

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

No. NSD 103 of 2023

BRUCE LEHRMANN
Applicant

NETWORK TEN PTY LTD
First Respondent

LISA WILKINSON
Second Respondent

SECOND RESPONDENT'S SUBMISSIONS FOR CMC ON 16 DECEMBER 2024

Re: ADOPTION OF REFEREE'S REPORT

1. The Second Respondent submits as follows on whether the report of the Referee, Roland Matters, dated 3 December 2024 (the **Report**), should be adopted.
2. The Second Respondent submits that the issue of whether the Report should be adopted cannot currently be determined.
3. This is because the Referee does not identify the amount – either by way of an actual figure or by reference to a percentage of the total costs actually incurred – which the Referee considers to be reasonably necessary to have been incurred. In some instances, the Referee has made determinations and provided amounts or percentages as to the work and costs he considered to have been reasonably necessary. In other parts of the Report, conclusions as to work or costs that were or were not reasonably necessary are made by the Referee but he does not quantify any amount or percentage allowance or reduction for those costs.
4. Put simply, it is not possible for the parties or the Court to work out the quantum of the costs that the Referee determined were reasonably necessary to be incurred by the Second Respondent.

5. That issue needs to be determined before the Second Respondent and, the Second Respondent submits respectfully, the Court is in a position to understand the Referee's conclusions and whether the Report should be adopted.
6. The First Respondent acknowledges the issue in its submissions. However, while seeking to agree with aspects of the Report, the First Respondent then invites the Court to reject other parts of the Report and to make its own assessment on a variety issues. The First Respondent's approach should not be adopted. If the Court is not to adopt the Report and, instead, is to undertake its own assessment, then a timetable for the provision of submissions identifying relevant issues in dispute will need to be established. However, that is premature when the parties and the Court are not able to determine the effect of the Referee's inquiry.
7. Accordingly, the Second Respondent submits that the Referee should be asked to determine the amount of costs – either by way of an actual figure or by reference to a percentage the total costs actually incurred – which the Referee considers was reasonably necessary.
8. The Second Respondent makes the further comments set out in paragraph 14 and following below by way of illustration of the issues with the approach taken by the Referee in respect his analysis of the costs of different aspects of the proceeding. Immediately below (between paragraphs 9 and 13), the Second Respondent identifies two further issues of general application.

Overall approach

9. The Referee sets out the principles applicable to his inquiry in the Report at [8]-[11]. In summary, these are:
 - (a) “reasonably necessary” means the tasks commonly addressed, services commonly provided and the amounts commonly quantified on behalf of a second respondent separately represented in the proceeding in the position of the Second Respondent absent the indemnity;
 - (b) the issue of what is reasonably necessary is to be determined:
 - (i) with regard to the state of knowledge that the Second Respondent's legal representatives would commonly possess at the time the services were provided; and

- (ii) undertaken with the objective of obtaining a judgment, obtaining a costs order and incurring the minimum amount of costs to achieve these objectives.

10. The Report does not proceed on the above basis. In many instances the Referee appears to have considered the work undertaken and the costs incurred from a position of hindsight and not from the perspective of what was reasonable at the relevant time – that is, when the work was performed and the costs incurred – in order for the Second Respondent’s lawyers to protect the Second Respondent’s interests in defending the claims made by the Applicant against her.

Hourly rates

11. The Referee was provided with an Excel spreadsheet that detailed the costs incurred by the Second Respondent in connection with this proceeding. The Referee has determined that the hourly rates applied in that spreadsheet should be reduced for work done after 9 May 2023, however the Referee has not undertaken the task of adjusting the rates before making the percentage and numeric reductions or allowances that he does make in the course of the Report.

12. As to the rates of charge determined by the Referee in the Report at [14], the Second Respondent will make submissions in due course in the event that the Second Respondent submits that the Report should not be adopted. At this stage, it is sufficient to note as follows.

13. The rates are not reasonable rates for this work and for the practitioners at Gillis Delaney Lawyers (**GDL**) undertaking the work from 9 May 2023. Notably, as set out in the Second Respondent’s submissions to the Referee, the amounts allowed by the Referee as reasonable for the Second Respondent in the Report are lower than the rates charged by the lawyers from Thomson Geer many of whom have less experience than the lawyers from GDL. The Second Respondent submits that the following rates should be allowed as reasonable:

Lawyer (year of admission)	Rate per 6 minute unit incl GST	Rate per hour incl GST	Rate per hour excl GST
Partner Anthony Jefferies (1996)	\$82.50	\$825.00	\$750.00
Special counsel David Collinge (1989)	\$71.50	\$715.00	\$650.00

Senior Associate Nicola Sanchez (2014)	\$58.30	\$583.00	\$530.00
Associate Nicola Sanchez (2014)	\$49.50	\$495.00	\$450.00
Paralegal	\$27.50	\$275.00	\$250.00

Costs associated with the EOT Application

14. The Referee considers that it was reasonably necessary for the Second Respondent to incur the costs of work listed in [16(4)(a) to (i)] of the Report to the extent that the tasks were undertaken in relation to the issues identified in [16(4)(j) to (m)] of the Report. It is not clear if the Referee determined that any reduction to the costs incurred by the Second Respondent was applied on this account. The Referee noted in endnote 14 (page 16) that the amount is not a question posed by the Relevant Questions and as such is required to be answered other than in the enquiry before him.
15. As such, the parties are left with no determination in this regard as to the quantum of the costs that the Referee considered to be reasonably necessary for this work.

