



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

No. NSD 103 of 2023

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LTD and another

Respondents

OUTLINE OF FIRST RESPONDENT'S OPENING SUBMISSIONS

A. INTRODUCTION

1. This proceeding arises out of an episode of *The Project* on 15 February 2021 presented by the second respondent (**Ms Wilkinson**) and consisting principally of an interview with Ms Brittany Higgins.
2. The applicant (**Mr Lehrmann**) contends that the episode conveyed defamatory imputations to the effect that he raped Ms Higgins in Parliament House in 2019. He sues over the television broadcast of the episode on 15 February 2021 (**Broadcast**), publication of the episode on the 10 Play website at www.10play.com.au on and from 15 February 2021 (**Website Publication**) and publication of the episode on *The Project* YouTube channel at www.youtube.com/@TheProjectTV/featured from 15 February 2021 (**YouTube Publication**) (together, **the Publications**).
3. Mr Lehrmann was not identified by name, title or likeness in the episode.
4. The first respondent (**Network Ten**) anticipates that the evidence will show that a considered decision was taken by the team responsible for producing the Publications not to name Mr Lehrmann. The central theme of the episode was the manner in which Ms Higgins' allegation of rape was handled by the then government. Care was taken to confine references to the person accused by Ms Higgins of having raped her to that necessary to give proper context to that theme.

5. Network Ten denies that Mr Lehrmann was reasonably identified by viewers of the Publications. Whether he was so identified and, if so, the nature and number of the persons who reasonably identified him, is an issue for determination in this proceeding.
6. Network Ten has been informed that Mr Lehrmann now confines his claim in respect of the YouTube Publication to any downloads between 15 February 2021 until 30 June 2021. Accordingly, it is no longer necessary for this Court to determine issues arising on the pleadings as to the competency of his claim in respect of any downloads of the YouTube Publication on or after 1 July 2021. All issues for determination in this proceeding now fall to be decided under the *Defamation Act 2005* (NSW) (**Act**) as in force prior to the commencement of relevant amendments made by the *Defamation Amendment Act 2020* (NSW).
7. Network Ten otherwise relies upon substantive defences of (a) justification at common law and pursuant to s 25 of the Act, (b) qualified privilege pursuant to s 30(1) of the Act, and (c) common law qualified privilege as extended by the decision of the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**).

B. IDENTIFICATION

8. Identification is an essential element of the cause of action for defamation and a matter in respect of which Mr Lehrmann bears the onus of proof. Mr Lehrmann must establish that the Publications were of and concerning, or about, him: *Knupffer v London Express Newspaper Ltd* [1944] AC 116 (HL), 121, 123; Act, s 8.
9. Because he was not named in the Publications, Mr Lehrmann must establish that persons viewing the Publications reasonably understood them to be about him: eg *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 (HL), 1246, 1254-5, 1269-70; *David Syme & Co v Canavan* (1918) 25 CLR 234; *Burston v Hanson* [2022] FCA 1235, [106]-[110], citing the principles as to identification referred to in *Plymouth Brethren (Exclusive Brethren) Christian Church v the Age Company Ltd* [2018] 97 NSWLR 739, [58]ff and *Triguboff v Fairfax Media Publications Pty Ltd* [2018] FCA 845, [35]-[36].
10. Mr Lehrmann's pleaded case (statement of claim, particulars of identification under [4], [6] and [8]) is that he was identified by the Publications in three ways.
11. **First**, Mr Lehrmann alleges that there is a class of viewer who was aware of five matters: that the alleged rapist: (a) worked in the office of Senator Reynolds in a position senior to Ms Higgins, (b) had attended Friday night drinks organised by Ms Higgins on 22

March 2019, (c) had started packing his belongings on the Tuesday morning following a meeting with Fiona Brown, (d) was working in Sydney in February 2021, and (e) was the person alleged by Ms Higgins to have sexually assaulted her (particulars of identification under [4], [6] and [8] at (a)–(e)).

