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

No. NSD 103 of 2023

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD and another
Respondents

Network Ten's submissions on the adoption of the Referee's report

A. INTRODUCTION

1. Network Ten makes these submissions pursuant to the orders made on 16 October 2024, for the purpose of identifying the objections it takes to the adoption of the report of Mr Roland Matters (**Referee**) dated 3 December 2024 (**Report**). The principles relevant to the adoption of the Report are summarised in Part B of these submissions.

2. Part C of these submissions addresses two preliminary but fundamental matters resolved by the Referee, in respect of which Ms Wilkinson raised concerns in her submissions to the Referee dated 27 November 2024 (**LW Submissions**) and 3 December 2024 (**LW Response**). Those matters are (a) the applicable rates for the work charged by GDL after 9 May 2023, and (b) the appropriate legal standard to be applied in determining costs subject to the indemnity. Network Ten contends that no error is demonstrated in the Referee's conclusions in respect of the appropriate legal standard and makes submissions in anticipation that Ms Wilkinson may seek to maintain the position set out in the LW Submissions and LW Response. In respect of the applicable rates after 9 May 2023, for the reasons articulated in Part C, Network Ten's primary position is that those rates are the rates identified in the retainer letter sent by GDL to Ms Wilkinson in February 2023. In the alternative, Network Ten submits that the rates identified as reasonable rates for work performed after 9 May 2023 by the Referee in [14] of the Report should be adopted.

3. Part D of these submissions identifies the Referee's opinions on questions set out in Annexure A to the orders made on 28 June 2024 (**Wilkinson Relevant Questions**) in the Report to which objection is taken by Network Ten. To the extent that Network Ten objects to portions of the Report, those objections are limited to matters where Network Ten asks the Court to substitute its own findings rather than adopting the opinions expressed by the Referee in respect of the relevant questions. It is submitted that the Court is already in possession of all the relevant facts, in circumstances where it observed the running of the hearing in this proceeding. It is not proposed that the Referee be asked to consider any further matters or adjust the Report in those respects where an objection has been identified. Network Ten contends that this approach is most desirable in seeking to resolve the outstanding issues in a manner consistent with the overarching purpose.

B. RELEVANT PRINCIPLES

4. The relevant authorities and principles applicable to the adoption, variation or rejection of a referee's report are uncontroversial and well-known. They have been usefully set out by Allsop CJ in *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 at [8]-[10], and *Gulf Conveyor Systems Pty Ltd v Gulf Integrated Systems Solutions Pty Ltd* [2020] FCA 1245 at [13]-[21] (Katzmann J) and may be summarised as follows:

   (a) a Court should be reluctant to allow factual issues determined by a referee to be argued afresh in Court;

   (b) some error of principle, absence or excess of jurisdiction or patent misapprehension of the evidence should generally be demonstrated to justify the rejection of the referee's report;

   (c) the Court will generally not reconsider disputed questions of fact where there exists factual material that is sufficient to entitle the referee to reach the conclusions that he or she did, particularly where the disputed conclusions are made in a technical area in which the referee possesses appropriate expertise;

   (d) if the source of a party's dissatisfaction with a report is a question of law or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh;

(e) relevant to the Court's discretion is the cost of re-litigating an issue determined by the referee, or the cost of a further proceeding before the referee is justified;

(f) if the Court decides that the reasons are flawed, either on their face or because they have been shown not to deal with important matters, the Court may decline to adopt the report or examine the evidence to see whether the expense of a further proceeding before the referee is justified.

C. MATTERS RAISED BY MS WILKINSON IN SUBMISSIONS TO THE REFEREE

The rates to be applied to work carried out after May 2023

5. As recorded in the orders made 28 June 2024, it is an agreed fact that as and from 9 May 2023, there was no valid costs agreement between Ms Wilkinson and GDL. By her counsel, on 27 June 2024, Ms Wilkinson accepted that the rates applicable to work carried out after that date would be assessed on a quantum meruit basis (Transcript of 27 June 2024 at T6.10-16).

6. It is also an agreed fact for the purposes of the Reference that the rates to be applied for the work carried out by GDL in the period from 15 February 2023 to 8 May 2023 are the rates disclosed by GDL in their February 2023 retainer letter (**Initial GDL Rates**) (Court orders dated 28 June 2024). The Initial GDL Rates are:

Lawyer	**Position**	**Hourly rate (excl GST)**
Anthony Jefferies	Partner	$550
David Collinge	Special Counsel	$500
Nicola Sanchez	Associate	$450

Network Ten's position

7. Network Ten's primary position is that, on a quantum meruit basis, a reasonable rate for Ms Wilkinson to have incurred for work performed from 9 May 2023 are the Initial GDL Rates. In reaching that conclusion, the Referee should have found that the February 2023 retainer letter was the surest guide to determining the rates that were fair and reasonable. Under section 172(4) of the *Legal Profession Uniform Law* (NSW), a valid costs agreement is prima facie evidence that legal costs disclosed in the agreement are fair and

reasonable. Indeed, the February 2023 retainer is evidence of the bargain struck between Ms Wilkinson and her solicitors, which they must have regarded as fair and reasonable rates at the time. There is no evidence before this Court, or before the Referee to the contrary.

