to the present case. The publication in that case could fairly be described as trivial and the fabricated special damages claim seems to have been the major component of the relief sought. Even if it is found that Mr Lehrmann was dishonest about engaging in (some) sexual activity, that dishonesty (serious as it may have been) falls very far short of fabricating a cause of action or a head of damages. The defamation, unlike in *Joseph v Spiller*, was very serious, and Mr Lehrmann was still in a position to suffer very serious reputational damage by reason of the publication of the false allegation of rape, notwithstanding such dishonesty.

530O. To deprive Mr Lehrmann of damages in relation to a substantive cause of action which has been (on this hypothesis) established on the facts, would not be a proportionate or just response to the dishonesty involved in falsely denying any sexual activity with Ms Higgins. It would relieve the Respondents of a substantive liability in circumstances where they have failed to prove the truth of their publication and have failed to establish that they behaved reasonably in publishing it: compare *Summers* at [61].

530P. If contrary to the above, the Court finds Mr Lehrmann did abuse the process of the court by falsely denying sexual activity with Ms Higgins, such an abuse of process can be more justly and proportionately addressed by other means short of an award of nominal damages, such as the drawing of adverse inferences against Mr Lehrmann on other issues, or a reduction in the amount of damages he might otherwise have been awarded in accordance with the principles for "mitigation" of damages, as Mr Lehrmann accepted was open to the Court at [488] of the ACS.

M.2 Aggravated damages

531. This section addresses the particulars of aggravated damages provided to the Court on 22 February 2024. The principles applicable to the determination of an entitlement to aggravated damages are sufficiently set out in the opening written submissions and were recently stated in succinct form in *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [494]-[495].

532. It is by no means suggested that this is a case "*awash with aggravating factors*": *Russell (No. 3)* at [460]. Mr Lehrmann would, however, draw attention to two aspects of the respondents' conduct which, it is submitted, were improper, unjustifiable or lacking in bona fides, and which aggravated his hurt.

533. First, the respondents' approach to seeking comment from him prior to publication of the Programme, which were described in detail in Parts F and K.3 above. The attitude they took to this task is reflected in Mr Llewellyn's statement to Ms Wilkinson on 11 February 2021, that "*The questions are really to cover us off for defamation",* and his comment to Ms Higgins and Mr Sharaz on 27 January 2021, in the presence of Ms Wilkinson, that "*reasonable can be pretty iffy, as long as it's not five minutes before broadcast. And if its ten minutes, we should be okay."*

534. The inference from this evidence is that Mr Llewellyn, at least, regarded the process of seeking comment as a mere box-ticking exercise. His joke about five minutes before broadcast being "*iffy*" but ten minutes being "*okay*" is eloquent of a state of mind that was not much interested in anything Mr Lehrmann might have had to say in response to the request for comment. This is consistent with the fact that he was not approached sooner than the Friday before publication, at a time when any response he provided could not realistically have altered the general shape and tenor of the Programme. Furthermore, the use of information sources from Sharaz including a hotmail address, an email address for a former employer and a phone number from a 2 year old press release also establishes improper and unjustifiable conduct particularly when Llewellyn knew Mr Lehrman could be reached at various social media addresses.

535. The respondents', or at least Mr Llewellyn's flippant attitude to seeking comment, and lack of genuine interest in Mr Lehrmann's side of the story, are at least lacking in bona fides. Mr Lehrmann's evidence in his affidavit at [16], [45] is that he feels hurt by their approach to seeking comment from him. That he would feel such hurt is plausible and unsurprising given it suggests that the respondents were uninterested in his side of the story, and would confirm in his mind that the story was always going to be one-sided.

536. Second, Ms Wilkinson's conduct in making the Logies speech on 19 June 2022. The context of that speech is summarised in Part G above. As noted there, it plainly conveyed the impression that Ms Higgins was credible and to be believed, and therefore, by implication, that her allegations were true. Eight days before the criminal trial was due to begin, to publish such statements in such a public way did present a real risk of prejudicing his right to a fair trial.

537. ~~Ms Wilkinson's reliance on obtaining advice prior to giving the speech does not assist her in circumstances where the advice has not been disclosed and cannot be evaluated or tested. Much would depend on the question asked. For example, it would be relevant to know whether Ms Wilkinson ought advice about the broader prudence or advisability of giving the speech, having regard to factors such as the risk of prejudicing a fair trial, or whether it was a more self-interested request, e.g. "*Will I get in trouble if I give this speech*?" Moreover, as pointed out in Part K.3 above, lawyers seldom advise in terms of absolutes. More commonly, they advise in terms of the range of options and potential risks. The fact of receiving advice does not exclude the possibility, and indeed the likelihood, that there was some exercise of judgment on the part of Ms Wilkinson in deciding what to make of the advice given to her. None of that is able to be tested, given the refusal to disclose the advice, and so little weight can be placed on Ms Wilkinson's assertion that she received it.~~

