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SECOND RESPONDENT'S SUBMISSIONS ON NOTICE OF CONTENTION

No. NSD701 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

On appeal from the Federal Court of Australia

BRUCE EMERY LEHRMANN

Appellant

NETWORK TEN PTY LIMITED & LISA WILKINSON

Respondents

Matters in contention

1. These submissions address paragraphs 2 and 3 of the Second Respondent's (**Wilkinson**) notice of contention filed on 19 June 2024 (**NOC**): CA pp443-448.

2. Wilkinson contends that if the appeal is allowed in relation to the defence of justification, then his Honour should have found that she succeeded in her defence under s30 of the *Defamation Act* 2005 (NSW) (**Act**) which is addressed by the primary judge in Part K of *Lehrmann v Network Ten Pty Limited (Trial Judgment)* [2024] FCA 369 (**TJ**): TJ[901]-[963], CA pp348-369. The primary judge at TJ[936] relies upon the findings in Part J as a basis for those reasons "*to the extent they are relevant*": TJ[760]-[900], CA pp301-348.

3. Alternatively, if the court considers that damages should have been awarded and proceeds to reassess the provisional award nominated by the primary judge, Wilkinson contends that his Honour erred in finding that her conduct in giving the Logies speech aggravated damages: TJ[1023]-[1025], [1032]-[1054], CA pp382-392.

Introduction

4. Wilkinson was sued personally as a publisher of an episode of *The Project* that aired on Network Ten at 7pm on 15 February 2021 (**Broadcast**) in which Brittany Higgins made allegations of sexual assault at Parliament House in February 2019. The Broadcast was published about 11

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hours after News Limited published an article by Samantha Maiden which made the same allegations of sexual assault (Ex 2) (**Maiden article**).

5. It was established at trial that the appellant, Mr Lehrmann, was the subject of that allegation, and although he was not named, was identified by a handful of persons as the perpetrator of that assault: TJ[76]-[85], CA pp126-127. Wilkinson admitted that to such persons an imputation of rape was carried: Defence [4.3], CA p33.

6. Section 30 of the Act, as it was at the time of broadcast in February 2021 (TJ[901], CA p348), provided a defence to journalists who published defamatory matter which was of interest or apparent interest to the audience, and where the conduct of the journalist in publishing that matter was reasonable in the circumstances.

7. The defence proceeds on the basis that the imputation carried about Mr Lehrmann was otherwise indefensible. The defence does not arise in relation to a defamatory matter that has been proved substantially true. Section 30 is an important recognition by the legislature that journalists can defend stories of public interest even if serious, defamatory and untrue imputations are carried about a person. That means that journalists can get something wrong, defame a person, damage their reputation irreparably, and still not be liable in defamation.

8. His Honour correctly directed himself by noting that the defence recognises that a "*publisher can publish untrue material but still act reasonably. In this regard there is a need to guard against judging a publisher by unrealistic standards, adopting a counsel of perfection, or adopting hindsight bias.*": TJ[922], CA p356. It would be unrealistic to expect a journalist to be held to account as though they were a judge, a prosecutor or even a police officer making a decision to charge. News and current affair journalists operate in an environment whereby their sources and information are weighed and used depending on the nature of the allegations, the identity of the sources, their belief in the truth and their attempts to obtain a response from the person accused.

9. The key factors were set out by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 574. Those are reasonable grounds for believing in the truth of the imputation, "*proper steps, in so far as they were reasonably open to verify the accuracy of the information*", they did not believe the imputation to be false, they have sought a response form the person defamed and published that response (if any) (unless seeking the response was not practical or was unnecessary). Section 30(3) included other relevant factors, such as the extent to which the matter is of public interest and the nature of the business environment in which the publisher operates. There was no dispute below that this was not a checklist.

10. Wilkinson pleaded s30 (Defence [13]-[15], CA pp41-52) and relied on a significant body of uncontested evidence including contemporaneous records, her own testimony and evidence from other journalists and senior executives who prepared the Broadcast.

11. His Honour failed to have regard to a number of key factors that were proved, uncontested, in the evidence and relied on by Wilkinson in her extensive submissions at trial (both in writing and orally): Wilkinson's final written submissions (**WWS**) [1A]-[24O], [49]-[51], [176]-[349A], [483]-[580I]; T2272-2274, 2279-2283, 2286-2307, 2322 (oral closing); T2448-2459 (oral reply).

12. His Honour made findings, or otherwise failed to make findings, in dealing with this defence and then failed to consider the significance of those matters. This resulted in a failure to engage with the correct operation of s30 in relation to Wilkinson.

Lehrmann not named – Ground 2(e)(iv), 2(g)

13. The fact that Mr Lehrmann was not named in the Broadcast was the first circumstance of publication that Wilkinson relied on at trial. The fact that the rape allegation had already been made in the mass media in the Maiden article over 10 hours earlier generating discussion throughout the day and being an issue of significant public interest was the second circumstance that Wilkinson relied on at trial: WWS [523]-[528]. Those matters were the prism through which Wilkinson's conduct needed to be assessed, yet they were not referred to by the trial judge.

14. On the question of identification, his Honour found that the contest in the case was not whether one person identified Mr Lehrmann but the extent of that identification, noting that it was relevant to damages and the defence of common law qualified privilege: TJ[48], CA p121. In making that finding the primary judge made no reference to the s30 defence and, it would appear, did not take this factor into account in the consideration of that defence at all.

15. The publishers decided, after consideration, not to name Mr Lehrmann in the Broadcast. This was obviously a key factor in their favour in the consideration of their reasonableness. The publishers were also aware, about a week before the Broadcast, that News Limited would not be naming Mr Lehrmann in the Maiden article.

16. His Honour found that Mr Lehrmann was capable of being identified by the Broadcast, was in fact directly identified by a few people who were aware of certain additional facts, was the subject of some "*chitter chatter*" but there was otherwise "*very modest social media dissemination*" and "*it was less a firehose and more the splutter of an insecurely fastened sprinkler*": TJ[77]-[85], CA pp126-127. His Honour also went on to find, in assessing damages provisionally, that the Broadcast was preceded by the Maiden article, in which substantially the same allegations were made (also not naming Mr Lehrmann) and that the real damage to Mr Lehrmann's reputation was caused when he was charged and named publicly some months later: TJ[1064]-[1067], CA pp395.

17. These key findings about identification and causation (because Mr Lehrmann was not named in the Broadcast) are not referred to in His Honour's consideration of the s30 defence despite being a significant part of "*the circumstances*". It was an error to fail to assess Wilkinson's conduct in the context of an unnamed perpetrator who, on the factual findings was only reasonably identifiable by a small group of persons. All of this occurred within the broader circumstance of the Maiden article and the reaction to it, including by the politicians referred to in the Broadcast. The fact that the rape allegation had already been made 10 hours earlier in the mass media and was the subject of substantial debate and discussion, making it a story of significant public interest, was not even considered by the trial judge in assessing Wilkinson's reasonableness.

18. Prior to the introduction of a statutory qualified privilege defence (in the New South Wales *Defamation Act* 1974), the media generally had no common law qualified privilege defence because of the size of the audience of the publication. It could rarely be established that each recipient had the relevant reciprocal interest necessary to succeed on that defence. In *Lange* the High Court explained the introduction of the reasonableness standard to replace reciprocity of interest due to the size of the audience because the damage of such a publication is likely to be so much greater: at 572-573. Thus, when the publisher reasonably believes that the defamatory imputation will likely only reach a very small audience, as occurred here, the reasonableness assessment must be carried out in this context.