Costs of the Notice to Produce

16. The Referee determined in the Report at [16(5)] that it was reasonably necessary for the Second Respondent to incur the costs of paragraphs 1 and 2 of the Notice to Produce served on 10 March 2023 but that it was not reasonably necessary for the Second Respondent to incur the costs in relation to paragraph 3 of that Notice to Produce. The Referee then states in the third paragraph of this section that he cannot identify which costs it was not reasonably necessary for the Second Respondent to incur.
17. Accordingly, the parties are left with no indication as to what actual amount the Referee considers to be reasonably necessary for this work.

Costs associated with the hearing

18. In the Report at [17(6), (7)], the Referee sets out in narrative form his determination as to the number of lawyers and counsel that he considered were reasonably necessary for the Second Respondent to retain on each day of the hearing.
19. In paragraph 17(8) the Referee sets out percentages of the costs charged to the Second Respondent by GDL that he considers were not reasonably necessary for the Second

Respondent to have incurred for each date. These percentages are expressed in dollar amounts in endnote 20 to the Report (from page 19). These amounts appear to have been calculated by the Referee based on the amounts detailed in the Excel spreadsheet without making any reductions to the same to account for the hourly rate reductions that the Referee makes earlier in the report.

20. On this basis, it is likely that these overall numbers and percentages are in fact incorrect.
21. Then, at [17(9)] of the Report, the Referee provides his opinion in numeric terms as to the costs reasonably incurred by the Second Respondent for senior and junior counsel for the hearing for certain dates. However, it is not clear how the further comments set out in the endnotes to the Report fit into the conclusions including, for example, endnote 17 (page 19) which refers to the costs for trial preparation.
22. The result is that it is not possible to determine the actual amount of costs related to the hearing that the Referee considered to have been reasonably necessary for the Second Respondent to have incurred.

Costs associated with submissions

23. The Referee states in the Report at [17(10)] that he considers that it was reasonably necessary for the Second Respondent to incur the costs of preparation of the content of her own opening submissions at paragraphs 44 to 49 under heading “F. QUESTIONS 13, 14 AND 15 – DAMAGES” and the content of her closing submissions addressing questions of fact and law on the CII of the defence of substantial truth. The Referee then determines that it was not reasonably necessary for the Second Respondent to incur costs otherwise of preparation of her own opening written submissions or closing submissions on the CII.
24. The Referee makes two conflicting statements in relation to these costs at [17(11)] of the Report. He finds in sub-paragraph (a) that a global discount of 15.63% should be applied to time entries referable to preparation of written submissions **or** the position is as in sub-paragraph (b), namely, that there should be no global discount to the time entries referable to the preparation of written submissions. Endnote 31 records that the percentage of 15.63% is based on the length and content of the First Respondent’s opening and closing written submissions and the Second Respondent’s opening and closing written submissions addressing certain issues.

25. The Report does not state which of the opinions the Referee adopts and nor does it provide any indication of the actual items of work detailed in the spreadsheet to which he considers any applicable reduction should be made. Nor does the Report indicate whether any reduction is to be made to the costs charged to the Second Respondent by GDL or counsel.
26. Accordingly, the actual costs related to the preparation of submissions cannot be determined.
27. A separate, but additional, matter is that to the extent that the costs incurred by the Second Respondent for junior counsel during the hearing (which are also dealt with by the Referee at [17]) have been allowed, the corresponding disbursement entries do not appear on the annexure to the Report. This impacts the calculations of the percentages and amounts of the Second Respondent's costs which are reasonably necessary to have been incurred.

Costs associated with the re-opening application and hearing

28. It is not possible to determine what costs associated with the re-opening application and hearing the Referee considers to be reasonably necessary.
29. The Referee makes a number of determinations in [18(12) to (15)] of the Report as to the costs that he considered to be reasonably necessary or not reasonably necessary. Then, at endnote 32 (page 24), the Referee states that the "answers" to those matters were principally based on an analysis of the transcript of the re-opening hearing set in endnotes 33 and 34. The Referees however does not indicate which costs in the spreadsheet are of concern or which of the costs incurred by the lawyers from GDL and junior and senior counsel he considers to have been not reasonably incurred.

Costs for residual matters

30. Question 17 of the Wilkinson Relevant Questions asked the Referee to consider the costs incurred by the Second Respondent in relation to the balance of the work undertaken in the proceeding not addressed in the other specific questions.
31. The Referee states his opinion in this regard in [27(17)] of the Report. He makes no reductions on account of the matters outlined in [27(17)(a), (b) and (c)] and makes an

overall percentage discount to the work undertaken by GDL of 20.14% as set out in [27(17)(d)] and a 1.1% discount to be applied to disbursements including counsels' fees as set out in [27(17)(e)].

32. These amounts, now expressed as costs not reasonably incurred, are detailed as being highlighted in yellow by the Referee in attachments D1 and D2 to the Report. The total amount of the costs apparently disallowed by the Referee on this basis for GDL's professional fees is \$115,330.87 and for disbursements including counsels' fees is \$11,646.50.
33. The only reasons provided by the Referee for these significant reductions are those set out in endnote 44 to the report. One of these reasons given at endnote 44.2 was that the Referee considered that there was insufficient descriptive information or other inquiry material to support the costs charged. The Referee did not seek any additional information from the parties in this regard and the Second Respondent provided detailed submissions in relation to the draft Report on this point.
34. The Second Respondent will make submissions in due course about this issue in the event that the Second Respondent submits that the Report should not be adopted. For current purposes the Second Respondent notes that this determination appears to have proceeded on the erroneous basis that there was an absence of material which would properly inform the determination

16 December 2024

Gillis Delaney Lawyers