8. A mechanism for reviewing (and presumably increasing) the Initial GDL Rates was provided for in clause 13 of the "GD Master Retainer Terms" annexed to the February 2023 retainer letter, which provided for reviews of the professional fees charged on 31 January of each year with reviewed rates becoming effective from 1 March of that year. The "GD Retainer Schedule" provides for professional fees to be reviewed on 1 July each year. There was no basis to increase the Initial GDL Rates from 9 May 2023 under these fee review mechanisms, and there is no evidence to suggest that any such fee review was conducted. Further, a comparison of the fees charged by Thomson Geer (**TG**), the solicitors for Network Ten, does not assist in determining a fair and reasonable rate for work conducted by GDL from 9 May 2023, having regard to the media law expertise of the solicitors from TG and the amount of the agreed Initial GDL Rates. It is unclear how the Referee has concluded that the rates referred to in [14.1] of the Report are reasonable rates for work performed by GDL from 9 May 2023. The proper analysis ought to have involved relying on the Initial GDL Rates as prima facie evidence of the fair and reasonable rates, before considering whether there are any particular circumstances that justify a departure from those rates under a quantum meruit analysis. Network Ten submits there are no such reasons. The Initial GDL Rates fall within the scales of costs as referred to in the LW Submissions. There is no adequate explanation given by the Referee justifying the departed from the Initial GDL Rates.

9. In Network Ten's submission, the Court should reconsider that conclusion and determine instead that the Initial GDL Rates continued after 9 May 2023 and are an appropriate reasonable rate to apply in the circumstances.

Ms Wilkinson's position

10. If the Court is not minded to accept the submissions of Network Ten as at [7] – [9] above, then the Court should adopt the findings at [14.1] of the Report, and to the extent Ms Wilkinson maintains [20]-[31] of the LW Submissions, that position should also be rejected. At [20]-[31], issue is taken with the Referee's determination of the appropriate

rates for the solicitors of GDL on a quantum meruit basis. Ms Wilkinson contends that the reasonable rates should be significantly higher than determined by the Referee.

11. The submission, in effect, amounts to a complaint that the rates determined by the Referee are not fair and reasonable and that the Referee has assessed the applicable rates as being at the very high end of the Federal Court's schedule of costs (see *Federal Court Rules 2011* (Cth), Sch 3 (as at 2023) (**FCA Costs Schedule**)) but not at the very highest. For example, the partner's rates are specified as being $71.50 per 6-minute unit, rather than the Court's maximum allowable amount, being $72. Importantly, the Referee has found that this rate should apply to all work carried out by a partner at GDL and is not limited in the ways set out in the FCA Costs Schedule. For example, the FCA Costs Schedule provides that the preparation of correspondence ought be limited to $53 per 100 words, that the drafting of documents be limited to $65 per 100 words, and reviewing correspondence ought be limited to $20 or $40. Although Network Ten made submissions to the Referee that the appropriate rates should be determined by reference to Schedule 3 to the Federal Court Rules (and therefore discounts should be applied for work including reviewing emails), that submission was not adopted by the Referee. The rates found to be reasonable by the Referee apply across all work carried out by that individual, no matter the nature of that work. The Referee has otherwise addressed and rejected the complaint at [24(a)] of the LW Submissions that the rates found to be reasonable did not account for the purported specialist experience of the solicitors at GDL who worked on the matter (see endnote 9, pp 14-15).

12. Further, the initial rates that GDL agreed to charge Ms Wilkinson in their February 2023 retainer letter were significantly *lower* than the rates found by the Referee to be reasonable. There is no evidence before the Referee to demonstrate these rates were discounted rates.

The standard of reasonable necessity

13. As to the legal standard to be applied for the purpose of determining the costs subject to the indemnity, Ms Wilkinson has expressed her ultimate position as being that:

> *an indemnity is an indemnity – and that unless costs were incurred in respect of work* ***completely unconnected*** *with the proceedings, then the costs incurred are liable to be reimbursed.*

14. Ms Wilkinson's position is inconsistent not only with the relevant authorities, but also the agreed position of the parties prior to the reference commencing. It is not open to Ms Wilkinson to seek to re-agitate this issue afresh now.

15. As identified by the Referee at endnote 5 to the Report, by late June 2024, both the Court and Ms Wilkinson's legal representatives were well apprised of Network Ten's position that the phrase "reasonably necessary" and the adjective "necessary" were correctly expressed to direct findings as to costs that fall within the indemnity. It was equally evident at that time that Ms Wilkinson did not agree.

16. Following without prejudice discussions between Ms Wilkinson and Network Ten, an agreement was reached as to the proposed wording of the Wilkinson Relevant Questions. As can be seen on the face of the questions, the framing of the legal standard was of central importance to the reference exercise. The standard agreed upon as recorded in the Wilkinson Relevant Questions was the standard of "reasonable necessity".