19. The prism through which Wilkinson's conduct should have been assessed for the purposes of s30 necessarily required consideration of the likely reputational harm caused by the Broadcast to the unnamed rapist including:

    (a) the fact that he would not be named;

    (b) that very few people were likely to identify him;

    (c) that Wilkinson was aware prior to Broadcast of the decision not to name him and she agreed with that decision ([99] Wilkinson Aff, 28.7.23);

    (d) that Wilkinson considered that there was insufficient information in the working drafts of the Broadcast that she reviewed to enable Mr Lehrmann to be identified by anyone other than those who were already aware of the allegations against him ([116]);

    (e) that Wilkinson was aware that the Maiden article would go to print in the morning of the Broadcast, some 10 hours before the Broadcast ([114]; [120]).

20. The failure by the primary judge to have regard to the identification factor, particular in the context of the publication of the Maiden article, which should have been the starting points of the reasonableness assessment, undermines all of his Honour's conclusions about Wilkinson's conduct.

Presumed falsity of entire matter – Grounds 2(a), 2(b), 2(d),2(l), 2(x)

21. His Honour erred in approaching the question of reasonableness for s30 from "*the premise the rape allegation was not true*": TJ[922], CA p356. That error carried through to the incorrect conclusion that the respondents were unreasonable because they "*started from the premise that what Ms Higgins said about her allegations was true*": TJ[936(8)], CA p362.

22. Although the defence of statutory qualified privilege only arises when the defamatory matter is not otherwise defended, that does not mean that the truth or falsity of what was published is relevant to the defence nor can the reasonableness of the conduct be judged by reference to that factor: *Duma v Fairfax Media Publications Pty Ltd (No 3)* [2023] FCA 47 at [239]-[267] per Katzman J and the authorities there cited. In many cases, like in *Duma*, s30 is the only defence relied on, and the truth or falsity of the defamatory matter is not a contest engaged in by the parties for determination by the Court. That occurred here in relation to the "cover-up" allegations. There was no imputation that the publishers sought to justify that related to that allegation – the truth or falsity of it was not in issue between the parties as to any aspect of the proceedings.

23. The task for the Court is to examine the circumstances that have led to the publication of an otherwise undefended defamatory matter. It is not for the Court to assess the publisher's conduct on the premise that the source was not telling the truth and the defamatory matter was false. The Court's assessment as to the reasonableness of the respondents' conduct should have been neutral as to the truth or falsity of the defamatory matter and therefore Ms Higgins' credibility. Rather than undertaking the assessment of reasonableness for s30 from a neutral standpoint, the primary judge sought out and relied on material that the primary judge considered evidenced the unreliability of Ms Higgins (a matter that his Honour had considered and assessed in detail for the purposes of the justification defence).

24. In doing so, the primary judge criticised Wilkinson and Angus Llewellyn for approaching the matter from the opposite perspective, repeatedly referring to their unwavering belief in Ms Higgins from the outset and suggesting that it evidenced lack of independence or bias on their part. It was the primary matter that His Honour relied on in his assessment of Wilkinson's reasonableness, as is extrapolated below: TJ[942]-[943]; [949], [954]-[960], CA pp364-368. This factual premise, which underpinned the failure of the defence, ignored the objective evidence of contemporaneous complaint (in March 2019) that Wilkinson had in her possession from the outset, which was one of the grounds of her unchallenged belief in Ms Higgins' rape allegation against Mr Lehrmann: TJ[936]-[963], CA pp358-369. The fact that Wilkinson was, two years after the alleged rape, provided with documentary evidence of contemporaneous complaint was essential to the assessment of reasonableness and would have been taken into account if a neutral evaluation not infected by error had occurred: c.f. TJ[535]-[543], CA pp236-237.

25. In the factual narrative (TJ[781], CA p306-307) the primary judge describes information in the Timeline document (Ex R125) provided to Wilkinson when she was first approached by Mr Sharaz, said to indicate the unreliability of Ms Higgins from the outset, but erroneously fails to have regard to the contemporaneous complaint emails and messages that were also included, directly corroborative of the very serious allegations she made against Mr Lehrmann: (1) email dated 2 April 2019 from Federal Agent Thelning; (2) email from Ms Cleaves from the AFP about a SACAT (Sexual Assault and Child Abuse Team) appointment; (3) email from Ms Cripps from the CRCC (Canberra Rape Crisis Centre); (4) email dated 13 April 2019 from Ms Higgins to Sarah Harman from SACAT; (5) message from Ms Brown on 31 March 2019 inviting Ms Higgins to bring her father to talk with Senator Reynolds; (6) messages with Mr Dillaway referring to her incident; and (7) message to Mr Dillaway about being assaulted by Bruce in Senator Reynolds office. Mr Sharaz also emailed the Timeline document on 19 January 2021 with a screenshot from the ACT Police recording a sexual assault complaint in 2019 at Parliament House, a document that was independently verified by Mr Llewellyn: Ex R124.

26. Wilkinson also had reliable information that Ms Higgins remained a loyal Liberal Party staffer for almost two years after her rape complaint – which significantly undermined any suggestion of a political motive in relation to the rape allegation. As is seen below, the trial judge spent some time addressing the conduct and motives of Mr Sharaz, despite the fact that he was not in Ms Higgins' life in 2019, at the time of her contemporaneous allegations of rape.

27. The consequences of the erroneous approach premised on the falsity of the allegation and thus the unreliability of Ms Higgins, so as to ignore the contemporaneous complaint evidence and finding that Wilkinson was bias and lacked independence, were significant because the documents were central to Wilkinson's early and ultimately unshaken belief in Ms Higgins allegation of rape (Wilkinson Aff [36]) which subsequent fact checking by the *Project* team and comment from the Commonwealth corroborated in her mind.

28. Wilkinson had a reasonable basis to believe the truth of the very serious rape allegation once she reviewed the Timeline and then spoke to Ms Higgins a number of times, that belief was reasonably based on her assessment of Ms Higgins and on objective factual material that was, to her knowledge verified, and she did believe in the truth of the rape allegation at the time of publication.

Credit not a factor, approach to fact finding – Ground 2(c), 2(i), 2(j), 2(l)

29. His Honour erred in his approach to fact finding in relation to the s30 defence: TJ[762]-[766], CA p302-303.

30. In concluding that the Court was not bound to accept the unchallenged evidence, the primary judge noted that there "*was no denial of procedural fairness in this case: everyone knew what was in*

issue, and everyone had a chance to address those issues": TJ[766]. The error in the finding is that, from Wilkinson's perspective, there was no effective challenge to her conduct and knowledge relevant to the publication of the rape allegation about Mr Lehrmann.

31. Wilkinson was cross-examined for about a day and half, but only in relation to a relatively narrow set of topics. The cross-examination substantially focused on the Logies speech, the problems with Ms Higgins' phone and Wilkinson's state of mind in relation to the "*roadblocks*" and the "*cover-up*" allegations: T1724-1897. Despite the limited topics of cross-examination, Mr Lehrmann's counsel made a generalised, unhelpful, assertion that none of Wilkinson's evidence should be accepted.

32. The chronology of events leading up to Broadcast was consistently set out in affidavits from persons whose evidence as to what occurred was not challenged in cross-examination or in submissions. That evidence was supported by a large body of contemporaneous documents.

