Cross-claimant's Outline of Opening Submissions

Introduction

1. By cross-claim filed on 5 December 2023, the cross-claimant, Ms Wilkinson, seeks a declaration that the cross-respondent (**Ten**) is obliged to indemnify Ms Wilkinson for the legal costs incurred by her in defending the applicant's claim against her, the quantum of such costs being the amount agreed or as assessed on the solicitor-client basis. The legal costs in question are liabilities Ms Wilkinson has to her solicitors in respect of their fees and disbursements (including counsel's fees).

2. The cross-claimant relies on the affidavits of Lisa Wilkinson dated 5 December 2023 (**Wilkinson 1**), dated 16 January 2024 (**Wilkinson 2**) and dated 2 February 2024 (**Wilkinson 3**). The documents conveniently located in the served exhibits identified as AJJ-1 and AJJ-2 will also be tendered as will the inter-party correspondence at pages 132 to 158 of the served exhibit identified as DEC-1.

3. A few uncontroversial matters may be noted by way of introduction.

4. *First*, the alleged liability of Ms Wilkinson to the applicant is one that arose out of, or in the course of, her employment with Ten.

5. *Second*, and by virtue of that reality, the law recognises the existence of an obligation on Ten's part to indemnify Ms Wilkinson in respect of her reasonable legal costs of defending the claim. It is an indemnity implied into every contract of employment: see, e.g., *In re Famatina Development Corporation Ltd* [1914] 2 Ch 271 at 282; *Kallinicos v Hunt* [2006] NSWSC 723 at [21]; *National Roads and Motorists' Association v Whitlam* (2007) 25 ACLC 688; [2007] NSWCA 81 at [85]-[89]; *Dodds v Howitt-Stevens Constructions Pty Limited (No 2)* [2010] NSWSC 1398 at [69]-[70]. The indemnity is a "fundamental principle" and "duty" of the employer: *Australian Associated Motor Insurers Limited v Elmore Haulage Pty Ltd* (2013) 39 VR 465; [2013] VSCA 54 at [104]; an appropriate corollary to the fact that the individual's liability would arise in the course of doing their job, with the employer seeking to profit from those directed labours of the employee.

6. *Third*, a person who is sued has a general right to be represented by the legal practitioner of his or her choice, subject to the Court's supervisory jurisdiction to restrain a legal practitioner from acting in a particular case: *Grimwade v Meagher* [1995] 1 VR 446 at

452; *Kallinicos v Hunt* (2005) 64 NSWLR 561; [2005] NSWSC 1181 at [76]; *Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404 at [35], [51]; *Bahonko v Nurses Board of Victoria (No 3)* [2007] FCA 491 at [2]; *Shaw v The Official Trustee in Bankruptcy Vic 1697/14/1 of Australian Financial Security Authority* [2020] FCAFC 142 at [13]-[14]; *Porter v Dyer* (2022) 402 ALR 659; [2022] FCAFC 116 at [113]. The employer's obligation to indemnify exists within this reality. It picks up and operates within (rather than excluding) the fundamental principle that an individual sued is entitled to be represented by the practitioner of their choice.

7. *Fourth*, in the present proceeding, Ms Wilkinson is named as an individual respondent and a finding is sought by the applicant that she is personally liable. She has not been made a respondent for the sake of completeness, for some estoppel or *res judicata* purpose. She is the most direct of respondents, with allegations being made and causes of action being pursued directly against her.

8. *Fifth*, those allegations and claims against Ms Wilkinson gave rise to a very large amount of public and media attention, interest and comment, of a kind that would bear directly on Ms Wilkinson's reputation and standing within her profession. The conduct of the proceedings and the findings to be made could be expected to have significant impacts upon her reputation and professional future, in addition to bringing with it all of the anxieties already associated with being an individual party to litigation.

9. *Sixth*, Ms Wilkinson obtained advice from three separate lawyers (including two senior counsel) that she should be separately represented. One of those advices was obtained by Ms Wilkinson at the express proposal of Ten, and for the purpose of enabling Ms Wilkinson to obtain separate advice from that of her own lawyers of choice as to whether she should be separately represented. That advice, provided to Ms Wilkinson by the silk proposed by Ten (Bret Walker SC) and a solicitor proposed by Ten (Patrick George, defamation and insurance specialist) was that, for a variety of reasons, it was appropriate for Ms Wilkinson to be separately represented.

10. *Seventh*, following confirmation of the fact that this advice had been given by Mr Walker, and knowing that Ms Wilkinson was separately represented, and faced with an impending cross-claim from Ms Wilkinson if Ten refused to confirm that it would indemnify her in respect of the legal costs of her own lawyers, Ten then expressly confirmed through solicitor's correspondence dated 24 March 2023 from Baker & McKenzie to Gillis Delaney Lawyers (Ex LW-1 page 189) that it would indemnify her

in respect of her reasonable costs. That confirmation was not qualified by a statement that, in fact, Ten considered it did not have to indemnify Ms Wilkinson at all because she was being separately represented (the position Ten now takes). It read as follows:

> We are instructed to confirm that:
>
> (1) Network Ten agrees to reimburse Ms Wilkinson for her legal costs of defending the Proceedings to the extent that those costs are properly incurred and reasonable in amount and to the extent required under section 3(1)(b) of the *Employees Liability Act* 1991 (NSW) and at general law; and
>
> (2) the appropriate time for reimbursement of her legal costs will be at the conclusion of the Proceedings once the quantum of those legal costs can be determined, taking into account any costs orders in Ms Wilkinson's favour.

11. Although Ten has taken a number of different positions at different points in time with a view to resisting paying Ms Wilkinson any money in respect of the legal costs she has incurred, the issues in dispute between the parties have now reduced to two only. Each is addressed below. Neither of those is the payment timing point which Ten relied on in paragraph (2) of the above confirmation, an assertion now abandoned by Ten.

Issue 1 - Ten's claim that it was unreasonable for separate representation

12. The primary issue which Ten now advances is this: it says that it was unreasonable for Ms Wilkinson to be separately represented at all and as a result, the costs liabilities she has incurred were unreasonably incurred and therefore fall outside the indemnity. The first issue therefore reduces to a question as to whether it was unreasonable for Ms Wilkinson to elect to be separately represented.