17. In correspondence on 12 August 2024, Network Ten raised a concern with Ms Wilkinson that her response to a question asked by the Referee as to the meaning of "reasonably necessary" indicated that she sought to deviate from the parties' agreed position. On 13 August 2024, Ms Wilkinson confirmed (through GDL) that the Referee's task was not "*to perform a solicitor / client assessment of costs*". However, this appears to be just what Ms Wilkinson now continues to agitate. The LW Submissions seek to elevate the finding of an entitlement to separate representation made in *Lehmann v Network Ten Pty Limited (Cross-claims)* [2024] FCA 102 (**Cross-Claim Judgment**) to a finding that Ms Wilkinson was entitled to conduct her defence of the proceeding in whatever manner she saw fit, without paying due regard to her obligation to minimise costs as far as possible. This submission was already considered and rejected by the Court during the case management hearing on 1 May 2024, when it was confirmed that the Cross-Claim Judgment did not preclude Network Ten seeking to have the costs issue determined on an "issues basis" (T2972.20 – 2973.3).

18. In the light of that context, Ms Wilkinson cannot point to any error in the Referee's expression of the legal standard at Part C [9] of the Report. The Referee has quite clearly drawn the principles expressed at [9] from a careful consideration of the authorities referred to at [36] – [40] of Network Ten's costs submissions. Critically, as will be

elaborated on further below, the Referee found that the costs incurred by Ms Wilkinson were to be incurred with the objective of "*incurring the **minimum** amount of legal costs **as between client and law practice…**"* (at [9.2.3] of the Report). Therefore, Ms Wilkinson's submission that "*it is not reasonably open to find that the work done by Ms Wilkinson's lawyers was not reasonably necessary because work of the same or similar kind was also being undertaken by NT's lawyers*" is plainly wrong.

D. NETWORK TEN'S OBJECTIONS TO THE REPORT

Questions 2 and 3 - Preparation of Ms Wilkinson's defence insofar as it related to CII

19. Network Ten does not agree with the Referee's answers to Questions 2 – 3 of the Wilkinson Relevant Questions and objects to the Court's adoption of this finding. The Referee's finding that it was reasonably necessary for Ms Wilkinson to prepare and draft her defence insofar as it related to the CII without reference to the defence prepared by Network Ten appears to be based on erroneous findings of fact to the extent they are made within endnote 12. Endnote 12 proceeds on a misinterpretation of the factual matters set out in Network Ten's Reference Submissions. For example, the assertion at endnote 12.6 that Network Ten does not dispute the representation of fact in the eighth row of the table at [35] of LW Submissions to the effect that Ms Wilkinson's Defence as it dealt with the defence of substantial truth was preferred by the Court over Network Ten is factually incorrect and was the subject of dispute in Network Ten's submissions. The defences insofar as they related to the CII were identical in substance, including in respect of the defence of substantial truth. It was not reasonably necessary for Ms Wilkinson to have incurred the costs of drafting her defence without reference to the defence of Network Ten, and particularly in circumstances where Network Ten was always going to be responsible for running that defence. In Network Ten's submission, the Referee's answer to Questions 2 and 3 should not be adopted and, instead, the Court should either disallow the costs incurred by Ms Wilkinson in preparing her defence insofar as it related to the CII on the basis that the incurrence of those costs was not reasonably necessary or apply an appropriate percentage discount to those costs. But in any event, given the errors in endnote 12, Network Ten submits that the findings of fact expressed in endnote 12 should not be adopted as findings of the Court.

Questions 4 and 5 - Costs associated with the Applicant's extension of time application (EOT Application)

20. Network Ten supports the adoption of the Referee's findings in answer to Question 4 of the Wilkinson Relevant Questions (Report [16.4] – [16.5]). However, in order to fully resolve the dispute between the parties, Network Ten considers it necessary for the Court make a further finding as to the specific percentage of work to be dis-allowed by reason of the Referee's findings.

21. At Report [16.4], the Referee sets out the matters in respect of which it was reasonably necessary for Ms Wilkinson to incur costs. The Referee does not go further by nominating a percentage of the costs incurred in respect of the EOT Application which are referrable to the tasks and/or services at [16.4]. Network Ten submits that the Court is in as good a position as the Referee to undertake a broad-brush assessment of the percentage of costs incurred in relation to the EOT Application, and to do so would be consistent with the overarching purpose and avoid the need to seek the preparation of a further report from the Referee. In the circumstances, Network Ten asks the Court to answer the following question:

> Having regard to the findings at [16.4] of the Report, and the Court's knowledge of Ms Wilkinson's participation at the EOT Application (see, eg *Lehrmann v Network Ten Pty Limited (Limitation Extension)* [2023] FCA 385) (**Limitation Judgment**), what percentage of the costs in respect of the EOT Application (being a total of approximately $137,588.00[1]) were reasonably necessary for Ms Wilkinson to have been incurred?