12. The five matters are expressed cumulatively in the pleading: “Viewers of the [Publications], or some of them, were aware of the matters set out in paragraphs (a)–(e) above” (see particulars of identification under [4], [6] and [8] at (f))
13. There is an illogicality in this aspect of Mr Lehrmann’s pleaded case. On the pleaded case, any person who identified Mr Lehrmann from the Publications *already knew* that he had been accused of rape by Ms Higgins (matter (e)). To those persons, the Publications did not cause any further harm to Mr Lehrmann; they repeated an allegation that was already known to them.
14. In any event, however, it does not appear that Mr Lehrmann intends to seek to, or could, adduce evidence of any viewer who in fact knew all five of the pleaded matters and identified him at the time of viewing the Publications as a result of such knowledge. It is inherently improbable that there were any such viewers, other than persons who had worked in or closely with Senator Reynolds’ office at the relevant time.
15. **Secondly**, Mr Lehrmann alleges that he was identified to (i) Commonwealth politicians, political assistants and staffers, journalists and other person who worked at Parliament House Canberra, and (ii) family, friends and acquaintances, who viewed the Publications at the time of their publication: see particulars of identification at (h).
16. The evidence to be adduced in support of this ground by Mr Lehrmann appears to be limited to two close family friends and two former colleagues from Parliament House, none of whom, presumably, believed the allegations made by Ms Higgins or thought any the less of Mr Lehrmann as a result of having viewed the Publications. That evidence will be challenged in cross-examination. It is also contrary to a body of contemporaneous evidence to be tendered showing that other close friends and colleagues of Mr Lehrmann who viewed the Publications did not suspect him of being the alleged perpetrator, and were instead speculating about who the alleged perpetrator might be.
17. **Thirdly**, Mr Lehrmann alleges that there is a class of viewer of the Publications who had read or subsequently read social media posts and online articles that named Mr Lehrmann as the person accused by Ms Higgins of sexually assaulting her. The posts and articles

relied upon by Mr Lehrmann materially post-date the Broadcast, are obscure and would not be understood by ordinary readers as being either reputable or reliable. They include www.kangarocourtofaustralia.com (a website that has been used to publish material in contempt of suppression orders: see *Seven Network (Operations) Ltd v Dowling (No 2)* [2021] NSWSC 1106 at [13]-[19]) and www.clownworldau.com.

18. Mr Lehrmann apparently cannot adduce evidence that any viewer of the Publications in fact identified him having read such posts. In the absence of evidence, the Court would not reasonably infer the existence of a class of such viewers: cf *Raul Amon International Pty Ltd v Telstra Corp Ltd* [1998] 4 VR 798. Nor would the Court conclude that any supposed identification as a result of a person reading speculation in an obscure publication of dubious repute or reliability was reasonable, as required by the authorities cited at [9] above.
19. Further and in any event, the authorities in relation to identification of a person from a subsequent publication made by a publisher other than a respondent require something in the nature of an invitation or encouragement by the respondent to seek out identifying information: eg *Baltinos v Foreign Language Publications Pty Ltd* (1986) 6 NSWLR 85. There was no such invitation or encouragement by Network Ten; indeed, the evidence will be that steps were actively taken to prevent speculation as to the identity of the alleged perpetrator, such as by disabling comments on the online versions of the Publications.
20. Mr Lehrmann has apparently chosen not to seek a remedy in defamation law against any of the publications that named him.

C. JUSTIFICATION

Principles

21. At common law and pursuant to s 25 of the Act, a respondent has a defence to the publication of defamatory matter if the imputations found to have been carried by the matter of which the applicant complains are substantially true. In s 4 of the Act, the term “substantially true” is defined to mean “true in substance or not materially different from the truth” (see also *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981, [105]).
22. It is not necessary to establish that every part of an imputation is literally true; it is sufficient if the “sting” or gravamen of an imputation is true: *Kumova v Davison (No 2)* [2023] FCA 1, [94]. While the defence focuses on the truth of the imputations, the proper

approach is to consider the propositions contained in the imputation in context, construing the matter as a whole: *Hanson v Burston* [2023] FCAFC 124, [47], [48], citing *Greek Herald Pty Ltd v Nikolopoulos* (2002) 54 NSWLR 165, [21]-[26].