538. ~~In any case, the reliance on getting advice (particularly legal advice) tends to conflate the question of whether the Logies speech was unlawful with the question relevant to aggravated damages, namely whether it was improper or unjustifiable. Again, much depends on the question which was asked, which is unknown. If Ms Wilkinson was told that it would not be unlawful to give the speech, or that she was unlikely to be held in contempt, or even that McCallum CJ was unlikely to vacate the trial date on account of the speech, none of that gainsays the obvious risk that publicly asserting that Ms Higgins was credible and should be believed, on the eve of the trial, was prejudicial and unfair. That is what makes the conduct improper or unjustifiable, and it is not an answer if Ms Wilkinson believed on advice that it was not unlawful.~~

539. With respect to the first respondent, the evidence as adduced in the cross-claim establishes that the first respondent:

(a) knew that the second respondent had been subpoenaed to give evidence for the Crown in the *R v Lehrmann* trial and that it was scheduled to commence on 27 June 2022 (see e.g. Smithies Affidavit [17]; [20]; Ex. X1 pages 37-41).

(b) knew that there was a chance the Project broadcast might win a silver Logie (Smithies Affidavit [18]);

(c) knew that they had to be careful in handling any comment/publicity regarding the broadcast due to the Applicant's upcoming trial (Smithies Affidavit [19]);

(d) knew that the second respondent was going to give a speech at the Logies on 19 June 2023 if the broadcast won the award (Smithies Affidavit [24]);

(e) knew that the second respondent herself raised concerns when seeking 'sign off' in relation to the Logies Speech including "*how legally sensitive the timing is*" (Ex. X1 page 88);

(f) , despite the evident risks, did not clearly articulate contempt of court concerns, or ensure some formality in process or procedure for the giving of legal advice with respect to something so self-evidently important (see e.g. Ex. X1 pages 83-87);

(g) after reviewing the whole speech, and therefore being on notice as to the contents, only proposed the editing of a few words (Ex. X1 page 86);

(h) , despite Mr Farley proposing amendments to the sentence "it belongs to a woman who said enough" because he was concerned it would be taken to be referring to the alleged assault (Ex. X1 page 86 - 87), either was not aware of that advice or was aware of the advice but still approved the speech without ensuring any amendment to that impugned sentence actually took place (see e.g. T2546 L40; Ex. X1 page 96; Ex. 12 at 0:01:38-0:01:41);

(i) knew that the ACT Director of Public Prosecutions had not provided any advice, positive or negative, to the speech's content (Smithies Affidavit [30]);

(j) was concerned about the "unwavering courage" sentence of the speech but did nothing about it on the basis that the ACT Director of Public Prosecutions had remained silent when that section was read to him, despite the first respondent, at this meeting, being aware that it was not "a matter [the DPP] can deal with", "it was not the DPP's role to give legal advice" and it was not "Mr Drumgold's responsibility to legal the speech" (Smithies Affidavit [30]; [34]);

(k) knew that the second respondent was an employee of the first respondent who could have been directed not to give the speech on behalf of the first respondent; (*cf* Smithies' Affidavit [39]);

(l) never advised the second respondent not to give any speech, despite the closeness of the trial and her role as a Crown witness;

(m) congratulated the second respondent in giving the speech afterwards (see e.g. Ex. X1 page);

(n) knew that the Chief Justice of the ACT was so concerned with what had taken place with the giving of the Logies Speech that her Honour had to take the step of having to direct her Honour's Associate to write to the first respondent to ask them to refrain from publishing any further material, the clear inference being behind such a serious step being taken that her Honour had no confidence the first respondent comprehended the magnitude of what had just taken place and no confidence that it would not happen again (page 52 TTS-1); and

(o) knew that the speech had been held by McCallum CJ to have destroyed the distinction between "an untested allegation and the fact of guilt" and that the "public at large has been given to believe that guilt is established" (see *R v Lehrmann (No 3)* [2022] ACTSC 145, [29]-[30]; Smithies Affidavit [45])

540. These facts highlight the unjustifiable conduct on the part of the first respondent in not either stopping the speech or not significantly editing the content of the speech in a way that would have mitigated against any risk of prejudicing the trial.

541. The risks of prejudicing the criminal trial ought to have been plain not only to any journalist (including particularly someone such as the second respondent of over 40 years' experience) but especially so to the first respondent's in house senior litigation counsel.

542. When the first respondent's knowledge and conduct as set above is viewed through the prism of their daily business and experience it is plain that the conduct was completely unjustifiable.

543. The unjustifiable conduct has continued. During the cross-examination of Ms Smithies there was no acceptance that an error had been made by the first respondent. Instead, Network Ten has cleaved to the original advice despite the concerns expressed on multiple occasions by this Court (see e.g. T1833 L7-14) and the reasoning of McCallum CJ in *Lehrmann (No 3)*. The first respondent, via Ms Smithies, continued to "stand by" the 'advice' given (T2617 L25-26) and hold that the 'advice' and actions taken with respect to the Logies speech were completely justified (see e.g. her failure to be personally or professionally embarrassed by the 'advice' at T2569 at L5).