33. Subject to particular observations, the trial judge accepted that parts of Wilkinson's evidence were sincere and genuine. His Honour accepted that Wilkinson believed Ms Higgins, including in relation to her allegations about Minister Reynolds' knowledge at the time of the 1 April meeting, and that Wilkinson was confident in her colleagues who were responsible for different aspects of the Broadcast beyond her own: TJ[322]-[323], CA p189. Despite those findings, his Honour found that he did not accept that Wilkinson relied on the production team to fact check Ms Higgins' allegations: TJ[947], CA p365. This issue formed a large part of Wilkinson's affidavit in which she detailed her conduct, knowledge and communications with other members of the production team in the latter part of the production phase, after Wilkinson had conducted the recorded interview with Ms Higgins: Wilkinson Aff [102]-[109], [111]-[119], [123]-[133]. Neither the cross-examiner nor the primary judge put to Wilkinson that any of this evidence was inaccurate (despite the primary judge intervening during the cross-examination of Wilkinson to ask other questions). Mr Lehrmann made no specific submission that Wilkinson's evidence in this regard was inherently implausible, nor was it in fact implausible.

34. Further, Lee J found that Wilkinson "*must have known that this fact checking was not starting from a point of independence and professional detachment but from Mr Llewellyn's acceptance of the veracity of Higgins' account*.": TJ[949], CA p366. This was not a matter put to her and nor was it the subject of any specific submissions.

35. In *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361; HCA 11 (at [69]-[75]) the High Court found that a trial judge erred in making findings against a party who gave evidence, where those allegations were not notified to that party/witness prior to judgment.

Wilkinson as an individual – Grounds 2(d); 2(i); 2(j); 2(l)

36. The primary judge accepted that the conduct of Wilkinson needed to be considered separately to that of Network Ten for the purposes of her defence under s30 of the Act: TJ[899], CA p347-348.

37. However, his Honour erred in his findings about this issue and failed to have regard to evidence relied on by Wilkinson on this topic. At the outset, the acceptance as "*accurate*" a submission made by senior counsel for Mr Lehrmann as to Wilkinson's position about her role in the Broadcast was erroneous: TJ[941], CA p363. His Honour also erred in finding that there was an "*attempt to seal her off from the final content and publication of the programme*": TJ[944].

38. Wilkinson admitted at trial that she was a publisher – which is unsurprising given that any person who participated in the publication of the Broadcast was a publisher of the defamatory matter for the purposes of s30. The producers, writers, editors, cinematographers, in-house lawyers, Network Ten executives and even Ms Higgins were all publishers. In the case of print journalism, typically a journalist writes an article, and subject to editorial control, decides what is said (and not said). Televised news, on the other hand, and current affairs involves many individuals with different skills and experience. Each of those persons had a different level of involvement and control over the form and content of the Broadcast. The uncontested evidence was that Wilkinson brought the story to Network 10 and was intimately involved in its development. However, when it came to decisions about content, editing and music – her views were not determinative and indeed, on the most part, were not even sought for consideration. Wilkinson's evidence on her involvement from time to time (or lack thereof) was recorded in the contemporaneous records and the unchallenged evidence of the witnesses. As previously submitted, there was no dispute about the relevant chronology of the instigation, development and ultimate publication of the Broadcast. Contrary to the findings at TJ[941] and [944], Wilkinson was not disclaiming responsibility for the Broadcast nor seeking to suggest that she had "*some kind of lesser responsibility*".

39. Culpability as a publisher involves a wide spectrum of conduct. Similarly, in the consideration of reasonableness in publishing defamatory matter, individual conduct and control needs to be assessed. His Honour was invited to consider Wilkinson's conduct in the context of what she did, what she knew, and what she was reasonably able to do in the context of her role as a presenter of the *Project* working as part of a larger team including her bosses. In accepting Mr Lehrmann's mischaracterising submission, the Court failed to engage in this task in relation to Wilkinson.

40. Extensive unchallenged evidence was adduced about the role of different employees in the television broadcast process and the specific processes that had long been used to produce *The Project*. That included specific evidence as to the expertise of the individuals involved in the Broadcast in question and Wilkinson's reliance on each of their experience and expertise.

41. In that regard, his Honour correctly accepted the submission on behalf of Wilkinson that "*the defence is focussed on conduct, and all the attributed conduct of Network Ten is not her conduct*": TJ[940], CA p363. His Honour then went on to accept that "*various communications did not go to her*", she "*did not write the script*", and it was not possible for Wilkinson to be involved "*in any late additions*": TJ[944], CA p365. His Honour also accepted that "*Wilkinson did rely upon trusted and experienced producers and reposed confidence in the expertise of each of Mr Campbell, Mr Meakin, Ms Binnie, and Mr Bendall in doing their jobs in supervising and approving the work undertaken*": TJ[946], CA p365.

42. However, as is discussed above, the primary judge rejected her unchallenged evidence that she relied on the production team to fact-check Ms Higgins' allegations: TJ[947]. In doing so, in addition to the problems raised in relation to fairness, his Honour did not refer to, and plainly failed to have regard to, the evidence of the extensive fact checking process from other witnesses:

    (a) Sarah Thornton gave evidence of the fact checking process which included "steps taken to independently verify and fact check Ms Higgins' allegations" and the "*extensive steps*" taken by Mr Llewellyn "*throughout the production process to fact check Ms Higgins' story*": Thornton Aff [49]-[55].

    (b) Christopher Bendall gave evidence that it was "normal for the producer, who on this story was Mr Llewellyn, to carry out the bulk of the investigation and fact checking in the lead up to a story being prepared for broadcast": Bendall Aff [51]-[52].

    (c) Angus Llewellyn confirmed that it was his role as the producer to conduct fact checking and that he approached all stories with a degree of scepticism: Llewellyn Aff [12(b)]; [72]. He gave extensive evidence of the steps that he took ([150]-[196]).

43. His Honour also disregarded the evidence of other witnesses on the production team about the competence and experience of Angus Llewellyn: Thornton [53]; Binnie [27]; Campbell [18]. Also not referred to, was the role of Peter Meakin, a journalist for over 60 years who consulted on the preparation of the Broadcast, and communicated on a daily basis with Angus Llewellyn and Laura Binnie: Meakin Aff [22]-[23], [30], [35].

44. The fact that his Honour was unimpressed with Mr Llewellyn's conduct, assessed after the fact, was not a proper basis on which to find Wilkinson's reliance on him in February 2021 was not reasonable. That is erroneous hindsight reasoning.

45. It was plainly reasonable for Wilkinson to rely on those processes, conducted by a producer that she (and the rest of the team) considered to be experienced, highly capable and professional. His Honour erred in failing to have regard to this body of evidence in making findings about Wilkinson's reliance on Mr Llewellyn in this regard.

Legal advice – Grounds 2(g)

46. His Honour erred in discounting unchallenged evidence that Wilkinson relied upon the fact the Broadcast was "legalled" because his Honour was "*in the dark about the precise content of interactions with solicitors prior to broadcast*" did "*not know what precisely the solicitors were told, or what their detailed advice was, and to whom it was given*": TJ[950]-[951], CA p366.

47. The primary judge further erred in his findings that "*the provision of legal advice does not go very far*" and "*no assumptions ought to be made in this case, particularly when the only in-house legal advice revealed as to this matter was counterintuitive*": TJ[784]-[785]. His Honour concluded that he accepted that legal advice was obtained (he assumed) on the topic of whether to name Mr Lehrmann but otherwise found that "*it does not assist in the assessing of reasonableness of conduct if it is said the content of advice relevantly informed conduct*" and that further "*I cannot, and will not, act on speculation*": TJ[785].