13. Ms Wilkinson contends that Ten's position on that issue does not accord with principle, and in any event ought not to be accepted having regard to the matters identified above and below. Given that it is anticipated the Court will already have a general familiarity with the relevant facts and circumstances, the following submissions proceed on that basis and deal directly with Ms Wilkinson's position by reference to those matters. It is noted that, should this not be the case, and in any event, the later part of these submissions does address those facts and circumstances and the evidence in respect of them.

14. Ms Wilkinson was reasonably entitled to be represented by lawyers that she trusted, and who she felt could advise her as to what they thought was in her best interests, whatever Ten's interests might be on any point concerning the conduct of her defence of the proceeding. She was a respondent in the most direct sense of that word, and the

proceedings had all of the attributes and the very personal impacts and potential consequences for Ms Wilkinson described above. It was natural that she would want her lawyer to be someone she personally trusted, and who could focus exclusively on her interests.

15. The lawyers acting for Ten were not so placed, as Ten's preferences and interests did not align with those of Ms Wilkinson.

16. Even prior to the commencement of the proceeding, it was apparent that Ms Wilkinson's interests and preferences did not align with those of Ten in relation to matters pertaining to the events giving rise to this proceeding. Those events included Ms Wilkinson's giving of the Logies speech (a subject matter of this proceeding), the stay of the applicant's criminal trial, and the subsequent false public statements made to the effect that Ms Wilkinson had been warned not to give the speech but had given it anyway. Those false statements cast Ms Wilkinson as a reckless individual determined to go against warnings given about an important matter. She had not even asked to give the speech. It was Ten who had asked her, and she had, prudently, sought and obtained legal advice from Ten and also obtained approval and authority from Ten's most senior executives, including its CEO, to give the speech. In giving the speech she was performing for Ten as she had been requested and approved to do.

17. Understandably, Ms Wilkinson wanted the truth just described to be made known, as her reputation was being publicly attacked, including through the media and online. She complained that Ten was not making the true position public. However for its own reasons, Ten did not want to take that course, and as a result, never corrected the public record. Ten consistently acted to guard privilege in the legal advice that it gave to Ms Wilkinson about the speech. During this same period, Ten publicly and privately disassociated itself from Ms Wilkinson, most strikingly by removing her from *The Project* and revising her employment contract accordingly, and then by its failure to give Ms Wilkinson any work under the revised contract. Ms Wilkinson was left off air and without an actual project to pursue before the proceedings had commenced, and that remained the case thereafter.

18. Each of Ten and Ms Wilkinson had their own legitimate interests and preferences in how matters such as the public falsehoods should be addressed. Ms Wilkinson wanted Ten to correct the public record. Ten did not, and maintained the position that it would

not waive privilege in the legal advice. Ten's preference prevailed, and Ten's lawyers acted (as they were bound to) in the pursuit of Ten's instructions and preferences.

19. The fact that Ten and Ms Wilkinson's interests were not identical in matters pertaining to this action was further exposed at the very outset of the proceeding. Even before defences were filed, and with the benefit of advice from her lawyers, it was revealed that Ms Wilkinson's preferences and interests differed from Ten's in material respects. For example:

(a) differences of interest existed and arose in relation to whether contentions should be made and evidence led about matters involving legal advice. This was not only in relation to the Logies' speech. It also concerned advice given in relation to the broadcast about which the applicant was suing. These were to be running sores through the course of the matter, including at trial (as the Court observed);

(b) as a section 30 defence is directed to individual publishers, Ms Wilkinson had her own defence, and it was different from that of Ten's;

(c) not only was Ms Wilkinson's defence different, but given her position as an individual respondent, she had the right and opportunity to analyse and criticise the conduct of other Ten employees. It was in her interests to explore that thoroughly, take advice on it, and make decisions based on that advice as to what action to take;

(d) on the facts concerning the claims and defences generally, the position was that Ms Wilkinson suggested changes to the proposed broadcast, to the questions to be posed to affected persons, and to the questions to be posed to Ms Higgins, being suggestions that were not taken up by Ten;

(e) Ms Wilkinson proposed to (and did) plead common law qualified privilege while Ten did not;

(f) Ms Wilkinson proposed to (and did) plead mitigation (sex with the consent issue not proved) while Ten did not;

(g) Ms Wilkinson did not wish to plead the truth defence in the terms Ten did. Her defence was pleaded in terms and tone notably different from the language that Ten and its lawyers wanted to use; and

(h) Ms Wilkinson had her own arguments available to her on the limitation issue (as an individual, having not been served a concerns notice, on the discretionary aspect).

20. Predictably, given the above misalignments in preferences and interests, there were others that became apparent as the proceeding progressed. For example:

(a) the discovered documents revealed that Ms Wilkinson had not been informed about information received for the broadcast and decisions made about the content of the broadcast, being matters about which she would wish to take advantage and highlight in a way Ten may not;

(b) Ten would not cross-examine the applicant on certain issues going to damages, and in particular in respect of his settlements with ABC and News Limited. Senior counsel for Ten was unable to pursue such a course, because he had appeared for News Limited in the proceedings which had settled, and had relationships with those entities. Ms Wilkinson wanted to cross-examine the applicant on these matters and did so; and

(c) Ten did not argue against the suppression orders sought by the interveners the ABC and News – perhaps for the same reason. Ms Wilkinson and her lawyers argued this.

21. There can be no contest that Ten's lawyers, Ms Saunders of Thomson Geer and Dr Collins KC, were duty bound to act throughout the proceedings in the best interests of Ten, and in accordance with instructions provided to them by Ten, whether those instructions were motivated by commercial, reputational or other considerations. Amongst other things, those duties would have prevented them from advising Ms Wilkinson as to the possibility of conducting any aspect of her defence in a manner that might be prejudicial to Ten in any way, or contrary to their understanding or instructions as to what Ten wished to achieve. Indeed the existence of such duties to Ten would mean that they would be unlikely to turn their minds to an exploration of such matters.

22. In light of the above matters, it was reasonable for Ms Wilkinson to decide to be represented by lawyers other than those acting for Ten, and by lawyers who would be solely devoted to her best interests and instructions and duty bound to do so. Indeed it is difficult to see how it could be asserted that Ms Saunders or Dr Collins could have

thought that it would have been appropriate for them to act for both Ten and Ms Wilkinson given such matters.