544. As to the position of Ms Wilkinson, it may be accepted that the advice lessens her personal culpability. However, as adduced in evidence following questions from the Court, Ms Wilkinson knew the speech suggested that Ms Higgins' allegations were truthful (T1731 L12-14). Accordingly, given the proximity of the trial, her experience and her role as a Crown witness, the risk ought to have been overwhelmingly apparent. Further, Ms Wilkinson, during these proceedings, continued to believe the speech was not reckless or ill-advised despite her own experience as to *sub judice* contempt and questioning by the Court (see T1730 L16-18, T1731 L18-22 and [297C]). Her conduct was and remains unjustifiable.

Responsive submissions to the First and Second Respondent's submissions at 1RS [1167B]-[1167K] and at 2RS [655A]-[659G]

544A. At [1167D] the 1RS impute to the Applicant a position that there is a distinction between whether the Logies speech was unlawful and whether it was improper, unjustifiable or lacking in *bona fides*. In truth, whether the Logies speech was unlawful or not with respect to the law of *sub judice* contempt is strictly irrelevant as to the question of whether the Respondents' actions were improper, unjustifiable or lacking in *bona fides*. This is because a determination as to the lawfulness of the behaviour is not required to establish that the behaviour should lead to an award of aggravated damages. However, clearly, if such behaviour was found to be unlawful, then that would be a not unhelpful indication as to whether the behaviour was improper, unjustifiable or lacking in *bona fides*. Therefore, whilst there has been no judicial determination as to whether the impugned behaviour was contemptuous, the question

of whether the impugned behaviour could have had a tendency to interfere with the administration of justice, and the fact that a temporary stay was ordered by McCallum CJ because of the Logies speech (see *R v Lehrmann (No 3)* [2022] ACTSC 145, [29]-[30]), remain relevant considerations for this Court when determining the question of aggravation.

544B. At 1RS [1167E] and also 2RS [657], the Respondents seek to rely on comments made by Mr Lehrmann to establish a lack of harm from the Logies speech. This point is irrelevant:

(a) Whether or not Mr Lehrmann actually received any forensic advantage from the giving of the Logies speech is just conjecture and speculation. Nobody can know the chain of events that would have resulted if the trial proceeded as planned. Therefore, little if any weight can be put on speculative commentary after the event.

(b) Even if Mr Lehrmann happened to receive a forensic advantage because of chains of events ultimately caused by the impugned behaviour:

i. That does not determine the question as to whether or not the behaviour was improper, unjustifiable or lacking in *bona fides*; and

ii. Such an outcome is irrelevant to the hurt feelings and anger experienced by Mr Lehrmann (see e.g. [305]-[308] and [502]-[503] above and the lengthy cross-examination on this topic by Ms Wilkinson's Senior Counsel at T504 L41 to T527 L29 where, despite repeated questions, Mr Lehrmann's evidence on this point did not change).

(c) A helpful analogy as to whether subsequent events can assist in determining whether the impugned behaviour was improper, unjustifiable or lacking in *bona fides* is the prism of *sub judice* contempt law. The test there is based on the tendency of the behaviour to interfere with the administration of justice at the time of publication (see e.g. *Hinch v Attorney-General for the State of Victoria* (1987) 164 CLR 15, 51 (Deane J), 70 (Toohey J); and David **Rolph**, ***Contempt*** (The Federation Press, 2023), 185 - 186). Therefore, whether subsequent events can negative or ameliorate that behaviour is not the relevant question.

544C. At 1RS [1167F] the First Respondent submits that the Second New Particular of Aggravated Damages, (being particular (e) as provided to the Court on 22 February 2024; see also 1RS [1167B]), is embarrassing and ought to be struck out. The applicant resists this and submits that the new particular is neither embarrassing nor improper.

544D. This new particular was first debated in correspondence prior to the serving of the parties' submissions on 28 February 2024. In that correspondence, annexed hereto at Annexure A and B, the First Respondent, on 22 February 2024, put its objection in similar terms as [1167B], namely that Ms Smithies provided honest evidence during the cross-claim proceeding. On 23 February 2024, in reply, the Applicant made clear that the new particular is based on the fresh (and unexpected) evidence from the cross claim confirming not only Ten's adherence to the advice that approved the Logies Speech but also the absence of any apparent regret for that advice.

544E. The fact that Ms Smithies was under an obligation to tell the truth in her evidence does not detract from the fact that the First Respondent's conduct was improper, unjustifiable or lacking in *bona fides*. The Applicant does not suggest Ms Smithies was lying. On the contrary, the First Respondent's public position is apparently that it's employee did give advice approving the Logies Speech (in fact approving the speech in the express terms delivered), that it now continues to 'stand by' that advice, and expresses no regret, remorse or embarrassment as to that advice. Given every opportunity, the First Respondent did not retreat, retract or resile from that position. This is despite the frankly disastrous consequences of that advice. This continuing course of conduct is in fact astonishing but the Applicant only need establish it is unjustifiable.