48. Wilkinson is not and has never been a lawyer, nor does she have any legal training. She gave uncontested evidence of these matters, and further of her reliance on what she considered (at the time of Broadcast) to be the expert, experienced and conservative advice of the Network 10 lawyers: Wilkinson Aff [12]; [79]; [89]; [91]; [100].

49. The legal advice was pleaded, and Wilkinson placed emphasis on it at trial: Defence [15.53]-[15.59], CA p50; Written Closing [1A(g)], [68]-[72], [223]-[226], [543]-[551H], [580D(d)]-[580H], [643A]; T557, 559-560 (oral opening); T2279-2283, (oral closing); T2649-2651 (cross-claim closing). Evidence was admitted, without objection during the cross-claim and became evidence in the trial, that Wilkinson was informed and understood that the lawyers cleared the Broadcast for publication and that all legal requests were met by the producers in order to comply with the law. Despite the pleading, submissions and evidence, no call was made by Mr Lehrmann's lawyers for the content of that advice (TJ[786]), and nor was Wilkinson challenged on her evidence of reliance on the processes that she understood were being followed in relation to legal advice at Network Ten.

50. In addition to the Network 10 lawyers, Wilkinson also gave evidence that she was reassured, once she read the Maiden article shortly after 8:30am on 15 February (and before Broadcast), that the large in-house legal team at News Limited appeared to have approved the publication of Ms Higgins' allegations: Wilkinson Aff [120].

51. The finding that his Honour was not told to whom the advice was given is erroneous and does not withstand scrutiny (TJ[951]):

(a) Wilkinson gave evidence that she was aware that producer Angus Llewellyn was liaising with the Network Ten legal team "*at every stage of the investigation leading up to an including the broadcast*": Wilkinson Aff [89].

(b) Angus Llewellyn gave evidence that he usually worked closely with the legal team to seek legal advice and carry our legal checks and that was an important part of the production process right up until broadcast: Llewellyn Aff [47].

(c) Llewellyn gave further evidence that the legal team was more involved in the Broadcast than other stories – from the start and throughout the production: Llewellyn Aff [58].

(d) Llewellyn gave evidence that from 26 January to 15 February 2021 he spoke to senior lawyer Myles Farley "*almost every day for the purposes of obtaining his legal advice in relation to the [Broadcast]*": Llewellyn Aff [95].

(e) Llewellyn detailed specific incidences of seeking and obtaining such legal advice, including creating and using a WhatsApp chat group with senior in-house lawyers Tasha Smithies and Mr Farley for that purpose: Llewellyn Aff [154]; [205]; [225]; [242]; [253]; [262]; [272]; [278]; [312]; [315]; [334]; [359]; [369]; [371]; [397]; [401].

(f) Sarah Thornton (who was not cross-examined) gave evidence that she received legal advice about the Broadcast and reported it to Network Ten CEO Beverley McGarvey: Thornton Aff [40]-[41]; [65]; [68].

(g) Supervising producer Laurie Binnie (also not cross-examined) gave evidence that it was her role to liaise with the in-house lawyers and to seek and consider pre-publication legal advice: Binne Aff [18(d)].

(h) Chris Bendall referred to the use of independent fact-checkers and lawyers used by the Project and a meeting in which he received legal advice from Mr Farley: Bendall Aff [19]; [26]; [58].

(i) Craig Campbell (also not cross-examined) gave extensive evidence about his use and involvement of lawyers: Campbell Aff [25]; [27]; [30]; [42].

(j) Peter Meakin gave evidence that the production team took legal advice on how far they could go without being guilty of identifying Mr Lehrmann: T195.4-38.

52. Further, as to the nature of that advice (TJ[950]):

    (a) Wilkinson gave unambiguous evidence that the Network Ten lawyers were involved at every stage and that in her experience they were very conservative and highly experienced.

    (b) Mr Llewellyn gave evidence that the legal team, fact checking team and heads of Department reviewed all stories and that he usually worked closely with the legal team to seek legal advice and carry out legal checks.

    (c) Peter Meakin gave evidence that he was aware that the in-house lawyers were involved from very early on and throughout the production process until the publication of the Broadcast.

    (d) Sarah Thornton gave evidence about legal advice throughout the production process, including as late as the day of Broadcast noting that Network Ten's lawyers "*were heavily involved in the story from the very start of the process*".

    (e) Craig Campbell gave evidence that he "*went to great lengths to ensure Network Ten's in-house lawyers were involved with the development of the story*".

    (f) Further, Mr Campbell said that the lawyers' views about the credibility of the woman making the allegation would be an important part in the preparation and production of the story: Campbell Aff [25]. This accorded with Wilkinson's evidence (at [100]-[102]) that Ms Smithies watched the interview of Ms Higgins as it took place and immediately told Wilkinson that she considered Ms Higgins to be *"credible*": Wilkinson Aff [100]-[102].

    (g) Mr Bendall confirmed that it was part of his role to ensure that *"all necessary rights of reply, fact-checking and legal processes have been complied with*". He explained the legal process undertaken for the Broadcast in detail: Bendall Aff [115]-[127].

    (h) The unchallenged evidence from multiple witnesses was that extensive legal advice was sought and obtained throughout the production process by various eminently experienced and professional television production operatives. That advice was provided by highly experienced media lawyers who were intimately involved in the production process.

53. In briefly referring to Wilkinson's reliance on these processes, his Honour failed to have regard to the above-summarised body of evidence and failed to take into account that receiving, relying upon and following the advice of a group of persons whom she considered at the time to be competent and experienced legal advisors is a hallmark of reasonableness for a journalist. The content of the advice was not relevant to Wilkinson's s30 defence, she relied on the fact that the process was taking place between the lawyers and the producers.

54. His Honour instead accepted Network Ten's submission that its decision to broadcast ultimately turned on Network Ten's confidence that Ms Higgins was telling the truth – a decision for the

production team, not solicitors, and accepted that the truth of Ms Higgins' account was never in doubt in the minds of Mr Llewellyn and Wilkinson: TJ[787], CA p308. That was not Wilkinson's position. Her argument was that she believed that advice was given and followed throughout the process and that to her knowledge, the lawyers cleared the Broadcast for publication. In this aspect of the case, Wilkinson's position differed significantly to that of Network Ten because she was not accountable for the quality of that advice – rather the question was whether she could reasonably rely on the fact of it.

Notification of Lehrmann/request for comment – Grounds 2(e)(v), 2(e)(vi), 2(e)(vii), 2(h), 2(r), 2(s)

55. The primary judge erred in finding that the respondents' conduct in seeking comment from the appellant "*were pointers*" as to why Wilkinson's conduct fell short of reasonableness: TJ[936(6)-(7)],[963]. The limited finding implicitly acknowledges that Wilkinson did not have an active role in seeking comment from the appellant.

56. The primary judge commenced the consideration of the evidence on this issue by outlining evidence from the executive producer, Mr Bendell, responsible for approving the publication of the Broadcast. That evidence describes discussions with Mr Llewellyn, Mr Meakin and Mr Farley (an in-house lawyer) but importantly not Wilkinson. That evidence directly corroborated Wilkinson's uncontested evidence that she was not part of the decision as to when requests for comment were sent or the timing of the Broadcast: Wilkinson Aff [112]); c.f TJ[862]-[874], CA pp335-339.

57. The primary judge erred, in the evaluation of a statutory qualified privilege defence, in criticising a producer (and by reference Wilkinson) seeking to follow a practice the High Court in *Lange* (see also s30(3)(h)) has described as an index of reasonable conduct: TJ[868]-[874]. The reason in-house lawyers recommend this step to guard against defamation risk is not just box-ticking, it is because the Courts have stated that giving such an opportunity to respond is a hallmark of reasonableness. The trial judge's reasons effectively criticise the publishers for taking steps, based on legal advice, to attempt to meet this standard. These reasons are inherently flawed.