23. The reasonableness of Ms Wilkinson's decision to be separately represented is yet further demonstrated by the following matters:

(a) Ten's lawyers were Dr Collins KC and Ms Saunders. The former is a barrister who made public comments to a national broadcaster about, and critical of, Ms Wilkinson in relation to the Logie speech, which public comments resulted in substantial adverse publicity for her. The latter is a solicitor who had, both before and shortly after the proceeding commenced, acted in the interests of Ten in respect of matters where there existed controversy between Ms Wilkinson and Ten. It is understandable why Ms Wilkinson would not have wanted these lawyers to represent her in these circumstances, and it was reasonable for her to decide to use others; and

(b) Ms Wilkinson obtained legal advice that it was in her interests to be separately represented, and she acted on that advice. One source of advice was an independent senior counsel suggested by Ten (Mr Walker SC). Ms Wilkinson received the advice she did from two different and experienced senior counsel, and that advice was based on a variety of different considerations, all of which pointed in the direction of Ms Wilkinson being separately represented. Mr Walker's advice identified the above differences in position between Ms Wilkinson and Ten and the potential for conflict that existed, and concluded that it could not reasonably be expected that Ms Wilkinson retain the same lawyers as Ten.

Ten has not led any expert evidence to say that it was not open to a reasonably competent lawyer to give such advice on the basis of any of the many and varied reasons that were given in the advices, let alone that a person in Ms Wilkinson's position ought to have appreciated that it would be unreasonable to act on that advice.

24. Above and beyond all these matters, Ten provided Ms Wilkinson with the confirmation that it would honour its indemnity to Ms Wilkinson in the terms set out above (paragraph 10). It did so at a time when it knew that Ms Wilkinson was being separately represented, that Mr Walker SC had advised that Ms Wilkinson should be separately

represented, and that Ms Wilkinson was about to launch a cross-claim if confirmation was not provided.

25. Having regard to the terms of the confirmation and the circumstances just identified, it was reasonable for Ms Wilkinson and all her lawyers to understand that the confirmation meant that Ten would indemnify her in respect of the costs of her separate representation, so long as the work done and amounts charged were reasonable, and on the basis that payment fell due at the end. That understanding was not only reasonable, but reflected Ten's actual position at the time. This is apparent from the confirmation letter and what it did and did not say in the above context, and the fact that Ten calls no evidence to demonstrate that its position was otherwise (which is an unsurprising reality given just how sharp the confirmation letter would have been if that was Ten's true position at the time). That confirmation remained Ten's position right up until 10 November 2023, when it changed its position and raised this issue in paragraph 19(d) of its commercial list response filed on 10 November 2023 in the Supreme Court. In short, it sought to change its position after most of the costs in question had been incurred.

26. It is not possible for Ten to say it was unreasonable for Ms Wilkinson to be separately represented in circumstances where its actual position, communicated to Ms Wilkinson in advance of her incurring the liability for the vast majority of the legal costs under consideration, was that Ten *would* indemnify her in respect of the costs of her separate representation, so long as the work done and amounts charged were reasonable. Even if one could assume that this was not Ten's actual position, it was reasonable for Ms Wilkinson and her lawyers to understand it to be Ten's position. It was not unreasonable for her to act in accordance with the confirmation she received, and her understanding of it.

Issue 2 – Ten's contention that this Court should engage in some costs assessment

27. Ten's cross-claim filed in this Court has introduced a further new argument, namely that Ten is only liable to indemnify Ms Wilkinson in respect of the costs incurred by her in defending issues in the proceeding other than so-called "common issues".

28. The claim by Ten that Ms Wilkinson should only have had representation on issues that were not "common" must, as a matter of logic, be an alternative to its primary case that it was unreasonable for Ms Wilkinson to be separately represented at all. That is because, if it was unreasonable for her to be represented at all, the "common issues"

argument would not need to be raised. The raising of this new point thus appears to reflect an appreciation by Ten of the difficulties highlighted above associated with its primary position, and a search for alternative and lesser basis for resisting payment.

29. Given that it must be an alternative and secondary case, for Ten to proceed with it, Ten would first have to identify which issues it says are not "common issues". To date it has not identified what it says they are. Ms Wilkinson will only be able to fully address the argument when Ten engages in this process and explains its reasoning.

30. Leaving that gap in logic and content in Ten's argument to one side, the "common issues" contention is not soundly based as a matter of principle, and, practically, is unworkable. Four points may be made in particular.

31. First, how could Ms Wilkinson reasonably be expected not to have engaged legal representation on an asserted common issue in circumstances where she does not have the legal knowledge to understand whether – and when – her interests with Ten on that issue might diverge so as then to require separate representation.

32. Secondly, similarly, how – and during what stage of the litigation – was Ms Wilkinson to know whether her interest on a particular issue aligned completely with that of Ten such that an issue was, truly, common. Unless Ms Wilkinson was separately represented on all of the issues and the many decisions to be made in respect of each issue, she would not be in a position to be advised about, and consider, whether it was in her best interests to pursue one particular course instead of another. The idea seems to be that Ms Wilkinson should have had her own advisers to work with her throughout the whole proceedings so as to advise her on what was best to do in her interests, and incurred all of the costs of so doing, but only be indemnified in any instance where she happened to take an approach that was not entirely common with Ten's approach.

33. Thirdly, how could Ms Wilkinson agree for a legal practitioner to act for her only on asserted non-common issues in a proceeding such as the present, where both respondents are sued in respect of the same cause of action based on one set of facts, as opposed to a proceeding where, for example, a second, factually and legally distinct, cause of action is brought against only one of two respondents.

34. Fourthly, once it is accepted that Ms Wilkinson would be appropriately separately represented in the proceedings, it is not sensible to speak of her only being represented by those solicitors on some issues but not others. She could not have solicitors on the

record for some issues but not others. As solicitors on the record, they would owe both Ms Wilkinson and the Court duties in respect of the conduct of the proceedings, and the discharge of those duties would necessarily require them to have an understanding of, and to form views about, all issues in the case and the conduct of it. This is quite apart from the fact that they would need to do this in order to determine whether it was in Ms Wilkinson's interests to do or not do what Ten was doing at any point in time, as described above.