544F. In [1167G] the 1RS details a number of factors as to why Ms Smithies' advice was not improper, unjustifiable of lacking in *bona fides*. Addressing each where appropriate:

(a) If it is correct that the consequences were not foreseen by the First Respondent or Ms Smithies, then that lack of foresight is entirely unjustifiable, especially given the timing and the other known circumstances surrounding the giving of the Logies speech, as previously discussed elsewhere (see e.g. [539] of these submissions).

(b) The Applicant does not accept there was any rational basis for the giving of the advice at the time the advice was given. Again, the known circumstances of the

Logies Speech (see e.g. [539] of these submissions) at the time of the delivery and approval of the speech are of sufficient significance to render any other factors irrelevant.

(c) and (d) The fact that the Second Respondent previously expressed public support for Ms Higgins and was known to have a relationship with Ms Higgins cannot rationally diminish the improper or unjustifiable nature of the actions of the First Respondent. If anything, if Ms Smithies had such matters in mind when providing her advice and assessing the likely impact of the speech, this would underscore the seriousness of the error. This is because the factors detailed at (c) and (d) of [1167G] actually increased the risk that any speech delivered by the Second Respondent had the tendency to interfere with the administration of justice. Even in the absence of public knowledge concerning the prior advocacy, public support and friendship between the Second Respondent and Ms Higgins, the extent to which Ms Higgins' credibility would likely be bolstered by such a speech, delivered to an audience far greater than any of the events detailed at [1167G(d)(i)-(iv)], is considerable. However, when combined with such public knowledge of those factors, the speech could not help but take on a significance that far surpassed any 'normal' awards acceptance speech. The combination of the prominence and public respect the Second Respondent enjoyed at that time and the public knowledge as to the closeness, support and advocacy given to Ms Higgins by the Second Respondent meant that the speech would be likely to enhance Ms Higgins' credibility to a dramatic extent. This would occur just 8 days prior to a criminal trial where the credibility of Ms Higgins was critical. In fact, as discussed in *R v Lehrmann (No 3)* at [23]-[25], that is exactly what happened.

(e) The Applicant does not accept that reasonable minds may differ as to the reasonableness of the advice given by Ms Smithies. It was plainly unreasonable.

(f) The Applicant's response to f)(i)-(iii) adopts what is set out above at c) and d), namely that these factors make the provision of the advice, and the failure to resile from the advice, worse not better. In particular, the prior public statements made by the Second Respondent were not made 8 days before a criminal trial where the Applicant's liberty was at stake. The point of distinction is clear. Additionally, the failure of the First Respondent, and Ms Smithies specifically,

not to anticipate the nature of the reporting that would follow the Logies speech is unreasonable, given the nature of the event (being the 'night of nights' for the entertainment industry), the Second Respondent's prominence, and the closeness of the trial.

With respect to f)(iv) the Applicant's position is that these factors, again, do not assist the First Respondent:

i. as detailed at [539(h) above] and contrary to the impression created by f)(iv)(iii), the actual speech as delivered by the Second Respondent did not make the one change that Mr Farley requested, which was to say the honour "*…belongs to a woman who inspired more than a hundred thousand similarly pissed off, exhausted, fierce women – and men – who said "enough*"". The speech actually said "*…this honour belongs to Brittany…it belongs to a woman who said enough*". Either Ms Smithies knew about this request by Mr Farley and did not ensure that that change was made, or Ms Smithies was not aware of what can only be interpreted as a 'conditional sign-off' by Mr Farley.

ii. Given the Second Respondent was to be a key Crown witness, the belief that the speech was reasonable because it was drafted to reflect the Second Respondent's personal experience and observations is clearly untenable. The speech clearly suggests that Ms Higgins' was telling the truth in her allegations and Ms Wilkinson (see [544]) ultimately agreed with this. Therefore, the greater the speech represented the Second Respondent's personal experience and observations the greater the credence she was lending to Ms Higgins' allegations.

With respect to f)(v), the idea that the Second Respondent *not* giving the speech could lead to prejudice is, with respect, simply fanciful:

i. the notion that silence on such an occasion could interfere with the administration of justice is improbable. It would always have been the safer course compared to actually delivering the speech.

ii. To the extent that the submission at f)(v) implicitly suggests that there was a binary choice between the speech as drafted and silence, that

position is untenable. There is no good reason why the First Respondent and Second Respondent could not have drafted and delivered a speech along the following lines:

> *On behalf of my colleagues, thank you very much for this honour. I wish to thank my producers and all the team at Network Ten. Due to obvious legal reasons, I can't say anything further at this stage but thank you again for this honour.*

With respect to f)(vi), the problem with this submission is simply Ms Smithies' own evidence that she knew Mr Drumgold could not 'legal' any speech (Smithies Affidavit [30]; [34]). The attempt to now rely on Mr Drumgold's involvement in the face of that evidence should be rejected by the Court.