58. As to the timing (about 2:30pm on the Friday not late afternoon) Mr Lehrmann was the only person who did not respond to the request for comment and have Network Ten publish those responses prior to Broadcast. The primary judge's suggestion that the respondents' conduct was unreasonable because there was no time to test the veracity of Ms Higgins' interview second guesses, without any proper basis, the professional editorial and production decisions of some of the most experienced television news and current affairs journalists in this country and is removed from commercial reality: TJ[874]; Bendall [58]; Lewellyn [322]; Thornton [77]; Wilkinson [113].

59. As to the inclusion of contrary information, pertinent responses to Ms Higgins' allegations received after 12 February 2021, including speeches in Parliament, were incorporated into the Broadcast.

60. Wilkinson repeatedly, contrary to the primary judge's findings about her state of mind, exhibited a desire to talk to and ask questions of Mr Lehrmann and other people that she hoped would be included in the Broadcast as illustrated in the questions she drafted sent to Mr Llewellyn in exhibit R541 that he pushed back on: Wilkinson Aff [115]; [125]-[127].

61. Wilkinson contends that the primary judge erred in failing to find that the appellant did receive one of Mr Llewellyn's emails before broadcast. The primary judge found the appellant was someone who "*told deliberate lies*" such that anything he said was not accepted unless where it amounted to an admission, accorded with the inherent probabilities, or was corroborated: TJ[153]. Nonetheless, the primary judge relied upon his evidence on this issue: TJ[871].

62. There was no dispute on the evidence that Mr Llewellyn's first email on 12 February was sent and received by the appellant: Lehrmann Aff [15(a)]; [22]. However, strangely, Mr Lehrmann did not give evidence about the second email sent on 15 February, nor did he give discovery of the emails. The only significant fact in issue was when the 12 February email was read, that is, was it before or after the Broadcast? His Honour relied upon the absence of any contemporaneous record of receipt, but this was a tenuous basis to reach that conclusion in light of the credit findings. It was also problematic for two further reasons: first, the contemporaneous record that morning evidenced the appellant lying to his friends about who the Maiden article may be about; and second, there is no contemporaneous record of his discovery of the emails later which would be expected given his repeated complaints about the injustice to him that he expressed in his messages once he shared his plight to his friends and his hurt described in [22] of his affidavit: see Exhibit R36. If the Court is satisfied the emails were received, then a reasonable attempt to contact the appellant for his response was established.

63. As the primary judge correctly observed, to the extent the Court is not satisfied the request was received the publisher need only prove they made a reasonable attempt to contact him. A reasonable attempt was established because it is inherently reasonable for a producer to infer that a person will routinely check a personal email account on a free service from Google (Gmail), Apple (iCloud) or Microsoft (Outlook/Hotmail) or would keep a mobile phone used for professional reasons when they moved jobs. The primary judge erred in not reaching that conclusion.

64. In any event, none of these findings about mobile phones, email addresses or other avenues of contact impacted the reasonableness of Wilkinson. Wilkinson understood that the questions had been effectively communicated to Mr Lehrmann on 12 February with a follow up on the morning

of 15 February. It was reasonable for her to rely on her experienced producer Mr Llewellyn to carry out that task. Further, the finding that Network Ten's motive in sending the questions to Mr Lehrmann was merely a "*box-ticking exercise*" to protect against defamation is also beside the point, particularly when it comes to assessing Wilkinson's reasonableness: c.f TJ[869]; [1030]. The evidence established that the questions sent to Mr Lehrmann were detailed, and that Wilkinson believed that any answers he gave would be published as part of the Broadcast, or that any interview he gave would also be published. To the extent that it was a "*box-ticking exercise*", it was one carried out to be fair to Mr Lehrmann, and therefore inherently reasonable.

65. Responses were received, to Wilkinson's knowledge, from other recipients of questions sent about the same time as those emailed to Mr Lehrmann on 12 February. Further, given the Maiden article and the promotional material for the Broadcast throughout the day, Wilkinson reasonably believed that Mr Lehrmann was, prior to Broadcast, on notice of the allegations against him and that they would be the subject of the Broadcast. This belief was erroneously not taken into account by the trial judge in assessing the reasonableness of her conduct.

66. The findings by his Honour about Mr Lewellyn's failures to obtain a better means of communicating with Mr Lehrmann and the findings about the timing of that communication were incorrectly relied upon by the trial judge as factors against Wilkinson on reasonableness.

Ignored warning signs/obvious steps not taken; bruise photo – Grounds 2(e)(i), 2(e)(ii), 2(e)(iii), 2(f), 2(h), 2(i), 2(j), 2(k), 2(m), 2(p), 2(q), 2(r)

Trauma & other evidence

67. The conclusions about the reasonableness of Wilkinson's conduct in TJ Part K.5 are to be understood by reference to the findings against Network Ten in TJ Part K.4 in the context of the findings in Part J (including the errors already identified in these submissions about the factual findings in Part J).

68. The primary judge erred in finding that Wilkinson ignored "*warning signs*" and failed to take "*obvious steps*" such that her conduct was unreasonable: TJ[962]-[963], CA p368. This finding turned on what the trial judge perceived to be deficiencies in the credibility of Ms Higgins and Mr Sharaz. As discussed above, these findings were infected by error because of his Honour's failure to have regard to the corroborative documents about rape complaint presented to Wilkinson at the outset.

69. There can be no dispute in listening to the recording of what Ms Higgins said to Wilkinson during the five hour meeting (Ex 36) that she was sometimes unclear about some matters or the timing of certain events. Ms Higgins also often referred to her reaction to events (how they made her feel) rather than clearly describing what occurred. In criticising Wilkinson's acceptance of Ms

Higgins despite these "*warning signs*" the trial judge erred in failing to have regard to Wilkinson's evidence about her extensive experience in speaking to survivors of sexual assault: Wilkinson Aff [74(g)].

70. As outlined in agreed facts tendered for the justification defence (TJ[117], CA p134-135) trauma has a severe impact on memory. The primary judge erred at TJ[952] in treating Wilkinson's specialised knowledge and experience speaking with sexual assault survivors as subjective views that did not withstand objective analysis. The fact that, in some respects, the publishers considered Ms Higgins to be an unreliable historian, did not mean that her allegation of rape was unreliable or something that an experienced journalist could not have reasonably believed or that required answers to the unanswerable on the matters the primary judge identified. In concluding his findings on Wilkinson's reasonableness, his Honour erroneously discounts Wilkinson's reliance on Ms Higgins, a person to whom she spoke at length and questioned on a number of occasions, as compelling.

71. His Honour makes a further finding, said to be relevant to reasonableness, that Wilkinson put words into Ms Higgins' mouth: TJ[960], CA p368. This not a fair or correct characterisation of the exchange. The conversation occurred during the five hour discussion that was not used in the Broadcast, Ex 36: TJ[789], CA p308. In any event, in the context, these are matters that Ms Higgins had already raised in her communications with Wilkinson and the impugned discussion occurred more than 3 and half hours into the meeting after Ms Higgins had already described the circumstances in which she did not proceed with the complaint and her acceptance of the extreme demands of working in Parliament where there is a "*weird little culty vibe*": 1:07:14-1:07:45.