35. Further to these points, or perhaps expressing them differently, the "common issue" notion provides an unstable starting point for Ten's argument. The question cannot be whether an issue raised in the proceeding is one in which they both happen to have the same interest in the ultimate outcome. That approach fails to address the practical reality that, in respect of every issue in the case, regardless of whether it is one in which both respondents wish for the same outcome, there will be many decisions to be made about a wide range of matters concerning the conduct of the case. These include, by way of example only, whether or not a particular argument should be raised in respect of an issue, how that argument is best put, which authorities should be deployed, what evidence should be called or not called, whether documents should be sought, whether privilege should be waived or not, whether a witness should be cross-examined or not and if so what questions should be asked or not asked.

36. Whether or not it would be in Ms Wilkinson's interests to take the same course as Ten in relation to such action or inaction, whether it be in respect of a so-called "common issue" or not, is something that Ms Wilkinson was reasonably entitled to obtain advice from someone who was responsible for considering the matter entirely from her perspective, and without having to accommodate or balance the interests of others, including Ten. She could not know what the available options could be in respect of each such decision as and when it fell to be made, let alone determine which of those options might be best from her perspective. It could not be predicted when such a circumstance would arise, and many times the assessments and decisions would need to be made quickly (for example, whether to ask a question of a witness if Ten's counsel did not, or whether to make a submission if Ten did not). Those advising her would need to be closely involved in the day-to-day conduct of the matter, and be consistently on hand, to be in a position to provide such support. In short, they would need to be acting for her in the proceedings.

37. The contest between Ten and Ms Wilkinson about privilege of advices given at a variety of times (including but by no means limited to the advice given by Ms Smithies to Ms Wilkinson in relation to the Logies speech) and its waiver is an immediate and convenient illustration of this. It is Ten who has taken the position throughout that there should be no waiver. That is not Ms Wilkinson's position, a fact made apparent from the time of McCallum CJ's judgment, as referred to below, and, again, from the earliest moments of these proceedings (when defences were being prepared), with debates ensuing between the different respondents' lawyers as to whether it should be relied upon or not: e.g. emails dated 28 February 2022 at Ex AJJ-1 pages 136-137. The Court has observed this ongoing issue through the course of the hearing: e.g. T1832/14 – T1833/44; T1888/18 – T1890/46; T2285/11 – T2286/2; T2279/13 – T2285/41. Both parties had a common interest in defending the claims, but their views about how this should be done differed significantly. It is reasonable for her to have had solicitors acting for her throughout, so that she had someone who was ready, willing and able to form a fearless and independent view as to what was the best step for her to take or not take at any point, whatever attitude Ten (and its lawyers on instruction from Ten) may have had.

38. Another stark example is the position which eventuated in cross-examination of the applicant (going to damages) in respect of his settlements with ABC and News Limited. Again, it was in respect of what Ten might call a "common issue", namely the quantum of loss. Senior counsel for Ten was unable to pursue such a course in his cross-examination, because he had appeared for News Limited in the proceedings which had settled: T486/23 – T491/27; T492/30.

39. The above analysis demonstrates that the "common issue" approach of Ten does not hold water. If Ten wants to say that a certain piece of work undertaken by Ms Wilkinson's lawyers was not necessary because it was an unnecessary duplication of the work Ten's lawyers was doing, that is a matter for assessment. The item of work can be identified, Ten can say why it was duplicative by reference to the particular work of its own and the circumstances in question and point to that work of its own, and the assessor can determine whether it was reasonable for Ms Wilkinson's lawyers to have done what they did, from a solicitor/client perspective. It will be a matter of hearing the particular explanations around each piece of work and the assessor forming his or her view. That is what an assessor does. The declaration sought by Ms Wilkinson in her cross-claim provides for this. What Ten is doing, through this fallback claim, is to seek

to short circuit this proper approach by having the Court adopt a "common issues" approach. For the reasons set out above, that is not appropriate and should not be allowed.

40. Ms Wilkinson has accepted that the assessment process should occur and that she should be indemnified in respect of the resulting figure. It is only Ten, by raising the above two issues, who has prevented this from occurring.

Addressing some matters of evidence and fact

41. What follows is an introduction to some of the facts and circumstances covered by the evidence, without intending to provide an exhaustive analysis in this document. It seeks to strike a balance between the provision of information on the one hand and the resulting length of this document on the other, so that the Court has at this stage a convenient summary of some of the important matters, without burdening it with a larger document covering every piece of evidence. A chronology is currently being prepared that will identify the events and where the evidence in respect of those events may be found.

General

42. The nature of the applicant's proceeding and the circumstances giving rise to its commencement have now been so thoroughly aired that it is not thought necessary to recite those matters again here.

43. In terms of formal introductory matters then, the only other matter addressed at this point is the identification of Ms Wilkinson's contracts of employment, the details of which are not in dispute. In this regard:

(a) by written agreement dated 12 December 2017 (**first employment agreement**), Ms Wilkinson commenced employment with Ten as the co-host of *The Project*, which is a television programme broadcast by Ten. The term of the original employment agreement was for four years, commencing on 1 January 2018 and terminating on 31 December 2021; and

(b) by written agreement dated 12 July 2021 (**second employment agreement**), Ms Wilkinson's employment with Ten as the co-host of *The Project* was extended for a further term of three years, commencing on 1 January 2022 and terminating on 31

December 2024. The significance of this second employment agreement will be discussed shortly.

Events prior to the commencement of this proceeding

44. At the 2022 Logie Awards on 19 June 2022, Ms Wilkinson gave a speech in accepting, on behalf of Ten, a Silver Logie for Most outstanding News Coverage or Public Affairs Report in relation to the Interview.

45. Prior to that event, Ms Wilkinson – who had been asked to give the speech by Ten – had sent the draft speech to Ten's executives and lawyers for approval: Wilkinson 1 at [26]-[29]; Wilkinson 2 at [4]-[14]. It was approved by Tasha Smithies, Ten's Senior Legal Counsel. It was approved by Sarah Thornton, Executive Producer of *The Project*: ExAJJ-1 pages 2-5. It was approved by Beverley McGarvey, the CEO of Ten, and Cat Donovan, the Head of Communications at Ten: Wilkinson 1 at [26]-[27]; Wilkinson 2 at [8]-[14]. Following the speech, Ms McGarvey commented that the speech given was a "beautiful speech": Ex AJJ-1 page 6; Wilkinson 1 at [29]; Wilkinson 2 at [14].