[1] Being the sum of the following rows of Attachment D-1:
I53,I67,I73,I84,I91,I93,I250,I263,I266,I276,I277:I278,I279,I281,I283,I285,I286,I287,I288,I289,I290,I293,I294.
I300,I301,I302,I305,I306,I307,I308,I310,I313,I322,I321,I324,I325,I326,I327,I329:I330,I331,I332,I333,I334,I3
35,I336,I337:I338,I339, I341,I342,
I344,I345,I347,I348,I349,I346,I351,I352,I354,I355:I357,I359,I360,I366,I367,I368,I369,I370:I372,I373,I374,I3
75,I376:I377,I378,I379,I380,I381,I388,I390,I391,I392,I393,I394,I395,I396:I398,I411,I412,I415,I422,I423,I424,
I425,I426,I428,I429,I430,I431,I432,I433,I434,I435,I436,I437,I438,I439,I440:I442,I443:I445,I446:I450,I451:I4
52,I455,I456,I458,I459:I460,I461,I463,I466,I467,I468:I470,I471,I473,I475,I476,I477,I482,I483,I484,I485,I486,
I487,I488,I489,I490,I491,I492,I493,I494,I495,I496,I497,I498:I501,I503,I504,I505,I506,I507,I508,I509,I510,I5
11,I512,I513:I515,I516:I517,I518:I521,I522:I524,I525:I528,I529:I531,I532:I534,I535:I537,I538:I540,I541:I544
,I545,I546:I548,I549:I552,I553:I555,I556,I557,I558,I559,I560,I561,I562:I571,I572,I573,I574,I576,I575,I577,I5
78,I579,I580,I581,I582,I583,I584,I585,I586,I587,I588,I589,I590,I591,I592,I593,I594,I595,I596,I597:I600,I601:
I605,I606:I608,I609,I610,I611,I612,I613,I614:I616,I617:I619,I622,I623,I624,I625,I626:I629,I630:I633,I634:I6
36,I637:I640,I641:I643,I645:I647,I648:I654,I655:I660,I661:I664,I665:I667,I668:I670,I671:I675,I676:I680,I681
:I684,I685:I696,I697:I708,I709:I711,I712:I714,I715:I718,I719:I722,I723:I737,I738:I741,I743,I744,I745,I746:I

22. It is submitted that, having regard to the findings at [16.4(j)-(m)] of the Report, the appropriate way to resolve this issue is to reduce the costs incurred by Ms Wilkinson by 50%. This is appropriate because:

    (a) it will be difficult, if not impossible, for the parties to properly quantify the findings at [16.4] of the Report;

    (b) the EOT Application prompted the production of a large volume of material under notices to produce and subpoenas, the vast majority of which did not go to the findings of fact contained in [16.4(j)-(m)] of the Report; and

    (c) having regard to the number of the matters dealt with in the Limitation Judgment which do not form part of [16.4(j)-(m)] of the Report, a reduction of 50% appropriately recognises the allowance made by the Referee for Ms Wilkinson's representatives to observe the services provided by Network Ten's lawyers throughout the EOT Application.

Questions 6, 9-11 - Truth Defence – closing submissions

23. Network Ten objects to the adoption of [17.10] to [17.11] of the Report (p7), insofar as those paragraphs record the Referee's findings in respect of the costs incurred by Ms Wilkinson in the preparation of her written closing submissions.

24. In carrying out his analysis, the Referee has acted upon a misapprehension of the facts in relation to Network Ten's truth defence, which has caused the analysis to miscarry. At endnote 31.1 of the Report, the Referee rejected Network Ten's submission that the truth defences run on behalf of Network Ten and Ms Wilkinson were identical in substance, and recorded his finding that:

748,I749:I753,I754:I756,I757,I759,I760:I762,I763,I764,I765,I772,I773,I774,I775,I776,I777,I778,I779,I780,I781,I782,I783,I784:I786,I787:I789,I790,I793,I794,I795,I796,I797,I798,I799,I800,I801:I803,I804:I807,I808,I809,I810,I811,I812,I813,I814,I815,I816,I817,I823,I824,I825,I826,I827,I828,I829,I830,I831,I832,I834,I835,I836,I837,I838,I839,I840,I841,I842,I843,I844,I845,I846,I847,I848,I849,I850,I851,I852,I853:I855,I856:I858,I859,I860,I861,I862,I863,I864,I865,I866,I867,I868:I870,I871:I873,I874:I877,I878,I879,I880,I881,I882,I883,I884,I914,I913,I912,I911,I910,I915,I916,I917,I918,I929,I930,I931,I932,I933,I934,I935,I936,I937,I938,I939,I940,I941,I942,I943,I944,I945,I946,I947,I948,I949,I950,I951,I952,I953,I954,I955:I957; and the sum of the following rows of Attachment D-2: J38,J39,J41,J45,J46,J47,J49,J50,J51,J52,J57,J58,J59, J60,J61,J62,J63,J11:J12,J17,J20 (noting that various findings in [16.4] of the Report necessitate the exclusion of some of junior counsel's fees).

LW's closing written submissions on the CII of the defence of substantial truth ***were substantively different*** *to those of Network Ten as they related to the question of fact of whether or not, if sexual intercourse occurred between Mr Lehrmann and Ms Higgins on the night of 22 - 23 March 2019, it occurred without Ms Higgins' consent, a difference that was expressly recognised by the Court by content of section H of the trial judgment.*

25. However, such a finding is inconsistent with:

(a) the written closing submissions of Network Ten and Ms Wilkinson dated 11 March 2024;

(b) the oral closing submissions of Network Ten and Ms Wilkinson on dates 21 and 22 December 2023;

(c) the manner in which the hearing was conducted (being that Network Ten adduced all evidence in respect of the truth defence, other than evidence from Ms Wilkinson and Ms Fiona Brown);

(d) a proper reading of the Trial Judgment at Section H;

(e) the actual characterisation of the submissions at [562] of the Trial Judgment. The Court characterised both respondents' submissions as "less than helpful in relation to this aspect of the case" and not just Network Ten's closing written submissions as contended by the Referee at 31.2 of the Report; and

(f) his Honour Justice Lee's comments on 1 May 2024, that "*there wasn't a cigarette paper's difference between [the respondents] when it comes to the truth defence*".