Bruise photo

72. The primary judge also erred when making the related finding that Wilkinson did not have a reasonable basis to conclude that there was sufficient work being done when she was present when issues of credibility arose as to the so-called "conspiracy theory", the "bruise" photograph and selective production of data that were not addressed. His Honour found that Wilkinson allowed her concerns about Ms Higgins' explanations as to how she lost material on her phone and selected material survived, to be "*fobbed off*" by what was said to be a "*self-evidently inadequate respons*e": TJ[947]-[949], CA p365-366. The primary judge did not identify what additional and "*obvious steps*" Wilkinson ought reasonably to have taken within her employed role in those circumstances.

73. The primary judge erred in pointing to Ms Higgins' explanation about her "loss" of material and the bruise photo as significant to the credibility of her allegation of rape and other matters raised at the first meeting on 27 January 2021 as a justification to find Wilkinson paid insufficient scrutiny to these matters to conduct an informed assessment of Ms Higgins' credibility:

TJ[936(1)], [830]. In making these findings, his Honour did not evaluate the significance of Wilkinson's possession and knowledge of the contemporaneous documentation of complaint two years before: TJ[767]-[831]. There was no basis for the primary judge to conclude Wilkinson knew or ought to have known or suspected that Ms Higgins had "curated", used in a pejorative sense, such contemporaneous material: see TJ[818]; c.f. findings on Ms Higgins' credit at TJ[254],[258] that could not properly be taken into account on the s30 defence. Such a proposition was never put to Wilkinson in cross-examination. The primary judge did not have any regard to the significance of the contemporaneous documents provided to Wilkinson other than the bruise photograph in making that finding and did not explain how "selective retention" could affect Ms Higgins' credibility <u>on the rape allegation</u>. Any person or journalist acting reasonably would consider those documents, with or without any potential context from other documents that might have existed, to evidence a contemporaneous complaint of rape.

74. Instead, his Honour concluded that Wilkinson allowed her genuinely held views about sexual assault that many would hold "*worthy*" to undermine her fairness and independence such that she ignored the "*warning signs*": TJ[954]. By failing to assess the significance of the contemporaneous documents other than the bruise photograph this was an error.

75. The evidence before the primary judge was that Wilkinson did question why the photograph existed despite the loss of the telephone data, contrary to the ultimate finding that she did not take "*obvious steps*": TJ[808]. Mr Llewellyn's response was that he would talk with Ms Higgins (TJ[809]) not the erroneous finding that this response cleared things up for Wilkinson: TJ[810]. Wilkinson's evidence was that, having raised it, she relied upon Mr Llewellyn to investigate the matter, as she had requested and he said he would, and that she continued to raise the matter and she was later advised that the matter was addressed: Aff [94]; T1747-1748, 1752-1753. Wilkinson was not "*fobbed*" off by this message as the primary judge found, which formed his Honour's basis to conclude she did not act reasonably.

76. The query was not ignored by her producers who, having no documentary evidence as to the date of the photograph one way or another, addressed the issue by having the source declare in a statutory declaration two weeks later the provenance and date of the photograph. The primary judge dismissed the significance of a person verifying her claim under oath: TJ[886]-[888]. However, it evidenced that the photograph issue was pursued by the producers, and that Wilkinson had a further basis to feel confident in Ms Higgins' credibility. It was significant to Wilkinson that this occurred, given her understanding that "*signing a false statutory declaration was a criminal act*": Aff [109]. His Honour referred to the statutory declaration in the context of Mr Llewellyn's state of mind and Network Ten's submissions on reasonableness: TJ[815]-[818];

[886]-[888]. However, the primary judge had no regard to Wilkinson's evidence on this issue in concluding that her reliance on Ms Higgins' credibility was not reasonable. That was an error.

77. Relevantly, from the time of the 5-hour meeting (27 January) and until Broadcast, Wilkinson had been directed that Mr Llewellyn was to be the point of contact with Ms Higgins and Mr Sharaz: Wilkinson Aff [93]. This was another matter that the trial judge erroneously failed to have regard to in finding that Wilkinson failed to take "*obvious steps*".

Sharaz motives

78. A further concern the primary judge identified was the possibility that Ms Higgins, with Mr Sharaz, in 2021 might be prone to speculation and conspiracy: TJ[799]. That concern, however, could not rationally affect the credibility of her rape complaint against Mr Lehrmann that was first made in 2019. This finding can be relevantly read with the findings generally about the trial judge's concerns about the motivations of Mr Sharaz: TJ[936(3)].

79. The primary judge makes findings about the genesis of the story and the Timeline document and the involvement of Mr Sharaz: TJ Part J.2. It is unclear why it was necessary for findings to be made, based on evidence in the trial, as to who drafted the document and its purpose: TJ[772]-[778]. The only relevant finding in relation to the document in so far as Wilkinson was concerned was the fact that she was provided with it, she read it and the reliance she placed on it. In assessing the Timeline (as discussed above) His Honour placed undue emphasis on the "cover up" aspect and made no reference to the material corroborative of the rape allegation: TJ[781].

80. Further findings are made about Mr Sharaz and his motives and Llewellyn's and Wilkinson's knowledge of those motives: TJ[794]-[798]. It is unclear, given Mr Sharaz was not a source of the rape allegation, and was not in the picture in 2019 when Ms Higgins reported the rape to various persons, why his Honour considered these findings relevant to the reasonableness of the respondents' conduct in publishing the rape imputation. Wilkinson was aware that Mr Sharaz was not in the picture in 2019 when Ms Higgins made the allegation of rape to the chief of staff, the Minister, her friend Mr Dillaway, various police officers and a rape counsellor. It is difficult to comprehend how Mr Sharaz's motives could impact Wilkinson's belief in the truth of the rape allegation in those circumstances.

81. The primary judge at TJ[797] relied upon selected extracts from a five hour conversation (Ex 36) that went from 1:14:09 in the second recording of the meeting to 1:53:35 in the third recording, a total of 2 hours 8 minutes 48 seconds (not 39 minutes 25 seconds as suggested) devoid of context. The first part of the extract includes Mr Sharaz telling Wilkinson and Llewellyn that the timing and interactions with politicians was so "*[h]opefully we can try and get the footage, that sort of stuff, for Britt's clarity.*" Not included in the extract was the follow-up from Ms Higgins at 11:07

in the second recording answering a question whether it was her plan to go back to the Police where she explained that she would if senate estimates could get *"footage, whether it's the logs, anything that I can kind of use to back up my word more so than just my word."* The primary judge did not refer to Ms Higgins' motive, that Mr Sharaz first raised when mentioning senate estimates in TJ[797]. The second extracted exchange immediately followed Ms Higgins' explanation of her motive and the discussion about politics was in this context – namely Ms Higgins' motive to use the Senate to obtain evidence for the police: see also Wilkinson Aff [71]. Further, the trial judge did not refer to Wilkinson's request, immediately after the later two hour interview, in which she requested the Broadcast include the statement from Ms Higgins that it was not a "*Liberal party or Labor party problem*" but an "*everywhere problem*": Ex R327.

Eight pointer assessment

82. The eight "pointer" assessment at TJ[936] of Network Ten's conduct, which goes on to inform his Honour's findings about Wilkinson TJ[963], adopts the wrong approach for the reasons already articulated. Further, it fails to have regard to the detailed questions sent by Network Ten days before Broadcast (a step that occurred to Wilkinson's knowledge) to Fiona Brown, Minister Reynolds, Minister Cash, the Speaker of the House, President of the Senate, the AFP, individual AFP officers, Mr Kunkel, Mr Finkelstein, and Mr Try: Exs 619-632.