Issues not in dispute and the anticipated evidence

23. Network Ten does not anticipate that there will be any dispute that:
- (a) as at Friday, 22 March 2019, Mr Lehrmann and Ms Higgins were colleagues working in the parliamentary office of the Hon. Senator Linda Reynolds, who was then the Minister for Defence Industry;
 - (b) on the evening of 22 March 2019, Mr Lehrmann and Ms Higgins attended a social function along with others at ‘The Dock’ bar in Kingston, Canberra, where they consumed alcohol; in Ms Higgins’ case, some 10 or 11 vodka drinks over a period of less than five hours;
 - (c) between about midnight and about 1.30am on 23 March 2019, Mr Lehrmann, Ms Higgins and two friends (Lauren Gain and Austin Wenke), attended a 1980s themed nightclub in central Canberra called ‘88mph’, where they continued to consume alcohol;
 - (d) after leaving 88mph, Mr Lehrmann and Ms Higgins attended Parliament House, arriving at around 1:41am and entering the Ministerial Suite of Senator Reynolds at around 1:48am;
 - (e) Mr Lehrmann left Parliament House alone and with some haste at around 2:33am on 23 March 2019; and
 - (f) Ms Higgins left Parliament House alone at around 10am on 23 March 2019.
24. Mr Lehrmann alleges that each of the Publications conveyed four defamatory imputations: statement of claim, [4], [6], [8]. Those imputations do not differ in substance: the sting of all four imputations is that Mr Lehrmann raped Ms Higgins. Network Ten admits that if, contrary to its primary submission, the Publications identified Mr Lehrmann, then each of the imputations or imputations not differing in substance from those imputations was conveyed by the Publications and is defamatory of him.
25. Network Ten understands that Mr Lehrmann denies engaging in any sexual activity whatsoever, consensual or otherwise, with Ms Higgins at any time.

26. Network Ten will seek to satisfy the Court, on the balance of probabilities, within the meaning of s 140 of the *Evidence Act 1995* (Cth), that Mr Lehrmann sexually assaulted Ms Higgins in the approximately 40 minute period between them entering the Ministerial suite together and his departure from Parliament House in the early morning of 23 March 2019.
27. In support of its justification defence, Network Ten will adduce evidence in relation to the following subjects:
- (a) **Prior relationship:** the relationship between Mr Lehrmann and Ms Higgins as at 22 March 2019. It is anticipated that evidence will be given on this topic by Ms Higgins, Jesse Wotton and Nicky Hamer.
 - (b) **The Dock and 88mph:** the events of the evening of 22 and early morning of 23 March 2019. It is anticipated that evidence will be given on this topic by Ms Higgins, Mr Wenke, Ms Gain and Nikita Irvine, each of whom attended The Dock and each of whom apart from Ms Irvine attended 88mph .
 - (c) **Parliament House:** evidence concerning Mr Lehrmann and Ms Higgins' arrival and departure from Parliament House. It is anticipated that evidence will be given on this topic by Ms Higgins, as well as two Parliamentary security officers, Mark Fairweather and Nikola Anderson.
 - (d) **The alleged rape:** it is anticipated that Ms Higgins will give evidence that she was raped by Mr Lehrmann in Senator Reynolds' Ministerial suite in the period between about 1.48am and about 2.33am on 23 March 2019.
 - (e) **Aftermath:** relevant events following the alleged rape. Evidence will be adduced from:
 - i. Fiona Brown and Reg Chamberlain, who were in contact with Mr Lehrmann in the period after 25 March 2019, and received information from him as to the reason for his attendance at Parliament House.
 - ii. those to whom Ms Higgins disclosed that she had been raped and those who made observations about the change in her demeanour after 23 March 2019, including Alex Humphreys, Ben Dillaway, Chris Payne, Kathryn Cripps, Matthew Higgins, Kellie Jago, Kelly Higgins and Samuel O'Connor. Ms Higgins also disclosed what had occurred to Ms Brown and Ms Irvine, each

of whom will give evidence about what she told them and what they observed.