26. Even to the extent that the closing submissions expressed matters in relation to the truth defence with slightly different emphasis, in order to recover her costs Ms Wilkinson must show that those differences were *reasonably necessary* to have been addressed for the purpose of protecting those interests. Having regard to the principles set out at [6] of the Report, it is not sufficient to demonstrate that the legal representatives involved preferred to express the same submission in a somewhat different manner.

27. Regrettably, it appears as though this misapprehension of the truth defence has also impacted upon the Referee's analysis of other questions beyond Questions 10 and 11 of the Wilkinson Relevant Questions. In particular, Network Ten contends that the similarities of the truth defences put forward by both respondents is of the utmost importance to the findings made at Question 6, in respect of the necessary attendances by solicitors at the hearing during the conduct of Network Ten's truth defence. The Referee's approach to that question is separately addressed in more detail at [31]-[37] below.

Findings contended for by Network Ten

28. In all the circumstances, if the Court finds that [17.10] to [17.11] of the Report ought be rejected insofar as they relate to Ms Wilkinson's closing submissions, it would be most efficient and consistent with the overarching purpose that the Court substitute its own finding in answer to Questions 10 and 11 of the Wilkinson Relevant Questions in that regard. While it is accepted that the Court should be hesitant to disturb facts found by the Referee where those matters relate to matters of technical expertise, the findings contended for by Network Ten are not of that nature. The Referee has no expertise over and above that of the Court in relation to Questions 10 and 11 of the Wilkinson Relevant Questions. Rather, the Court is well placed to make the determination without requiring the further cost and time of a hearing or written submissions, in circumstances where it observed the running of the entire hearing.

29. Network Ten contends that Question 10 should be answered such that, having regard to the manner in which Network Ten's truth defence was run during the hearing, it was not reasonably necessary for Ms Wilkinson to incur costs in the preparation of written submissions insofar as those submission related to the truth defence, or the other CII.

30. Network Ten contends that Question 11 should be answered by finding that it follows from the answer to Question 10, that a percentage discount of 30.6% should be applied for costs incurred in the preparation of written submissions.[2]

[2] See Annexure L to the Report, pp 130-144.

Question 6(b) - Truth defence – Attendances at Court on days when Network Ten ran its truth defence

31. Network Ten objects to the finding recorded at [17.6(b)] of the Report, that it was reasonably necessary for Ms Wilkinson to retain senior counsel, one partner and another solicitor to attend Court on days 28 November 2023 and 5 December 2023, and one senior counsel and one partner to attend Court on days 29 November 2023 – 1 December 2023, 6 – 8 December 2023 and 11 December 2023 (including conferences with client and after Court), being the days on which Network Ten ran its truth defence.

32. Network Ten contends that the Referee either acted upon a misapprehension as to how the truth defence was run (as explained at [24]-[26] above) or made an error of law in applying the legal standard as set out at [9] of the Report, when seeking to answer Question 6(b) of the Wilkinson Relevant Questions. In any event, both errors justify the rejection of the finding recorded at [17.6(b)].

33. The interests of Ms Wilkinson and Network Ten were wholly aligned in defending the proceeding on the basis of truth. In support of its truth defence, Network Ten called 20 witnesses, and served three expert reports. Network Ten incurred the costs involved in arranging, proofing and preparing the evidence-in-chief of those witnesses, and preparing those witnesses for cross-examination. Counsel for Network Ten conducted all examinations-in-chief and cross-examinations relating to the truth defence, with the exception of Ms Brown. Counsel for Ms Wilkinson conducted some limited cross-examination of Mr Lehrmann in respect of matters concerning the aggravated damages claim against Ms Wilkinson.

34. In these circumstances, there is no reason for the Referee to have found that it was reasonably necessary for Ms Wilkinson to incur the costs of a partner, another solicitor and senior counsel attending for the days on which the truth defence was conducted. The matters referred to at endnote 16.2 of the Report, do not justify such a finding. Rather, the Referee has pointed to a number of matters raised by counsel for Ms Wilkinson, predominantly in the form of an objection to a question asked in cross-examination, during those relevant days. As to the other matters raised (such as the tender of documents), there is no reason that could not have occurred on another day in the hearing, when it was necessary for Ms Wilkinson's legal representatives to attend. As to the

objections, the attendance of senior counsel only for this purpose could not be considered *reasonably necessary* in all the circumstances, having regard to the legal standard as explained at [9] of the Report.

35. During the cross-examination of Network Ten's witnesses, Network Ten's senior and junior counsel were present, and more than capable of taking objections to questions asked. When assessing the necessity of counsel and solicitor attendance, it appears the Referee has impermissibly allowed the benefit of hindsight bias to inform his views. In any event, there is no reason demonstrated on the basis of the objections taken by Ms Wilkinson's counsel, why those objections related to matters specific to the interest of Ms Wilkinson as opposed to Network Ten. In answering this question, the Referee has also failed to properly apply the principle at [9.2.3], that the tasks relevant to the proceeding be undertaken with the objectives of incurring the *minimum amount of legal costs as between client and law practice.*

36. Finally, the Referee has also relied on the fact that Ms Wilkinson attended Court each day in person to reach a conclusion that she required representation. But the Referee appears to have ignored the connected fact that Ms Wilkinson was not accompanied by any lawyer from GDL each day, but rather was accompanied by a junior lawyer from TG for the majority of the hearing at the request of Ms Wilkinson's senior counsel. This practice would have no doubt continued in the absence of Ms Wilkinson's own legal representatives being in Court every day.