544G. In [1167H]-[1167J] the 1RS deal with the letter of apology provided to the Associate to McCallum J. The submissions attempt to differentiate between an apology directed to the vacation of the Applicant's criminal trial, as opposed to an apology directed to the advice given prior to the speech. In our submission that distinction is plainly untenable. It was the speech that caused the vacation of the trial.

544H. However, a further, and more troubling, point is that the evidence from Ms Smithies at T2615 L38-43 is another example of the First Respondent standing by the advice given and the contents of the speech delivered, notwithstanding the opportunity presented to Ms Smithies in that exchange with the Court. In fact, Ms Smithies maintained the First Respondent's position that the only outcome for which Ten were sorry was a vacation of the trial as opposed to the clear cause of the vacation (noting the fact that that was the principal reason cited in *R v Lehrmann (No 3)*). This is a further instance of adopting a public stance embracing the advice and the giving of the speech as reasonable, proper and justified. That is astonishing and worthy of a substantial award of aggravated damages.

The effect of legal advice on the Second Respondent's liability for the Logies speech

544I. At 2RS [655F], the Second Respondent submits that her reliance on the legal advice of Ms Smithies "*is not capable of constituting conduct that is improper, unjustified or lacking in bona fides in a* Triggell v Pheeney *sense*".

544J. If this submission is seeking to say that *because of the reliance on legal advice* the giving of the Logies speech by Ms Wilkinson was not conduct that was improper, unjustified or lacking in *bona fides*, then, in response, the Applicant repeats his submissions at [297B] and [297C] and [544].

544K. Further, the law of *sub judice* contempt may again assist in assessing the Second Respondent's submission. Whether or not an alleged contemnor received legal advice prior to the impugned publication is a relevant consideration as to *sentencing* once *sub judice* contempt has been established (that is, it may be a mitigating factor - see Rolph, *Contempt*, 245, and the authorities cited therein). However, it is not a relevant consideration in establishing *liability* for *sub judice* contempt. This is because intention to interfere with the administration of justice is not required to find a person guilty for *sub judice* contempt (see e.g. *Attorney-General for New South Wales v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695, 708-709 (McHugh JA), and Rolfe, *Contempt*, 191).

544L. Therefore, given the circumstances of the impugned behaviour, it is not enough in this scenario for the Second Respondent to seek to hide behind legal advice. This is all the more so when one considers the factors outlined at [297B], [297C] and [544].

The question of disentitling conduct and its affect on compensatory damages

544M. Finally, unlike the First Respondent, which is silent on the issue, at 2RS [659B] the Second Respondent provides a frank, and with respect, correct, concession that an applicant who may have suffered no harm to their reputation because of disentitling conduct can still be compensated for hurt to feelings, including via an award for aggravated damages.

M.3 Additional Submissions on Damages as requested by the Court on 20 February 2024

Correctness of* Dank v Nationwide News Pty Ltd *[2016] NSWSC 295

545. In its email of 20 February 2024, the Court enquired whether the parties contend that the observations of McCallum J in *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 at [75] are correct, and whether, even if correct as a matter of State law, they are applicable in the Federal jurisdiction.

546. Mr Lehrmann's primary submission is that if the defences fail, there is no true analogy between the facts of *Dank* and the present case, whatever findings the Court might make about Mr Lehrmann's conduct.

547. As a matter of State law, her Honour's observations are probably correct. In *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468, the trial judge gave judgment for the defendant, but notionally assessed the damages as nil, relying on *Dank*. At [279]-[285], Leeming JA (Mitchelmore JA and Simpson AJA agreeing) considered that no error was disclosed by this notional assessment, although strictly this was obiter because the Court dismissed the plaintiff's appeal on liability.

548. As a matter of Federal jurisdiction, however, Mr Lehrmann's position is that s 22 of the *Defamation Act 2005* is inconsistent with ss 39-40 of the *Federal Court of Australia Act 1976*, not picked up by s 79 of the *Judiciary Act 1903*, and therefore not applicable in this proceeding: *Wing v Fairfax Media Publications Pty Ltd* (2017) 255 FCR 61 at [21]-[34] per Allsop CJ and Besanko J. Inasmuch as McCallum J's reasoning in *Dank* at [75] was based on the specific wording of s 22(3), it is not cogent in this jurisdiction.

Responsive submissions to the First Respondent's submissions at [1143A]-[1143R]

548A. In response to the Court's question regarding *Dank v Nationwide News Pty Ltd* [2016] NSWSC 295 the First Respondent provides a detailed analysis at [1143A]-[1143R] of the authorities concerning the development of defamation law with respect to the presumption of damage.

548B. In response, the Applicant respectfully submits that the authorities concerning the anterior issue of the presumption of damage are of limited relevance to the question of whether an applicant is entitled to meaningful compensation after the close of evidence where there is a debate about disentitling conduct.