- iii. Australian Federal Police officers to whom Ms Higgins made a contemporaneous disclosure that she had been raped, Detective Senior Constable Sarah Elizabeth Harman, Federal Agent Katie Thelning and Federal Agent Rebecca Cleaves.

D. STATUTORY QUALIFIED PRIVILEGE

Relevant principles

28. Section 30(1) of the Act in force at the time of the Publications provided that:

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.
29. Section 30(3) of the Act as in force at the relevant time provided a list of non-exhaustive factors a court may take into account in determining, for the purposes of s 30(1) of the Act, whether the conduct of the respondent in publishing matter was reasonable in the circumstances. The principles emerging from the authorities on the issue of reasonableness were conveniently summarised in *Chau v Fairfax Media Publications Pty Ltd* [2019] FCA 185 (**Chau**), [109]-[116] and supplemented in *Palmer v McGowan (No 5)* [2022] FCA 893 (**Palmer**), [184].
30. The matters listed in s 30(3) of the Act are not to be regarded as a series of hurdles to be negotiated before a publisher can successfully rely on the defence: *Chau*, [107], *Palmer*, [183]. Further, reasonableness should not be interpreted as requiring a counsel of perfection; the predicate on which the defence operates is that the imputations in question are not true and that the conduct of a respondent is accordingly not beyond criticism: *Hockey v Fairfax Media Publications Pty Ltd* (2015) 237 FCR 33, [228]. The considerations which bear upon the reasonableness of the conduct of a publisher will vary with the circumstances of individual cases: *Chau*, [107]. Reasonableness is “not a concept that can be subjected to inflexible categorisation”: *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327, [30].

31. There is no plea in defeasance, and so the defence must succeed if Network Ten proves the three elements in s 30(1) of the Act.

Interest or apparent interest

32. Mr Lehrmann does not appear to accept that the “interest” or “apparent interest” requirements in s 30(1)(a)-(b) are met. That is surprising. Mr Lehrmann has, belatedly, conceded that the Publications concerned matters of public interest, including the subjects particularised by Network Ten in Annexure B to the Defence (defined as the **Subjects**). In light of that obviously correct concession, it is surprising that Mr Lehrmann appears to maintain that recipients of the Publications did not have an interest or apparent interest in having information on the Subjects or that the Publications were published in the course of giving recipients information on those Subjects. In Network Ten’s submission, the point is beyond argument.

Network Ten’s conduct was reasonable in the circumstances

33. The evidence establishes a compelling case of reasonable conduct in the circumstances— Network Ten will ultimately submit that the degree of care that was taken in relation to the preparation of the Publications significantly exceeds that in any of the analogous authorities considering the application of the section 30 defence. Careful and reasonable steps were taken prior to publication to ensure that the matters stated in the Publications were fair and accurate: *Palmer*, [184(4)].
34. The Publications were the product of a collaborative process between a highly experienced and competent production team. The evidence will establish that an initial approach was made to Ms Wilkinson on behalf of Ms Higgins in around mid-January 2021. A team then worked with Ms Wilkinson to prepare and produce the Publications. That team included Angus Llewellyn, who had worked as a producer for *The Project* since around June 2019, with extensive prior experience as a producer of current affairs television. Mr Llewellyn and Ms Wilkinson drew on other experienced professionals, including two executive producers: Christopher Bendall and Craig Campbell, a supervising producer: Laura Binnie, the Network Executive Producer: Sarah Thornton, and Peter Meakin, an Editorial Consultant with over 60 years’ experience as a journalist who assisted with the commissioning, development and editing of the Publications. Legal advice was appropriately sought and obtained throughout the production process.