46. As to Ten's legal vetting and approval of the speech, Ms Smithies' reviewed the speech and, apart from a date change, did not suggest or require any other change to the speech, or advise Ms Wilkinson that she should not give the speech or of risks associated with doing so: Wilkinson 2 at [8]-[10]; Smithies affidavit at [34]-[37]. On the day of the Logie awards, Ms Wilkinson asked Ms Thorton to get Ms Smithies to review the speech again, and Ms Wilkinson was told that Ms Smithies said "speech all good": Wilkinson 2 at [11]-[13]; Ex LW-1 page 6. Ms Smithies' agrees that she reviewed the speech again at the request of Ms Thornton and did not make any changes to it: Smithies affidavit at [38]; Wilkinson 3 at [5]-[6].

47. A few days earlier, on 15 June 2022, Ms Wilkinson had participated in a meeting with Shane Drumgold SC, then ACT Director of Public Prosecutions, in respect of Ms Wilkinson's anticipated evidence in the then forthcoming criminal trial of the applicant (**Drumgold meeting**). Ms Smithies attended the Drumgold meeting. She agrees that, during the Drumgold meeting, Mr Drumgold did not advise Ms Wilkinson not to give the speech: Wilkinson 1 at [17]-[25]; Smithies affidavit at [33].

48. Following the giving of the speech, the applicant sought and obtained an order from McCallum CJ for a stay of the hearing of the criminal trial. In *R v Lehrmann (No 3)* [2022] ACTSC 145, her Honour set out her reasons for making that order, and in the

course of doing so referred (at [22]) to a "clear and appropriate warning" given by Mr Drumgold to Ms Wilkinson at the Drumgold meeting of dangers associated with giving the speech.

49. That finding was made on the basis of assertions by Mr Drumgold that he had given such a warning, when in fact he had not. That assertion, and the consequential finding, was made in circumstances where Ms Wilkinson was not represented at the stay application and had not been given the opportunity to be heard.

50. The matters just described are uncontroversial as between the parties, and is a reality which Mr Drumgold subsequently admitted, and is a matter which was recognised in the report (**Report**) later issued by the Board of Inquiry established by the ACT Government following the criminal trial of the applicant (**Inquiry**): Australian Capital Territory Board of Inquiry Criminal Justice System, Final Report, Walter Sofronoff KC, 31 July 2023 at [464].

51. From the time of receiving the judgment, Ten knew that:

(a) contrary to what the ACT Supreme Court had been told, Ms Wilkinson had not been warned by Mr Drumgold not to give the Logie Award speech;

(b) the speech had been reviewed and approved by Ten's lawyers, without any warning of a risk of the kind which came to pass;

(c) Ms Wilkinson had given the speech with the prior knowledge and approval of Ten's most senior executives; and

(d) contrary to acting in the reckless manner described in the judgment (i.e. going against express warnings given), Ms Wilkinson had acted prudently in seeking and obtaining legal advice and senior executive approval from the highest levels within Ten, and had acted in accordance with that advice and those approvals.

52. On 22 June 2022, the day following the judgment, Dr Collins KC, then President of the Australian Bar Association, gave an interview on Network Seven's *Sunrise* programme. A copy of the interview is contained at Ex AJJ-2. Those comments included that it was possible that the "authorities" will be "looking at the speech" Ms Wilkinson gave at the Logie Awards to see whether she did anything which had "a tendency to interfere with the administration of justice". Put plainly, Dr Collins was suggesting that Ms Wilkinson may be investigated to see whether she had committed a contempt of court.

53. This speculation did not reflect the reality. Neither the judge nor the prosecutor had made any allegation or suggestion that a contempt had been committed. The judge had not referred the matter to anyone, and the prosecutor had not suggested that this was something that could or should be done. The latter was unsurprising given that the judgment was based, in substantial part, on a falsehood propounded by the prosecutor.

54. The finding that Ms Wilkinson gave the Logie Award speech after having been warned not to was extremely damaging to her reputation; a fact exacerbated by Dr Collins' comments. Media articles published from 22 June 2022 (Ex AJJ-1 pages 17 to 78) included headlines or comments such as:

(a) "A top judge has slammed [Ms Wilkinson's] words" and "a senior lawyer says the media personality may face legal consequences" which "could include contempt of court charges": Ex AJJ-1 pages 17, 21;

(b) "Collins said [Ms Wilkinson] speech was 'ill-advised' and that a media veteran should have known better": Ex AJJ-1 pages 23; and

(c) "Lisa Wilkinson blasted for Logies speech as Brittany Higgins rape trial delayed", which referred to negative comments from media colleagues and that "Matthew Collins, president of the Australian Bar Association, told Sunrise on Wednesday that it is a 'serious possibility' that authorities may look into charging Wilkinson with contempt of court": Ex AJJ-1 pages 26-28.

55. Ms Wilkinson correctly considered the judgment of McCallum CJ and the reporting of it in the context of the remarks of Dr Collins to be highly critical of her: Wilkinson 2 at [21]-[28]. From when these first media reports commenced, Ms Wilkinson asked for Ten to publicly state the true position: Wilkinson 2 at [29], [37], [43], [58]. This never occurred.

56. At the same time as the judgment of McCallum CJ, Ten engaged Dr Collins – the person who had been making suggestions of contempt – to represent Ms Wilkinson and Ten in respect of issues arising from the speech at the Logie Awards and the judgment. Ten engaged Ms Saunders as the solicitor instructing Dr Collins: Saunders affidavit at [11]. Ms Wilkinson was not asked her views as to who should represent her: Wilkinson 2 at [30]; Wilkinson 3 at [7]. When Ms Wilkinson became aware that Dr Collins was acting for her, she made it clear that she was unhappy about being represented by Dr Collins

given his public comments and the extent to which they then featured in the damaging media commentary about her: Wilkinson 2 at [31]-[33]; Wilkinson 3 at [8].