548C. Instead, the focus should be on the circumstances in this matter, namely that Mr Lehrmann gave strong evidence as to his hurt to feelings (see e.g. [305]-[308] and [502]-[503] above) in a context where, in Mr Lehrmann's submission, the Respondents cannot discharge their burden on the justification defence. Therefore, even if it is found by the Court that Mr Lehrmann engaged in serious adverse conduct, any question as to the presumption of damage is of at best peripheral relevance.

Availability of aggravated damages if nominal damages are to be awarded

549. In its email of 20 February 2024, the Court enquired how, in the event the defences fail but no damages or nominal damages are to be awarded, the Court should approach the issue of aggravated damages as a matter of principle.

550. The starting point is, as discussed at Applicant's Submissions (**AS**) [489], that questions of "mitigation" are simply one part of the single exercise of determining an amount of damages which is proportionate to compensate the plaintiff for the real damage he or she has suffered.

551. With respect, the difficulty with the question posed by the Court is that it contemplates a scenario in which the Court concludes that nominal damages are appropriate and *then* turns to consider whether it is appropriate to award aggravated damages. This would not be a correct approach to the assessment of damages. As the Full Court observed in *Nationwide News Pty Ltd v Rush* [2020] FCAFC 115 at [380], aggravated damages are not awarded separately from general damages because both are compensatory, and the assessment of a sum sufficient to compensate the plaintiff for the totality of the non-economic loss he or she has experienced is "the product of a mixture of inextricable considerations". In *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1125-1126, Lord Diplock said:

> The tort of defamation… has special characteristics which may make it difficult to allocate compensatory damages between head (1) [i.e. general damages] and head (2) [i.e. aggravated damages]. The harm caused to the plaintiff by the publication of a libel upon him often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. A solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the damages under head (1) itself even in cases in which there are no grounds for "aggravated damages" under head (2). Again the harm done by the publication, for which damages are recoverable under head (1), does not come to an end when the publication is made… So long as its withdrawal is not communicated to all those whom it has reached it may continue to spread. I venture to think that this is the rationale of the undoubted rule that persistence by the defendant in a plea of justification or a repetition of the original libel by him at the trial can increase the damages. By doing so he prolongs the period in which the damage from the original publication continues to spread and by giving to it further publicity at the trial… extends the quarters that the poison reaches.

552. A conclusion that nothing more than nominal damages should be awarded is the end point of the analysis, reached only after the need for and extent of any aggravated damages has been considered.

553. There is a further reason why substantial mitigation would not stand in the way of an award of aggravated damages.

554. Questions of mitigation focus on the true value of the plaintiff's reputation and the extent of the real damage to it. For example, in *Grobbelaar v News Group Newspapers Ltd*

[2002] 1 WLR 3024 at [54], Lord Hobhouse explained that the decision in *Pamplin v Express Newspapers Ltd* [1988] 1 WLR 116 (emphasis added):

> … addresses the situation where a plaintiff is entitled to a verdict in his favour on the justification issue but the evidence properly before the jury on the issue of justification has disclosed that the reputation to which he is entitled is so depreciated **that the damages which he should be awarded for the damage to his reputation** by the (ex hypothesi) defamatory publication should be reduced below the level that would be appropriate for a plaintiff with an impeccable reputation, maybe even to a nominal figure.

This statement was cited with approval in *Massoud v Nationwide News Pty Ltd* (2022) 109 NSWLR 468 at [284] per Leeming JA (Mitchelmore JA and Simpson AJA agreeing). See also *Wright v McCormack* [2023] EWCA Civ 892 at [76] per Warby LJ (Andrews and Singh LJJ agreeing), which was excerpted at AS [489].

555. This is why evidence in mitigation of damages must pertain to the relevant sector of the plaintiff's reputation, including in cases where the mitigatory circumstances relate to the plaintiff's conduct in the litigation: *Russell v Australian Broadcasting Corporation (No. 3)* [2023] FCA 1223 at [467]-[471]; see also *Australian Broadcasting Corporation v McBride* (2001) 53 NSWLR 43 at [16]-[23]; *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335 at [162]-[186]; *Holt v TCN Channel Nine Pty Ltd* [2014] NSWCA 90 at [29]; *Gacic v John Fairfax Publications Pty Ltd* (2015) 89 NSWLR 538 at [176]-[178]; *O'Brien v Australian Broadcasting Corporation* (2017) 97 NSWLR 1 at [225]; *Rayney v Western Australia (No 4)* [2022] WASCA 44 at [161].