35. In summary, it is anticipated that the evidence will establish that from the early investigation stage of the production through to the commissioning, development and editing of the Publications, appropriate steps were taken to make proper and reasonable inquiries, to check the accuracy and reliability of sources of information and to otherwise act reasonably and responsibly in the production of the Publications. These steps should not be considered as a form of “checklist” but rather as constituting all of the relevant circumstances and the context in which the Publications were published: *Palmer*, [195]. The steps included:

Communications and contact with Ms Higgins

(a) Network Ten’s production team had extensive communications and contact with Ms Higgins and her partner, David Sharaz, by way of email, WhatsApp messaging, telephone conversations and face-to-face meetings for the purposes of obtaining information from or on behalf of Ms Higgins, and testing and corroborating that information. The communications between Ms Llewellyn, Ms Wilkinson and Ms Higgins included:

- i. a five-hour meeting in Sydney with on 27 January 2021 at The Darling Hotel in Pymont (**CB Part B** at Tab 242); and
- ii. a two-hour recorded interview on 2 February 2021 (**CB Part B** at Tab 376).

(b) It is anticipated that the evidence will show that these engagements with Ms Higgins caused each member of the production team to form a view, prior to publication of the Publications, that Ms Higgins was a credible source with integrity, who was consistent each time she told her story and candid in what she did not know or could not recall, and who was able to and did proffer information and documents that appeared to corroborate her story.

Research and Fact Checking

(c) Network Ten’s production team conducted thorough research into and fact checking of the information provided by Ms Higgins, including by reviewing information contained in a document entitled “Brittany Higgins – Timeline” (**CB Part B** at Tab 143), for the purpose of understanding that information and checking its accuracy and reliability. That work included considering photographs, email and text correspondence, listening to audio recordings of voicemails and considering various other documents relevant to the information provided by or on behalf of Ms

Higgins: (**CB Part B** at Tabs 236, 244, 247, 277, 278, 279, 280, 281, 282, 286, 308, 319, 320, 361, 410, 411, 412, 413, 425, 440, 464, 465, 626, 690, 697, 753, 754, 755, 756 and 790).

- (d) Further enquiries were made by Mr Llewellyn to verify the information provided by or on behalf of Ms Higgins, including by conducting internet searches to independently check information (**CB Part B** at Tabs 14, 223, 330 and 1066) and speaking with sources, including:
 - i. Kathryn Cripps, a counsellor/advocate from Canberra Rape Crisis Centre; and
 - ii. Ms Higgins' former flatmate, Ms Humphreys.
- (e) Network Ten anticipates that the evidence will be that the information provided by Ms Higgins which was included in the Publications was not contradicted by any of the research and further enquiries undertaken by the production team.
- (f) Mr Llewellyn is expected to give evidence that he also attempted to contact the AFP officers to whom Ms Higgins had made a contemporaneous disclosure that she had been raped, independently verified contact details for Mr Lehrmann, and spoke to constitutional law experts to better understand how allegations of criminal conduct inside Parliament House were treated. Those experts included Professor Anne Twomey from the University of Sydney, Rosemary Laing, the former Clerk of the Senate and Professor George Williams from the University of NSW.

Statutory Declaration and Appearance Release

- (g) Network Ten's production team obtained a signed 'adult appearance release' (**CB Part B** at Tab 387) and statutory declaration (**CB Part B** at Tab 574) from Ms Higgins in which she represented to Network Ten, in substance, that the information she had provided was true. Ms Higgins was provided with a transcript of the interview referred to in [35(a)(ii)] above and asked to check its accuracy for the purposes of providing the statutory declaration. These steps provided the production team with an additional layer of comfort as to the reliability of the information provided to them, having regard to the solemnity of such documents and the serious consequences that flow from the making of false declarations.

Internal procedures to ensure confidentiality during production

- (h) Network Ten took responsible steps in the production of the Publications to ensure the confidentiality of the information they had received having regard to the seriousness of Ms Higgins' allegations, by keeping the production team involved small, giving the story a codename and keeping documents off a shared server.

Legal Advice

- (i) While Network Ten does not waive privilege over any legal advice given to members of the production team, it does rely upon evidence that is anticipated to be given to the effect that legal advice was appropriately and regularly sought and obtained throughout the production process and prior to broadcast of the Publications, and that that legal advice was carefully considered by the production team before they decided to proceed with the Publications.