57. It was in Ms Wilkinson's interests for Ten to correct the public record as to the fact she had not been warned and had acted in accordance with legal advice and approvals she had sought and obtained in advance, and it was reasonable for her to want that to happen. There would be nothing remotely contemptuous in doing so. The fact that Ten would not agree to publicly state the true position, and never did, because it took its own view based on "commercial considerations" (see Saunders affidavit at [66]), was demonstrative of the fact that Ms Wilkinson's interests and those of Ten could not be taken to be one and the same, that substantial misalignment could arise, and that in the event of misalignment, Ten's interest would prevail, and the legal advice dispensed from Ten's legal team would necessarily be focussed upon what Ten wanted (consistent with their obligations to Ten) and not single-mindedly focussed on Ms Wilkinson's interests and objectives.

58. The engagement of Dr Collins KC to represent Ms Wilkinson was a further illustration of this. It is unsurprising that Ms Wilkinson did not want a person who had been speculating about contempt, and whose comments on that subject triggered the adverse media frenzy which followed, to be her lawyer. However, she was not given the opportunity to participate in the decision: Wilkinson 2 at [30]; Wilkinson 3 at [7]. Ten wanted to brief Dr Collins, and he was briefed. Ms Wilkinson felt she had little choice in these circumstances to go along with what had occurred, even though it was not what she would have preferred and she did not think it was in her interests to be seen engaging a lawyer who had made the comments in question: Wilkinson 2 at [31]-[33], [36]; Wilkinson 3 at [8]. Her view in this regard was to prove correct, for as she feared, the press was quick to get hold of the story and to highlight the apparent incongruity between the statements made by Dr Collins and what was publicised as Ms Wilkinson's choice to brief him: e.g. Ex LW-1 pages 27-30; Ex AJJ-1 pages 66-76. This was a further embarrassment for Ms Wilkinson, of the kind she had been concerned would arise. But Ten had secured the lawyer of its choice.

59. Ms Wilkinson met Dr Collins only once, being by Zoom on the afternoon of 22 June 2023. She did so because she was asked to do so by her employer, Ten. She participated courteously in the meeting, as did Dr Collins. However, that did not affect her concerns about him acting for her in light of what had occurred and the lack of any public statement by Ten: Wilkinson 3 at [8]. Even when Ms Smithies agreed that media articles

about Ms Wilkinson were inaccurate and potentially defamatory, Ms Smithies advised against Ten making any public statement to the contrary: Smithies affidavit at [82]-[84]; Wilkinson 3 at [11].

60. Also on 22 June 2022, Ms Saunders spoke with Mr Drumgold, and obtained confirmation from him that he had not given the warning to Ms Wilkinson, that he felt she had been poorly treated, and that he would consider how he could correct the record in court the following day: Saunders affidavit at [20]. The judgment of 22 June 2022 recorded that the matter would be listed again the following day (23 June 2022). Mr Drumgold did not take any step to correct the public record.

61. Later in 2022, with the public record still not corrected, Ten took steps to remove Ms Wilkinson from appearing on *The Project*, notwithstanding that the second employment contract terminated only on 31 December 2024: Wilkinson 2 at [44]-[55]. In an email dated 11 November 2022 from Ms McGarvey to Nick Fordham, the cross-claimant's management adviser, Ms McGarvey stated that "we plan to relieve Lisa of her duties on the Project": Ex AJJ-1 page 92. The second employment contract was amended by variation agreement dated 21 November 2022: Exhibit AJJ-1 page 94. Ms Wilkinson engaged Mr Jefferies of Gillis Delaney to act for her in relation to the variation: Wilkinson 2 at [55]. Notwithstanding the agreement in clause 2 of the variation agreement that Ms Wilkinson would conduct certain "Interview programs", none has in fact occurred: Wilkinson 2 at [55].

62. Ms Wilkinson was taken aback and embarrassed by the decision to remove her from *The Project* and felt that it showed that Ten had no interest in supporting her and, in fact, was taking steps which would damage her reputation further: Wilkinson 2 at [46]. In the context of the widespread media criticism of her, Ms Wilkinson's views were natural and reasonable. The impression being created by Ten's conduct was that they were deliberately disassociating themselves from Ms Wilkinson as a result of the judgment and its consequences. Ms Wilkinson was right to think that Ten did not have her interests at heart, and was prepared to distance itself from her in order to achieve its objectives. She could not reasonably expect that Ten, and those retained to advise and act on its instructions and in its interests, would be focussed on, let alone prioritise, what her interests were or what she may wish to achieve.

63. As the contemporaneous correspondence throughout the second half of 2022 makes plain (Ex AJJ-1 pages 96 to 109; Wilkinson 2 at [56]-[68]), Ms Wilkinson's view was

that Ten and its legal advisers were not "doing anything to correct the factual record behind the scenes on any element of the ongoing trashing of my name": Ex AJJ 1 page 101. That view reflected the true position.

64. In late 2022, the ACT Government announced the establishment of the Inquiry. Ms Smithies informed Ms Wilkinson that, notwithstanding Ten's and her knowledge of the true position, Ten would not be making any submissions to the Inquiry about the Drumgold meeting and that, if Ms Wilkinson wished to do so, she could make a lodge a "personal" complaint: Ex AJJ-1 at pages 113-116. Ms Wilkinson was taken aback that Ten was not prepared to make a submission to the Inquiry which, in her view, was the very place to clear her name and to correct the public record, as ultimately occurred. In Ms Wilkinson's view, this was a further example of Ten seeking to distance itself from Ms Wilkinson even though the Logie speech had been given by Ms Wilkinson at the request of and with the approval of Ten: Wilkinson 2 at [64]; Wilkinson 3 at [34]. Ms Wilkinson understood from discussions with Ms Saunders that one of the reasons why Ten did not wish to make a submission to the Inquiry was so as not to create further negative publicity, and that there was nothing more Ms Saunders could do. Ms Wilkinson was not satisfied with this, and did not feel that Ten or Ms Saunders were doing enough to promote her own personal interests and position: Wilkinson 2 at [65]-[68].

65. It is clear from her correspondence of late 2022 and early 2023 that, by this time, Ms Wilkinson was less than happy with the actions of Ten and Ms Saunders, and wished to be represented by lawyers who did not have to juggle competing interests and would instead be focussed on her: Ex LW-1 pages 75-76, Ex MRS-1 pages 179-181, Ex LW-1 pages 103-105; Ex MRS-1 pages 188-217, Ex LW-1 pages 107-116; Wilkinson 2 at [65]-[68]. To that end she retained her present solicitor (Mr Jefferies), and they began work for her on the Inquiry then underway: Wilkinson 2 at [69]. They, in turn, briefed Ms Chrysanthou SC. Ms Saunders ceased acting for Ms Wilkinson but continued to act for Ten, and in doing so, sought to encourage Ms Wilkinson's lawyers to make changes to Ms Wilkinson's draft submissions based on the position and information being provided by Ten: Ex AJJ-1 page 193. Having formerly acted for Ms Wilkinson in respect of the Inquiry, Ms Saunders was now acting for Ten in that matter, and advising Ten and advocating, on its behalf, for Ms Wilkinson to change her position.