556. Plaintiffs in defamation cases, however, are not awarded damages only to compensate for the harm done to their reputation and to vindicate their reputation. The third purpose of damages in defamation is to compensate the plaintiff for the subjective hurt, anxiety, loss of self-esteem, sense of indignity and sense of outrage felt by him or her: *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60 per Mason CJ, Deane, Dawson and Gaudron JJ, 71 per Brennan J. While a court does not assess damages by allocating a discrete sum for each of these three purposes, the ultimate figure must be a sum which is reflective of and proportionate to the totality of the harm suffered by the plaintiff, including hurt feelings and other subjective harm: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 per Lord Hailsham; *Carson* at 70-71 per Brennan J.

557. In some cases, the damage to the plaintiff's true reputation may be so nominal that it is reasonable to conclude that he or she cannot have suffered any meaningful injury to his or her feelings either. For example, how hurt could Mr Dank really have been by the untrue allegation that he had injected a blood-thinning agent into football players, when it was true that he had injected a horse feed supplement into the football players? Justice

Brennan alluded to this in *Carson* at 71, when he said, "the subjective reactions are often produced by the objective consequences of the publication".

558. In other cases, the nature of the defamation or the evidence before the Court will be such that it would be unreasonable not to find that the plaintiff had suffered serious subjective harm, even if the plaintiff had disgraced him or herself in such a way that he or she had little true reputation to be injured. In those cases, it would appropriate to award substantial damages, reflective of the real subjective injury caused by the publication, albeit in an amount which would be lower than if the plaintiff also had a good reputation to be vindicated.

559. A very recent application of this was in *Greiss v Seven Network (Operations) Ltd (No. 2)* [2024] FCA 98 at [417]-[420]. In that case, Katzmann J found that the applicant was defamed by a publication which imputed that he spat "at" a rape victim outside a courthouse. Her Honour did, however, find that the applicant spat "towards" the victim, that he generally displayed overt hostility and contempt for her, and that he also behaved disgracefully towards a group of journalists at the courthouse soon after the spitting incident. Her Honour concluded that he deserved only nominal damages for damage to his reputation and vindication. Nevertheless, she awarded substantial damages ($35,000) for hurt feelings, because she was persuaded by the evidence that he did feel embarrassment, shame, anger and distress, as he was vilified on social media and ostracised by members of his own family, and threats to his safety were made.

560. Two observations are made with respect to the *Greiss* judgment. First, even if serious adverse credit findings are made against Mr Lehrmann, his position is not analogous to that of Mr Greiss. It was established Mr Greiss still spat "towards" a rape victim, rather than "at" the rape victim – in other words conduct was found which went at least some way to justifying the sting of the libel. In Mr Lehrmann's case adverse credit findings, including even findings that he was untruthful about an aspect of what occurred on the night in question and in the days afterwards, are not in the same territory as an actual rape allegation. Second, even if the Court found that aspects of Mr Lehrmann's evidence were false, and even if the Court concluded that such false evidence was so disreputable as to mitigate the damages he should be awarded for vindication of his reputation to a low or even nominal level, it would by no means follow that Mr Lehrmann did not suffer very serious subjective hurt as a result of the publication of the false imputation that he raped Ms Higgins. The reasons are canvassed at AS [503]-[516]. As submitted there, it is entirely natural that a young person accused of rape on national television would be

extremely distressed, frightened and angry. What should also be borne in mind is that if the value of Mr Lehrmann's reputation is found to be diminished on account of his evidence in the trial in this proceeding, that is a subsequent matter. At the time of publication, however, his reputation was not compromised. His subjective reaction at the time of publication would therefore have been that of a person who otherwise had a good reputation.

561. Aggravated damages serve to compensate the plaintiff for additional subjective hurt which he or she experiences, where the manner in which the defendant commits the tort, or any aspect of the defendant's conduct up to the date of judgment, is improper, unjustifiable, or lacking in bona fides. As Diplock LJ said in *McCarey v Associated Newspapers Ltd* [1965] 2 QB 86 at 107 (emphasis added):

> Since the common law recognises that injury to feelings, such as grief or annoyance, resulting from some classes of wrongful acts is a proper subject of compensation, and since the extent of this kind of injury may depend not merely on the wrongful act itself but upon the manner in which, or, it may be, the motives with which, it is done, there are categories of wrongs (and libel is one of them) in which the appropriate compensation for the plaintiff's injured feelings may be greater than it would otherwise be; that is, the damages may be aggravated for one or other or both of these reasons.
>
> In an action for defamation, the wrongful act is damage to the plaintiff's reputation. The injuries that he sustains may be classified under two heads: (1) the consequences of the attitude adopted towards him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (2) the grief or annoyance caused by the defamatory statement to the plaintiff himself. **It is damages under this second head which may be aggravated by the manner in which or the motives with which the statement was made or persisted in.**

562. While mitigating factors may be such that the true value of a plaintiff's reputation is greatly reduced, even to a nominal level, the plaintiff can still suffer subjective hurt and there is no logical reason why this subjective hurt cannot be aggravated by the conduct of the defendant, either in committing the tort or up to the date of judgment, such as to warrant an award of aggravated damages.