83. In noting the evidence about the importance of seeking comment from persons referred to in the Broadcast or potentially affected persons, other than Mr Lehrmann, his Honour does not list each such person or refer to the content of those enquiries: TJ[862]-[874], CA p335-339. It is clear that in assessing Wilkinson's reasonableness, there was a failure by the primary judge to have regard to this step. This was a significant error, given each of those persons were relevantly asked questions about the allegations made by Ms Higgins concerning the response to her rape complaint.

84. Further, his Honour relies on his finding about Wilkinson's state of mind, being views she expressed to Ms Higgins and Mr Sharaz, as a reason why she "*was dismissive about anything which might be seen to constitute information contrary to what Ms Higgins said right up to the time of publication*": TJ[953]-[956]. However, no such information was identified by his Honour that relates to Wilkinson's conduct in publishing the rape allegation about Mr Lehrmann.

Carswell material & Brown & Reynolds

85. His Honour referred to Wilkinson being in possession of information that contradicted Ms Higgins: TJ[955]-[963]. However, no such precise evidence is referred to in relation to the rape allegation. There is a reference by his Honour to the "Carswell response". If that is intended to be the evidence set out at TJ[876], then as to the rape allegation, that statement corroborated Ms

Higgins. If the "Carswell response" is also intended to include the material referred to at TJ[880]-[882], the uncontradicted evidence was the Mr Llewellyn did not pass that material onto Wilkinson: see TJ[885]. The finding at TJ[883] was in error, because the cross-examination of Wilkinson did not relate to the material referred to at TJ[880]-[882]. The cross-examination was limited to the "*for publication statement*" set out in TJ[876] and not the "*background material*" in TJ[880]. This part of the fact finding concludes with the conclusion at TJ[885] which was not put to Wilkinson or Llewellyn and is not open on the evidence.

86. The erroneous factual findings in the preceding paragraph are significant, because the trial judge relied on these findings to evidence unreasonableness. In the findings about Wilkinson, her evidence about a message she sent to Mr Llewellyn on the day of Broadcast about comments being made in the Senate about the Maiden article are set out: TJ[957], CA p367. Consistently with incorrect factual findings at TJ[876]-[885], the paragraph does not accurately summarise the evidence. In particular, it is not an accurate description of the Carswell response set out at TJ[876] which relevantly confirmed:

(a) the fact that Ms Higgins reported the sexual assault to Minister Reynolds in 2019;

(b) the timing of the incident and the knowledge of staff (26 March 2019);

(c) the meeting between Minister Reynolds, Fiona Brown and Ms Higgins in the Minister's office - regret was expressed about the location of the meeting;

(d) the Prime Minister's office was aware of the rape complaint in 2019.

That document was not, as his Honour finds "*contradictory to what Wilkinson considered to be the core aspect of Ms Higgins' account*" (given the core aspect was the rape, and the fact that it was reported within days of it occurring). Further, the statement did not, as erroneously found by the primary judge, "*refer to contemporaneous material*": TJ[957].

87. In evidence Lee J asked Wilkinson to identify the lies she believed Minister Reynolds had spoken that morning in the Senate. Despite issues raised about Parliamentary privilege (T1891.25) Wilkinson identified the portion of Hansard where Minister Reynolds claimed that at the time of meeting Ms Higgins, she was not aware of the details or circumstances of the alleged incident in her office and would have conducted the meeting elsewhere: T1895.1-21. Wilkinson, having read the government's response expressing regret, the statement that she was encouraged to go to police; and having spoken to Ms Higgins about the issue, plainly had a sufficient basis to form the view that "*she was lying through her teeth*". Minister Reynolds' statement in the Senate appeared to be directly contradicted by the statement issued on the Government's behalf by Mr Carswell that Wilkinson had just read as she watched Parliament.

88. His Honour further relies on the fact that the Carswell statement was not raised with Ms Higgins as a factor against reasonableness: TJ[957]. Given the Broadcast included, at line 107, the response from the Government in the Carswell statement that Senator Reynolds and Ms Brown had encouraged Ms Higgins to speak to police, and Ms Higgins was guaranteed there would be no impact on her career, it was unnecessary to raise it with Ms Higgins. Both sides were presented in the Broadcast and viewers were informed where to find the full statement on the website.

89. The finding that Mr Meakin gave evidence that it "*would have been desirable*" to go back to Ms Higgins to check this contrary account is a misstatement of the evidence and erroneous: TJ[958]; T1961.5-1962.42. Mr Meakin was not being cross-examined about the "*for publication*" statement that Wilkinson read before Broadcast, which was the subject of her evidence referred to at TJ[957]. He was being cross-examined about the "background only" email from Mr Carswell to Mr Llewellyn which was not provided to Wilkinson. His Honour goes on to make a finding about Wilkinson, conflating two very different pieces of information from Carswell (one that Wilkinson was provided with, and one that she was not) to find, erroneously, that this affected her reasonableness: TJ[959], see also TJ[936(8)], being the finding against Network Ten picked up against Wilkinson at TJ[938].

90. In connection with the findings about the Carswell material, the primary judge identified so-called "*inconsistencies*" in relation to Senator Reynolds and Ms Brown: TJ[936(2)]. Given both Senator Reynolds and Ms Brown were not present during the alleged rape, the allegations against them in the Broadcast necessarily did not directly impact upon the credibility of the rape allegation. As discussed elsewhere in these submissions, each of them was sent detailed questions prior to publication and a response was provided by Mr Carswell, the government spokesperson on their behalf. Where the spokesperson contradicted Ms Higgins, that was included in the Broadcast.

Matters not relevant to reasonableness "Cover-up" including CCTV – Ground 2(b), 2(n), 2(o), 2(t)

91. The primary judge accepted Wilkinson's submission that, because s30 is a defence of confession and avoidance, the focus of the inquiry is the matter, "*but in its character of conveying the defamatory imputation*": TJ[919]-[921]. This finding is supported by the language of s30 which is a defence to the "*defamatory matter*" and the requirement that the conduct of Wilkinson in publishing "*that matter*" is reasonable in the circumstances. In this case, the defamatory matter was plainly the parts of the Broadcast that carried the allegation of rape against Mr Lehrmann.

92. Despite ultimately accepting that submission, the primary judge focussed upon, both at trial and in the judgment (and even when hearing the costs argument after the judgment), allegations against politicians and political operatives who were referred to in the second half of the Broadcast. None of those persons sued Wilkinson for defamation and the truth or otherwise of those allegations

were not issues in dispute in the proceedings: T2165.35-2166.66; T2299.6-T2306.6; T2304.1 T2964.1-2968.21.

93. In this regard, Wilkinson gave evidence about the information in her possession to justify the use of the term "*roadblocks*" in the Broadcast: WWW [574]; T1974.1-1797.41; T2298ff. Despite the fact that the term "*cover-up*" was not used in the Broadcast, his Honour wrongly conflated the "*roadblocks*" referred to in the introduction with an alleged "*cover-up*" and, throughout the findings on reasonableness, criticised Wilkinson in relation to this topic: esp. at TJ[838]-[842]; [889]-[898]. The trial judge incorrectly found that this was "*an extraordinary serious allegation*" of "*conscious wrongdoing to secure a perceived advantage*": TJ [898]. Those findings were not open having regard to the type of roadblocks listed in the Broadcast– such as a lack of a human resources department and the structure of the policing departments in Canberra.