66. These proceedings were filed on 8 February 2023. At 5:33pm that day, Ms Saunders was notified by email that Ten and Ms Wilkinson had been sued by Mr Lehrmann and

was asked whether she had instructions to accept service. She notified Ms Smithies by forwarding the email at 5:50pm. For reasons explained in her affidavit Ms Saunders did not inform Ms Wilkinson that she had been sued: Saunders at [102]-[103].

67. Ms Wilkinson became aware of the proceeding from reading the front page of *The Australian* newspaper on the morning of 8 February 2023 with a headline accusing her of being "*recklessly indifferent to truth*" accompanied by a large colour photograph of her: Wilkinson 2 at [75]; Ex LW-1 pages 146-149.

68. Ms Saunders accepted service on behalf of Ten and Ms Wilkinson on that day, even though she did not have instructions from Ms Wilkinson to do so: Wilkinson 2 at [81]. Ms Wilkinson did not receive confirmation that she had been sued from Ms Saunders until 12:25pm on 8 February 2023: Ex MRS-1 page 315.

69. Following the commencement of the proceeding, the media commentary continued to be critical of Ms Wilkinson and focused on her rather than on Ten: Wilkinson 2 at [75], [83]; Ex LW-1 pages 146-149.

70. At the time, Ms Wilkinson had a meeting planned with Ms McGarvey on 8 February 2023 at which Ms Wilkinson intended to make it clear that she was feeling abandoned by Ten and was considering getting separate representation: Wilkinson 2 at [77]-[79]. Ms McGarvey cancelled that appointment and stated that at any future meeting, Ten's lawyers would need to be present. Ultimately, no meeting occurred: Wilkinson 2 at [80], [82]. The process of disassociation was continuing, with Ten putting Ms Wilkinson at an increasingly greater distance from it.

71. Ms Wilkinson did not wish to be represented in the proceeding by the legal representatives which Ten had engaged to act for it. The relationship was strained, with Ten deliberately distancing itself from her, and acting in a way which led Ms Wilkinson to believe that her interests would be sacrificed by Ten as and when Ten considered it to be in its interests to do so, including on matters relating to the overall Higgins/Lehrmann controversy. She understood, correctly, that Ten's solicitors would be required to act in Ten's interests and would do so. She also understood that Ten intended to brief Dr Collins in the proceedings, a matter in relation to which she was not consulted and nor did she approve. She saw and had experienced a clear division between her interests and those of Ten: Wilkinson 2 at [84]-[85]. It was reasonable for Ms Wilkinson to consider that she had no confidence that her interests would be protected fearlessly by Ten and its legal representatives.

72. She discussed the matter with Mr Jefferies, who in turn sought senior counsel's view on that matter. To that end, on 11 February 2023, Mr Jefferies and Ms Wilkinson attended a conference with Sue Chrysanthou SC. That meeting is summarised in the second Wilkinson affidavit at [88]-[92]. Ms Chrysanthou advised as to the existence of other issues and arguments available to Ms Wilkinson from those available to Ten of the kind which have already been described above, and raised concern about the fact that the lawyers retained by Ten were on retainer with *The Australian* to vet articles published by it, including in respect of Ms Wilkinson. She advised that Ms Wilkinson should be separately represented.

Correspondence about the indemnity and other matters

73. On 14 February 2023, Mr Fordham on behalf of Ms Wilkinson advised Ms McGarvey that Ms Wilkinson would be represented separately from Ten in this proceeding: Ex AJJ-1 pages 133-134.

74. Ms Smithies replied to that email the following day, stating that as she would be separately represented, Ms Wilkinson would be responsible for her own legal costs: Wilkinson 2 at [93]-[95]; Ex AJJ-1 pages 132-134.

75. Following the email from Ms Smithies of 15 February 2023 referred to above, there were discussions between Mr Jefferies and Ms Saunders concerning Ten's position. During these discussions, Mr Jefferies said Ms Wilkinson was considering filing a cross-claim against Ten in relation to its obligation to indemnify Ms Wilkinson.

76. Subsequently, on 1 March 2023, Ms Saunders sent an email on behalf of Ten in relation to indemnity issues. Here again, Ms Saunders was acting as the solicitor for Ten *against* Ms Wilkinson (her former client). Ms Saunders only went so far as to confirm that Ten would meet its liability under s 3(1)(b) of the *Employees Liability Act* 1991 (NSW) or other vicarious liability that Ten incurs for any damages or costs awarded against Ms Wilkinson: Ex AJJ-1 pages 141. She made no mention of the obligation at law to indemnify Ms Wilkinson in respect of legal costs or damages, and did not cover at all the position as to the payment of Ms Wilkinson's own legal costs, even though that was a critical matter then under discussion.

77. The fact that Ms Saunders was acting for Ten *against* Ms Wilkinson in relation to the issue of indemnity, in circumstances where she had previously acted for Ms Wilkinson, was raised by Mr Jefferies in his reply email of 1 March 2023: Ex AJJ-1 pages 140-141.

78. This resulted in Justin Quill of Thomson Geer (a partner of Ms Saunders) becoming involved in place of Ms Saunders due to the concerns that had been raised. Mr Quill sent a further email to Mr Jefferies on 1 March 2023 as to the issue of separate representation and the payment of Ms Wilkinson's legal costs, to which Mr Jefferies responded by letter dated 3 March 2023: Ex AJJ-1 pages 143, 148. One matter to which Mr Jefferies referred in his response was that Thomson Geer was an advisor to *The Australian* newspaper in relation to pre-publication legal advice, that an article in *The Australian* following the filing of this proceeding (Ex AJJ-1 pages 129-130) was highly critical of Ms Wilkinson and that Thomson Geer's relationship with *The Australian* had never been disclosed by Thomson Geer to Ms Wilkinson.