563. The correct approach, in Mr Lehrmann's submission, is reflected in *Newsgroup Newspapers Ltd v Campbell* [2002] EWCA Civ 1143.

564. The plaintiff in that case sued in respect of an article which imputed that he was an active paedophile. The imputations fell into two general categories – (a) that he actually sexually abused children, and (b) that he had a perverted interest in children. The defendants were in possession of a video recording which was capable of proving the substantial truth of the second category of imputations, but the defendants had no evidence to justify the first category. They nevertheless persisted improperly in a

defence of justification to all imputations. There was also aggravating conduct on the part of the freelance reporter responsible for the material on which the article was based: at [116]. On the other hand, the plaintiff himself engaged in serious misconduct up to and including at the trial, essentially by procuring false evidence: at [115].

565. At trial, the jury awarded damages of £350,000. On appeal, this award was set aside as manifestly excessive. At [117]-[119], the Court of Appeal reasoned as follows:

(a) Had there been no partial justification, the defamation would have been near the top of the range of seriousness, and it was aggravated by the freelance reporter's conduct and also be the defendants' disgraceful conduct is seeking falsely to justify all of the imputations.

(b) The defendants established significant partial justification, in the form of the plaintiff having a perverted interest in children, even if the more serious imputations of actual sexual abuse were not justified. In these circumstances, damages no higher than £100,000 could have been appropriate.

(c) The plaintiff's "elaborate and long-lasting attempt to pervert the course of justice" had to be accounted for. He was found to have made and procured false testimony and made damaging allegations of corruption and lying against innocent third parties. In those circumstances, general damages were reduced to £30,000.

566. What occurred in *Campbell*, then, was that the need for an award of aggravated damages was factored in as an integral part of the overall assessment of compensatory damages, independently of the mitigatory effect of the plaintiff's litigation misconduct. It can also be seen that:

(a) despite the misconduct being very severe – indeed, more severe than any which Mr Lehrmann has arguably engaged in, given that it involved not only making but also procuring false testimony, as well as allegations against innocent third parties; and

(b) despite there being significant partial justification – which is not possible in this case;

the plaintiff was still awarded substantial damages in the sum of £30,000.

M.4 Other relief

567. Given the defamatory publications are no longer accessible online, Mr Lehrmann does not press a claim for injunctive relief.

~~25 December 2023~~

~~28 February 2024~~

11 March 2024

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Annexure A

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Our ref MS:5263490
Your ref MOBL:694

22 February 2024

Paul Svilans and Monica Allen
Mark O'Brien Legal
Level 19
68 Pitt Street
SYDNEY NSW 2000

Dear Colleagues

Bruce Lehrmann v Network Ten Pty Limited & Anor - Updated particulars of aggravated damages
Federal Court of Australia Proceedings No. NSD 103 of 2023

We refer to the Applicant's updated particulars of aggravated damages served on 22 February 2024 (**Updated Particulars**).

Particular E is not a proper particular of aggravated damages and should be immediately withdrawn.

As you are no doubt aware, Tasha Smithies was under oath during her examination-in-chief and subsequent cross-examination in relation to the cross-claim in this proceeding, including in respect of the evidence referred in the Updated Particulars, and had an obligation to the Court to tell the truth during her evidence. Ms Smithies complied with this obligation by providing honest evidence to the Court about her state of mind both at the time of providing legal advice in relation to the Logies Speech and subsequently.

In those circumstances, the conduct of Ms Smithies and Network Ten cannot be in any way categorised as being unjustifiable or lacking in bona fides. Particular E therefore has no proper basis.

Please confirm by **5pm** on Friday 23 February 2024 that you will write to the Court to advise that Particular E is withdrawn from the Updated Particulars.

Our client continues to reserve its rights, including to rely on this letter on the question of costs.

Yours sincerely

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Annexure B

MARK
O'BRIEN
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Our Ref: MOBL:694
Your Ref: MS:5263490

23 February 2024

Marlia Saunders
Partner
Thomson Geer
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SYDNEY NSW 2000

By email: msaunders@tglaw.com.au

Dear Ms Saunders

Bruce Lehrmann v Network Ten Pty Limited & Anor
Federal Court of Australia Proceedings No. NSD103/2023

We refer to your letter to us of 22 February 2024.

We reject your assertion that Particular E of our client's updated particulars of aggravated damages is not a proper particular.

Our client does not allege that Ms Smithies was dishonest whilst giving evidence during the hearing of the cross-claim.

Our client's particular has previously alleged the making of the Logies Speech was unjustifiable. It has emerged that legal advice permitting that speech to be made was given. That conduct is similarly unjustifiable. Ten's employee, Ms Smithies, whilst giving evidence in public, made it plain she adheres to the advice in relation to the speech. To our surprise, we are not aware of that position being corrected by Ten. We understand that Ten's continuing position is that the advice was appropriately given and that Ten expresses no regret for that.

In the circumstances, our client declines to withdraw Particular E of his updated particulars of aggravated damages.

Yours faithfully

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