37. The correct analysis is that from the perspective of a reasonable respondent who did not bear the responsibility of running the truth defence, there was no need to incur the costs of counsel and solicitors attending every day of that part of the hearing. It would have been sufficient for the solicitors to liaise with Network Ten's legal representatives (who would have informed them if there was any requirement for Ms Wilkinson's representatives to attend) and review the transcript as necessary.

Question 9 - Hearing costs recorded outside of attendances in Court

38. Network Ten objects to the findings recorded at [17.8] of the Report, in answer to Question 9 of the Wilkinson Relevant Questions. Question 9 required the Referee to identify all costs that were reasonably incurred in relation to each of the relevant hearing days throughout the trial. This required the Referee to have regard to the findings made

in answer to Question 6, and in addition, consider the reasonable necessity of the hours charged by GDL on each of the days outside of Court and conference attendances. These costs included, for example, drafting and reviewing correspondence generally; preparing lists of documents for tender; preparing emails to counsel; reviewing records of hearing; reviewing previous day transcripts for errors; and reviewing documents.

39. In answering Question 9, at [17.8] of the Report, the Referee has specified a proportion of hours charged by GDL in relation to the relevant hearing dates that were not reasonably necessary for Ms Wilkinson to have incurred (taking into account his answer to Question 6). The Referee has in effect found (without explanation) that almost all of the out-of-court costs incurred on the relevant dates were reasonably necessary. It must be concluded that the Referee has failed to correctly apply the legal standard of reasonable necessity in that a reasonable respondent seeking to incur the minimum amount of costs would have:

    (a) ensured the majority all non-attendance work, including reviewing and forwarding emails, reviewing transcripts and documents, could have been undertaken by the GDL staff already in Court while attending the hearing (particularly on days where they were not responsible for calling the witnesses who were giving evidence); and

    (b) ensured the persons attending the hearing undertook the large majority of non-attendance work during the course of the Court sitting hours.

40. However, this did not occur. The non-attendance time entries recorded during the hearing should have been approached by the Referee with extreme caution.

41. By way of example only, on 5, 12 and 13 December 2023, being the days on which Network Ten called witnesses in its truth and qualified privilege defences, GDL incurred costs in relation to:

    (a) on 5 December 2023:

        (i) the partner who attended the hearing reviewing and circulating correspondence related to the matter which was received throughout that day, which presumably occurred within the time already charged for his attendance at Court – noting that approximately 7.4 hours were charged on

5 December for attendances, with an additional 4.2 hours charged for correspondence and document review; and

(ii) two solicitors not in attendance at Court incurring a further 1.9 hours' worth of costs (mostly) relating to reviewing documents for the online file and the review and circulation of emails, which presumably could have been undertaken by the partner present in Court.

(b) on 12 December 2023:

(i) the partner who attended the hearing reviewing and circulating correspondence related to the matter which was received throughout that day, which presumably occurred within the time already charged for his attendance at Court – noting that approximately 7.8 hours were charged on 12 December for attendances, with an additional 2.3 hours charged for correspondence; and

(ii) one solicitor not in attendance at Court incurring a further 2.2 hours' worth of costs (mostly) relating to the review and circulation of emails, which presumably could have been undertaken by the partner present in Court.

(c) on 13 December 2023:

(i) the partner who attended the hearing reviewing and circulating correspondence related to the matter and received throughout that day, which presumably occurred within the time already charged for his attendance at Court – noting that approximately 10 hours were charged on 12 December for attendances (with an additional 2.3 hours charged for correspondence) and 10 hours were charged on 13 December for attendances (with an additional .2 hours charged for correspondence); and

(ii) two solicitors not in attendance at Court incurring a further 1.4 hours' worth of costs (mostly) relating to reviewing documents for the online file and the review and circulation of emails, which presumably could have been undertaken by the partner present in Court.

42. Despite the Referee finding that only one solicitor and counsel needed to be in attendance on those dates, the Referee has found that the costs of all non-court attendance costs on 5 December 2023, and the majority of non-court attendance costs on 12 and 13 December 2023 (including by other solicitors), were reasonably incurred and applied no discount by reason of the solicitors' approach to carrying out tasks outside of court.

43. In all the circumstances, Network Ten asks that the Court substitute its own finding as to the appropriate discount to be applied to non-court attendance costs incurred by GDL during the course of the hearing. In accordance with the overarching purpose, and the approach taken to the reference, it is contended that this may be done as a broad-brush assessment, without the Court needing to descend into the detail of reviewing individual cost items in the invoices or the excel spreadsheet attached to the Report. In accordance with the question posed at Question 9, an appropriate calculation could be done by *first*, identifying the percentage discount to be applied to GDL attendances at the hearing and conferences, and *second* applying that percentage discount to the balance of non-court attendance costs incurred by GDL during the hearing.