Reasonable attempts to obtain and publish a response from the applicant

- (j) Network Ten took reasonable steps to seek to obtain a response from Mr Lehrmann to the subject matter of the Publications: *Palmer*, [184(6)].
- (k) A detailed email was sent to Mr Lehrmann by Mr Llewellyn on 12 February 2021, calculated so as to put him squarely on notice of the matters which were intended to be reported in the Publications: cf *Hockey* at [360]-[372] (**CB Part B** at Tab 672). The email was sent to Mr Lehrmann's personal Hotmail account which was in use by him at the time (**CB Part C** at Tab 1071 at [15(a)]). The email enquired as to whether Mr Lehrmann would be available for an interview. The time within which a response was sought was reasonable in the circumstances. When no response was received, it is anticipated Mr Llewellyn's evidence will be that he made further efforts to ascertain where Mr Lehrmann worked (**CB Part B** at 236 and 790). A follow up email and a text were sent (**CB Part B** at Tabs 678 and 804), and Mr Llewellyn also made two follow up calls. It is anticipated that Mr Llewellyn's evidence will be that he considered seeking to contact Mr Lehrmann through Facebook, but when he reviewed Mr Lehrmann's Facebook profile, he observed that Mr Lehrmann's settings did not allow direct messages to be sent.
- (l) Network Ten anticipates that the evidence will establish that had Mr Lehrmann responded to the attempts to contact him, his side of the story or the substance of his response would have been included in the Publications and, depending on the

nature of any response, Network Ten may have considered offering him an opportunity to participate in an interview to be included in the Publications or delaying the Publications to give him an opportunity to respond.

Reasonable attempts to obtain and publish responses from others

- (m) Network Ten took appropriate steps, including by sending emails and texts messages, to obtain responses from (i) Senator Reynolds, (ii) Senator Reynolds' chief-of-staff, Fiona Brown, (iii) Presiding Officers at Australian Parliament House, (iv) the Commissioner of the AFP and the relevant Federal Agents, (v) the Prime Minister's Chief of Staff and Principal Private Secretary, and (vi) Minister Michaelia Cash and her Chief of Staff (**CB Part B** at Tabs 664, 665, 666, 667, 668, 669, 670, 671, 673, 674, 675, 676 and 677).
- (n) Network Ten published each response it received to those enquiries and alerted viewers of the Publications to the existence of those responses (**CB Part B** at Tab 908).
- (o) Those inquiries served as a further means of verifying the accuracy and reliability of the information provided by Ms Higgins. The information provided by Ms Higgins was not contradicted by any of those responses.

Descriptors of Mr Lehrmann in the Publications

- (p) A considered decision was made by the production team not to name Mr Lehrmann in the Publications and instead to refer to him as a "senior male advisor" or "senior male colleague". In so doing, Network Ten sought to strike a balance between not inadvertently identifying any other person as the person accused by Ms Higgins as having raped her, but also conveying the existence of a power imbalance between Ms Higgins and her alleged rapist; a matter relevant to the central theme explored in the Publications, namely the adequacy of the manner in which Ms Higgins' allegation of rape was handled by the then government.

Distinction in the Publications between allegations and proven facts

- (q) While Network Ten has taken the responsible position of accepting that, if he was identified, the Publications carried the imputations pleaded by Mr Lehrmann, the Publications nonetheless carefully and consistently distinguished between allegations and proven facts, both in the way that questions were put by Ms

Wilkinson to Ms Higgins, and in the way the information provided by Ms Higgins was described and presented in the Publications. The Publications repeatedly used terms such as “claims”, “allegations” and “alleged incident” when describing the claims made by Ms Higgins.