94. Earlier, the primary judge had said that Ms Higgins was alleging "*an inappropriate, indeed criminal cover-up*" for which there was no reasonable basis: TJ[753], CA p290-299. Despite that however, his Honour accepted that the government did not want the story about Ms Higgins' complaint to be published for "*political reasons*" in contrast to Ms Higgins' privacy: TJ[744], CA p291. Ms Higgins' credit on this issue, as found by the trial judge in TJ Part I, CA p151ff, was irrelevant to the s30 defence. Of limited relevance to that defence, given it did not impact the reliability of the rape allegation, was that Ms Higgins informed Wilkinson that she felt that politics affected her interactions with Ms Brown and Senator Reynolds earlier that year. It was erroneous to find that Wilkinson did not act reasonably because she accepted the inherent plausibility of politics being a factor in Ms Higgins communicating an allegation of being raped in the Minister's office to politicians and their staffers.

95. In relation to the CCTV and the police in Canberra, his Honour erred in finding that Wilkinson did not take steps to become apprised of the timing and circumstances of the abandonment of the police complaint in 2019, where Wilkinson had a copy of the email (Ex R125) dated 13 April 2019 from Ms Higgins to Sarah Harman that gave effect to that decision: TJ[842]. As to the CCTV, the police confirmed in answer to questions that they had not been given the footage in March 2019.

96. That finding followed assertions by the trial judge as to his understanding of the policing system in Parliament House, rather than what Wilkinson knew at the time of Broadcast: TJ[838]-[842]. It is unclear why Wilkinson was criticised for her concerns that the AFP act at the direction of the "*parliamentarians*" while referring to the fact that US Capital Police are appointed by the "*legislative branch*": TJ[840]. The ordinary and reasonable Australian, not versed in constitutional law, would consider the government of the day and the prime minister as its head to control both the legislature and executive and would not distinguish between those two branches

of government. The primary judge's views, regardless of their historical or legal accuracy, about the importance of and justifications for parliamentary privilege in our constitutional system of government, did not make criticism of delays to obtaining the access to the CCTV footage unreasonable or illegitimate, particularly in the context of sexual assault: TJ[738]. This was a matter erroneously relied on by the trial judge in finding that Network Ten, and therefore Wilkinson were not reasonable: TJ [936(5)], CA p361.

97. In any event, all of these matters were the subject of questions to affected parties – including the President of the Senate and the Head of the House of Representatives, as noted above. Further, as is evidenced in the Broadcast, expert advice was sought from George Williams, a constitutional law expert, to explain the issue: TJ[839], lines 80-82 Broadcast.

98. Following on from the criticisms referred to in the preceding paragraphs, his Honour erred in his characterisation of the Broadcast in a number of respects: TJ[889]-[898]. This was part of the trial judge's emphasis on the "cover-up" allegations in assessing Wilkinson's conduct in publishing the rape allegation.

99. First, at line 167 where Wilkinson said, "*we of course approached all of the people named in our story, and all our requests for interviews were declined*". Contrary to the finding at TJ[895] given Mr Lehrmann was not named, this statement did not include him. Mr Meakin's view, not agreed to by Wilkinson (T1880), was irrelevant to her and, as a matter of plain English, is not a reasonable interpretation of the sentence. Further, the assertion is that everyone was "approached", not that everyone was asked to give an interview – merely that those who were asked declined. It is difficult to see how this issue could be of any significance in the assessment of reasonableness.

100. Second, in relation to the CCTV, the findings made by the primary judge were based on evidence before the Court, not information in the possession of Network Ten and Wilkinson, discussed above: TJ[896]-[897]. The finding that Wilkinson's statement was misleading (which must mean, to be relevant, knowingly misleading) was not open on the evidence.

101. Third, the finding that there was not a proper basis for suggesting that there were "roadblocks" obstructing the rape investigation, discussed above, also impermissibly conflated his Honour's findings based on evidence before the Court, and the information available to Wilkinson at the time of Broadcast, and her belief based on that information: TJ[898].

Documentary evidence and other information – Grounds 2(d)(i), 2(e), 2(h), 2(m), 2(t), 2(u), 2(v), 2(w), 2(x), 2(y)

102. Reasonableness is not a wholly objective standard by which the publisher is compared to some hypothetical journalist. The question under s30 was whether Wilkinson's conduct, having regard to her experience, information and state of mind, was reasonable in the circumstances.

103. Wilkinson relied on a body of information in her possession at the time of Broadcast that corroborated Ms Higgins' allegations about Mr Lehrmann. Wilkinson's conduct should have been assessed by reference to her acts (and any omissions) in the context of the information and knowledge that she had at the time of Broadcast. On more than one occasion throughout the reasons, the trial judge conflates Wilkinson's conduct and knowledge with others, makes findings about the conduct of Network Ten, without addressing separately Wilkinson's knowledge and conduct, and fails to have regard to the fact that certain information was not in Wilkinson's possession, and therefore not relevant to the assessment of her reasonableness.

104. Each of the paragraphs addressed in these grounds have already been dealt with earlier in these submissions.

Conclusions on reasonableness

105. Wilkinson was part of an expert news and current affairs television production team who, shortly after the allegations were exposed in the Maiden article, presented to their audience Ms Higgins in person, enabling viewers to assess the credibility of her claims for themselves. By this time the allegations were public, although Mr Lehrmann was not publicly named. Each person affected by the Broadcast was sent detailed questions and their responses were included in the Broadcast or otherwise presented in full on the website. Some of those persons had already made public statements giving their own versions before Broadcast.

106. Wilkinson believed that the rape allegation was true. Her belief was reasonably based on the information that she had. Her conduct in publishing the rape allegation, in the context, including not naming Mr Lehrmann, was reasonable in the circumstances.

107. For the foregoing reasons, the trial judge should have upheld Wilkinson's s30 defence and dismissed Mr Lehrmann's claims against her on that basis.

Logies speech – Ground 3

108. The primary judge erred in finding that an employee journalist, who sought and received firm legal advice (more than once) about the contents of a televised speech she was directed to give on behalf of her employer was improper and unjustifiable such as to warrant an award of aggravated damages: TJ[1052].

109. Wilkinson gave evidence (that she was not cross-examined on) that she did not ask to give the speech (2nd Aff [14]). His Honour found that Network Ten procured Wilkinson to give the speech: TJ[1040], CA p388.

110. His Honour found that Ms Smithies was "*well qualified*" to give legal advice about the speech to Wilkinson: TJ[1033]. Wilkinson was not cross-examined on her evidence about Ms Smithies' extensive experience and qualifications as a senior media lawyer (Aff [83]) and was not cross-examined on her evidence that it was her experience and belief that the in-house lawyers at Network Ten, including Ms Smithies, were very conservative, more so than any other in-house lawyers she had encountered in her lengthy media career: Aff [12].

111. Wilkinson was also not cross-examined about her evidence in her second affidavit (at [18]-[25]) that she raised the speech with the ACT Director of Public Prosecutions, including reading to him the substance of it, and he did not warn her against giving the speech. In making the finding that Wilkinson's conduct was improper and unjustifiable, the trial judge erroneously failed to have regard to this evidence.

112. Wilkinson did not submit or give evidence that she was "*vexed and reticent*" to give the speech as the primary judge erroneously implied at TJ[1051]. On this appeal, for the avoidance of any doubt, Wilkinson submits that being nominated by her employer to give a speech in front her peers accepting a Logie award on behalf of her employer and colleagues was an incredible honour.

113. Wilkinson's individual conduct (in contrast to that of her employer) in giving the speech as an employee on behalf her employer is not unconscientious in the sense described in a *Triggell v Pheeney* (1951) 82 CLR 497.

Sue Chrysanthou SC 3 March 2025

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