44. Having observed the running of the hearing and having regard to the Referee's findings as to the attendances of solicitors during the hearing, the Court may fairly form a view as to the necessity of the work carried out by GDL during the course of the hearing.

Question 17 - Discount to be applied to residual costs incurred in the proceeding

45. The Referee has found at [27.17(d)] of the Report, that a global discount of 20.14% should be applied to the residual pre-trial costs incurred by GDL. Network Ten submits that this process has miscarried, in circumstances where the Referee appears to have nominated this percentage by identifying specific line items to be discounted, on the face of the narrations of those time entries.

46. As submitted by Network Ten at the case management hearing on 27 May 2024, there are serious difficulties faced by any person seeking to identify the costs reasonably incurred by reference only to the line items recorded in this matter.

47. By way of example only:

(a) The phrase "email to counsel" appears in 130 rows in Attachment D-1 to the Report. In 17 of these rows there is no context provided beyond the phrase "email to counsel". Only 12 of these rows are highlighted yellow (being entries the Referee has found not to be reasonably necessary for Ms Wilkinson to have incurred).

(b) There are 32 rows in which "NF" appears. NF is a reference to Nick Fordham, Ms Wilkinson's agent. Only 2 of these rows are highlighted yellow. It is not clear why it was not reasonably necessary for Ms Wilkinson's solicitors to take instructions from Mr Fordham in respect of discovery (rows 1206, 1797), but reasonably necessary for Ms Wilkinson's solicitors to liaise with Mr Fordham about Ms Wilkinson's defence (row 280) or to call and correspond with him about the filing of Network Ten's defence (row 2150).

48. In contrast to the approach taken by the Referee, Question 17 required the Referee to take a high-level approach and apply a single percentage discount to all residual costs, having regard to the answers already given in respect of the earlier questions in the Report. The Referee has fallen into error by considering specific line items that were identifiable by reason of their narration, and by apparently ignoring line items without sufficient detail to assess. Consistent with the examples above, it is unclear why some items have been highlighted yellow but identical entries from other days have not.

49. In Network Ten's submission, the appropriate course would have been to have regard to the following:

(a) the proportion of all of the respondents' submissions that related to SII, being approximately 40%;

(b) the proportion of the hearing conducted in relation to SII, being approximately 23%;

(c) the totality of evidence adduced solely by Ms Wilkinson, being one lay witness and documentary tenders,[3]

[3] Ms Wilkinson's documentary tenders account for approximately 2% of the documents tendered in proceeding, although Network Ten acknowledges that some of the documents it tendered related to Ms Wilkinson's qualified privilege defence as well as its own.

and then form a view as to the appropriate percentage discount to be applied to the costs incurred by Ms Wilkinson in the lead up to the trial based on these matters and the general approach to the hearing taken by Ms Wilkinson and her legal representatives.

50. Alternatively, the Referee's initial draft report circulated on 13 November 2024 (**First Draft Report**) provides another basis on which the finding at [27.17(d)] of the Report could be based. On 14 November 2024, the Referee sent a follow up email clarifying his approach to the yellow highlighting in Attachments D-1 and D-2 of the First Draft Report. A copy of the email is attached to these submissions. In his follow up email, he confirmed that the yellow highlighting in Attachments D-1 and D-2 to the First Draft Report corresponded with, amongst other things, "services in respect of which I was not able to identify by the description or by inference, content and purpose and, as a consequence, for which there is currently insufficient probative basis for requisite fact-finding". He cited rows 623 and 1241 in Attachment D-1 as examples. The total sum of yellow highlighted rows in the First Draft Report was $204,811.75. The total sum of yellow highlighted rows in the Report is $189,340.25.

51. Row 623 corresponds with an entry for a GDL solicitor with the narration "[t]elephone call with counsel". No further context is provided. This row was provided by the Referee as an example of the yellow highlighting because the narration provided an "insufficient probative basis for requisite fact-finding". Notwithstanding this, in the Report row 623 is no longer highlighted yellow. It is an entry that, because it falls out of the reach of other findings of the Report is subject to a 20.14% discount in accordance with the finding at [27.17(d)].

52. The final sum of the yellow highlighting used as the numerator in endnote 44 is $115,330.87. Network Ten submits its "time objection as to 50%" objections do not provide a sufficient basis to reduce the sum of all of the corresponding rows highlighted yellow in the Report. In the circumstances, Network Ten submits that the entire yellow highlighted figure in the Report is an appropriate numerator upon which the percentage reduction in the findings at [27.17(d)] of the Report should be based. That is, the figure of $189,340.25 should be calculated as a percentage of $572,753.50. Network Ten submits that the appropriate percentage reduction for the finding at [27.17(d)] of the Report is 33.01%. Viewed pragmatically, this would amount to a finding that Ms Wilkinson is entitled to 66.99% of her costs which are not otherwise dealt with in the

Report. This figure is squarely within the ordinarily accepted range of costs recoverable on the basis of an assessment of a standard costs order.