Belief in the truth of the published information

- (r) It is anticipated that Mr Llewellyn will give evidence that he reasonably believed that the information included in the Publications was true and that anything which could not be independently verified was omitted. It is anticipated that he will say that, as a result of all of the investigations that were undertaken, at the time of the Publications, he believed that Mr Lehrmann had raped Ms Higgins in Parliament House in 2019.
36. The Court will hear evidence from members of the production team and Ms Higgins in support of the proposition that it was in the public interest in the circumstances for the Publications to be published expeditiously once the requests for comment had been issued but, at the same time, the production team did not rush into publishing the Publications. By the time the Publications were published, the allegations made by Ms Higgins were already in the public domain and had been the subject of discussion in Parliament, including by the Prime Minister. Further, it is anticipated that the evidence will show that, prior to publication and on the basis of the information referred to above, each member of the production team formed the view that it was in the public interest to publish the Publications.
37. Network Ten also relies upon a number of matters that occurred after publication in support of the reasonableness of the belief formed by the production team that the Publications were in the public interest. Those matters include statements made by the then Prime Minister and the establishment by the Government of the Independent Review into Commonwealth Parliamentary Workplaces conducted by Kate Jenkins, the then Sex Discrimination Commissioner and the outcomes of that review.
38. Mr Lehrmann was charged with sexually assaulting Ms Higgins on 7 August 2021. He was not named by any mainstream media organisation until after he was charged. Mr Lehrmann has now confined his claim in this proceeding to publications occurring before 1 July 2021, more than a month before he was first named in the mainstream media.

39. Mr Lehrmann’s criminal trial commenced in the ACT Supreme Court on 3 October 2022. On 26 October 2022, McCallum CJ discharged the jury, which had been deliberating, due to juror misconduct. The charge against Mr Lehrmann was withdrawn on 2 December 2022.
40. In all the circumstances, Network Ten submits that the Court will be comfortably satisfied on the evidence that Network Ten has discharged its onus of establishing that its conduct in producing and publishing the Publications was reasonable in the circumstances, such that the defence of statutory qualified privilege must succeed.

E. LANGE QUALIFIED PRIVILEGE

41. The background to the *Lange* defence and a helpful analysis of its constituent elements is set out in *Palmer*, [200]-[224]; see also *Russell v Australian Broadcasting Corp (No 3)* [2023] FCA 1223, [291]-[293].
42. In *Lange*, the High Court recognised that each member of the Australian community has an interest in receiving information, opinions and arguments concerning government and political matters, and each person has a correlative duty to disseminate such information, opinions and argument: *Palmer*, [202]. Although not an issue arising for determination in this proceeding, the defence may be defeated upon proof that the respondent was actuated by malice in making the communication: *Lange*, 572.
43. In view of the breadth of the audience that has an interest in receiving discussion about government and political matters, the imposition of a requirement of reasonableness in substitution for the general common law requirement of reciprocity was held by the High Court (at 572-3) to be “reasonably appropriate and adapted to the protection of reputation and, thus, not inconsistent with the freedom of communication which the Constitution requires”.
44. The general approach taken by courts has been to equate the notion of reasonableness in *Lange* to that in s 30 of the Act: *Palmer*, [212]-[221], despite that approach leading to an often microscopic and overly burdensome analysis of pre-publication conduct: *Palmer*, [207].
45. This case is a textbook example of publications suited to the application of the expanded common law defence of qualified privilege. It is surprising that Mr Lehrmann appears to dispute that each of the Publications constituted information, opinions and arguments concerning government and political matters, having regard to the substance of the

Publications, including that they concerned an allegation of rape involving two political staffers in a Minister's office at Parliament House, the then government's handling of that allegation (including the absence of an appropriate human resources structure and complaints handling process for ministerial and parliamentary staff) and the fact and circumstances of an investigation by the Parliament House police unit and the AFP.

46. In relation to the question of reasonableness, Network Ten refers to and relies upon the submissions made above in respect of the statutory defence.

F. RELIEF

47. A helpful summary of the principles relevant to the assessment of any damages is set out in *Palmer*, [425]-[429]; see also *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15, [228]-[240].
48. Network Ten will make further submissions in relation to this issue after the close of evidence, but for the reasons set out above, it is contended that the appropriate order is for this proceeding to be dismissed, with the parties then to be heard in relation to costs.

13 November 2023

M J COLLINS

T SENIOR

Counsel for the First Respondent