79. Given the ongoing disagreement concerning payment of Ms Wilkinson's legal costs in circumstances where she was separately represented, by email dated 7 March 2023 from Ms McGarvey to Ms Wilkinson, Ten suggested that Ms Wilkinson "obtain a separate opinion" from "an independent and pre-eminent senior counsel" on the question of whether Ms Wilkinson's "interests are best served by maintaining separate defence arrangements", with Ten to bear the costs of such opinion: Ex LW-1 page 160. One such senior counsel nominated by Ms McGarvey was Bret Walker SC.

80. That suggestion was accepted by Ms Wilkinson, who took the correspondence as an indication that Ten would abide by the independent advice she would obtain as to the issue concerning her representation and the costs of that representation: Wilkinson 2 at [96]-[98]; Ex LW-1 page 159. Ten did not say that it wished, let alone required, to be involved in the process of instructing counsel, or that Ms Wilkinson would be required to waive privilege in the advice by providing it to Ten once it was obtained.

81. In accordance with Ten's proposal, Ms Wilkinson obtained advice from Mr Walker SC and Mr George, solicitor. That advice was set out in an opinion dated 17 March 2023 (**Walker opinion**): Ex AJJ-1 pages 157-165. The Walker opinion concluded, relevantly, that:

    (a) there were differences between the interests of Ms Wilkinson and those of Ten in relation to the applicant's "claim for aggravated damages, the affirmative defence under s30 of reasonable publication where the onus is on the defendants, and the likely differences between [Ms Wilkinson] and Ten in the conduct of the proceedings by which she will be seeking to protect her reputation as the primary

objective, whereas Ten's interests will not be likely to do so given the current employment situation" (at [55]);

(b) "there is the potential for conflict in the defence of the proceedings over the pre-publication steps and advice for the broadcast, the pre-Logies advice, the Collins media commentary, the failure to correct [Mr Drumgold], the submissions that might now be made to the ACT Inquiry" (at [57]);

(c) "it cannot reasonably be expected" that Ms Wilkinson retain the same lawyers as Ten and Ms Wilkinson "should not reasonably be expected to retain lawyers who have previously acted against her interests on these matters, noting Collins' criticism of her conduct and suggesting she may have committed a criminal offence, and Thomson Geer advising The Australian it appears in relation to an article damaging her reputation and then advising Ten against her interests in respect of the entitlement to indemnity" (at [58]-[59]); and

(d) Ms Wilkinson "is entitled to separate representation" from Ten in this proceeding and that "it is reasonable to do so in the circumstances" (at [60]).

82. Ms Wilkinson read the Walker opinion. It confirmed her decision to maintain separate representation in this proceeding: Wilkinson 2 at [100].

83. Following the receipt of the Walker opinion, there was various correspondence between the parties as to the conclusions reached in the Walker opinion: Ex AJJ-1 pages 166-175. Ten attempted to obtain a copy of it, notwithstanding the above matters. Ms Wilkinson said she did not agree to waive privilege, but did provide written confirmation from Mr George as to the substance of various matters in the Walker opinion, and that confirmation was provided to Ten: Ex LW-1 pages 180-188.

84. With these events having occurred, Mr Jefferies corresponded with Ten and its lawyers on terms which made it plain that, if Ten did not agree to indemnify Ms Wilkinson, a cross-claim would be filed in the proceeding. The cross-claim had been drafted and was ready to be filed.

85. In response, Ten (through Baker & McKenzie, who by this time had been engaged by Ten in relation to the issue of indemnity) sent a letter of 24 March 2023 confirming indemnity, as referred to in paragraph 10 above: Ex LW-1 page 189. As has been noted, that confirmed that Ten accepted it was liable to indemnify Ms Wilkinson in respect of

her legal costs and expenses incurred in defending the applicant's claim where such legal costs have been properly incurred and are reasonable in amount.

86. Neither that letter, nor any other subsequent correspondence from or on behalf of Ten, stated the position now taken by Ten, namely that Ten actually had no obligation to indemnify Ms Wilkinson at all, because she was being separately represented. Nor did it state that Ten had no obligation to indemnify Ms Wilkinson unless the representation was in respect of a "non-common" issue.

87. Both of these arguments have only been raised after Ms Wilkinson has incurred the vast majority of her liability for legal costs – the first argument being first articulated in paragraph 19(d) of a pleading filed in the Supreme Court in November 2023 after Ms Wilkinson took action on the indemnity; and the second argument only appearing in paragraph 1 of Ten's cross-claim filed on 20 December 2023.

88. Upon receipt of the indemnity confirmation letter of 24 March 2023, Ms Wilkinson and her lawyers understood that the effect of Ten's confirmation was that Ten would indemnify Ms Wilkinson in respect of her liability for her own legal team's costs, provided the work and amounts charged for it were reasonable: Wilkinson 2 at [103]-[105]. The fact that Ms Wilkinson and her lawyers understood this is apparent from the fact that Ms Wilkinson did not then proceed with the cross-claim that was about to be brought: Wilkinson 2 at [106]. This was not only a reasonable understanding to hold in the above circumstances; it was correct – that is, their understanding reflected Ten's actual position at the time.

89. The contentions that Ten had advanced in and shortly after the confirmation of indemnity letter were: (a) that its obligation to pay only arose at the end of the proceedings and after the making of costs orders between the applicant and respondents, because Ms Wilkinson may obtain a costs order in her favour against the applicant: Ex LW-1 page 189; and (b) certain items of work performed by Ms Wilkinson's lawyers were not reasonable because, for example, the course being pursued was not a sensible one (such as an unsuccessful position taken on a notice to produce): Ex DEC-1 pages 150-152. Neither of those contentions is now before the Court. Ten has abandoned the argument in (a). The argument in (b) is addressed by Ms Wilkinson's acceptance of the fact that the legal costs fall to be assessed. But both of these earlier contentions of Ten, consistent with its confirmation of 24 March 2023, premise a liability to reimburse at least some agreed or assessed amount – the antithesis of Ten's primary claim now.

Conclusion

90. For the above reasons, it is respectfully submitted that the Court should not accept Ten's contentions and, instead make the declaration sought in Ms Wilkinson's cross-claim, and dismiss Ten's cross-claim, with costs.

9 February 2024

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