Questions 12-15 - Discount to be applied to residual costs incurred in the proceeding

53. At [18.12-15] of the Report, the Referee has made findings relating to Network Ten's re-opening application and the re-opened hearing (**re-opening**). However, the Referee does not go further by nominating a percentage of the costs incurred on the re-opening. Network Ten submits that the Court is in as good a position as the Referee to undertake a broad-brush assessment of the costs incurred in relation to the re-opening, and to do so would be consistent with the overarching purpose and avoid the need to seek the preparation of a further report from the Referee. In the circumstances, Network Ten asks the Court to answer the following question:

> Having regard to the findings at [18.12-15] of the Report, and the Court's knowledge of Ms Wilkinson's participation during the application and on the re-opened hearing, what approximate percentage of the costs incurred by Ms Wilkinson (being a total of approximately $51,966.75[4]) in respect of the application to re-open Network Ten's case were reasonably necessary to have been incurred?

54. The Referee placed significant reliance on the following extract from T2963.17-27:

> "*DR COLLINS: The application we agitate is unusual and exceptional. I propose to address your Honour in relation to five matters. First, could I identify the material on the application. Secondly, could I identify the context for the application. That is, how we got to be here today. Third, could I identify the substance of the fresh evidence that we seek leave of the court to rely upon by way of a reopening of the case for the first respondent.*
>
> *Fourth, could I address your Honour in relation to the legal principles as to which I don't apprehend the parties are likely to be apart. We will be apart, however, in relation to the fifth matter I wish to address your*

[4] Being the sum of the following rows of Attachment D-1: I3595:I3704, and the following rows of Attachment D-2: J142:J147 and J244:J253,

Honour on, which is the application of those principles in the present context."

55. Network Ten submits that, having regard to Ms Wilkinson's level of involvement in the re-opening, as well as the findings at [18.12-15] of the Report about the appropriateness of her representatives' attendance, an appropriate way to resolve this issue is to reduce the sum incurred by Ms Wilkinson by 60%.

13 December 2024

T SENIOR

Z GRAUS

C O'BEIRNE

Counsel for the First Respondent

From:	Roland Matters
To:	"David Collinge"; CausleyTodd, Amelia
Cc:	"Anthony Jefferies"; "Nicola Sanchez"; Saunders, Marlia; Meixner, Sophie
Subject:	Lehrmann v Network Ten Pty Limited & Anor (Federal Court of Australia Proceeding No NSD103/2023) (proceeding)
Date:	Thursday, 14 November 2024 8:02:53 AM
Attachments:	image003.png image002.png

Dear Practitioners,

I omitted to inform you yesterday that the yellow highlighted content in proposed attachments D-1 and D-2 includes:

1. services and amounts that I understand from the content of the columns headed "NETWORK TEN OBJECTION" and "WILKINSON RESPONSE" the inquiry parties are in agreement as to inclusion/exclusion;

2. services in respect of which the amount quantified is to be reduced but not excluded in entirety; for example, row 33 in proposed attachment D-1; and

3. services in respect of which I was not able to identify by the description or by inference, content and purpose and, as a consequence, for which there is currently insufficient probative basis for requisite fact-finding; for example, rows 623 and 1241 in proposed attachment D-1

I have used the descriptions expressed in the worksheets, inference, my practice experience and the inquiry material to comprehend the services provided by GDL, barristers and other services providers.

I intended to express yesterday in respect of "the approximate relating costs quantified in attachments D-1 and D-2" referred to at point 1 below is refers to the costs of all relating services and not only drafting content of the affidavits, that is, including attendances, written communications and reading/examination of material for annexure/exhibiting by both GDL and barristers

Regards,

Roland Matters
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4/1 Tunks St, Waverton NSW 2060

From: Roland Matters [mailto:roland@rolandmatters.com.au]
Sent: Wednesday, 13 November 2024 8:13 PM
To: 'David Collinge'; 'CausleyTodd, Amelia'
Cc: 'Anthony Jefferies'; 'Nicola Sanchez'; 'Saunders, Marlia'; 'Meixner, Sophie'
Subject: Lehrmann v Network Ten Pty Limited & Anor (Federal Court of Australia Proceeding No NSD103/2023) (proceeding)

Dear Practitioners.

I **attach** a draft of the report to be submitted pursuant to order 2 of the Order made on 28 June 2024 and order 1 made on 16 October 2024 in the proceeding and proposed attachments “A” to “D-2” to the draft report. Answers to the Wilkinson Relevant Questions expressed in the draft that are dependent on the provision of further information and further findings are highlighted in grey.

I have proceeded on the assumption that the term “review” as expressed in attachment D-1 is, unless otherwise indicated, synonymous with the phrase ‘reading and considering’ and the more arcane costs quantification term ‘peruse’.

I invite the provision of submissions and/or further material in relation to the content of the attached draft that the inquiry parties elect to provide by close on 27 November 2024.

I ask that I be apprised of/provided with:

1. the number of pages (both deposed content and annexures/exhibits) of affidavits in chief served on behalf of Ms Wilkinson and the approximate relating costs quantified in attachments D-1 and D-2 to the attached draft;

2. a copy of the court book index and the approximate relating costs quantified in attachments D-1 and D-2 to the attached draft in respect of the services of Ms Wilkinson’s legal representatives; and

3. the number and approximate pages of documents analysed in respect of Ms Wilkinson’s discovery (to the extent that this does not impact on any entitlement Ms Wilkinson has to maintain confidentiality of documents and/or information) and the approximate relating costs quantified in attachments D-1 and D-2 to the attached draft.

Regards,

Roland Matters
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