

**BRUCE LEHRMANN**  
Applicant

**NETWORK TEN PTY LTD and another**  
Respondents

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**Network Ten's outline of submissions in respect of the cross-claims**

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**A. INTRODUCTION & OUTLINE OF ARGUMENT**

1. The first respondent (**Network Ten**) denies that it has any obligation to indemnify the second respondent (**Ms Wilkinson**) in respect of costs incurred in this proceeding, on the basis that such costs were not reasonably and properly incurred, within the meaning of the indemnity owed by Network Ten to Ms Wilkinson.
2. There is no dispute that as Ms Wilkinson's employer, Network Ten, has an obligation to indemnify Ms Wilkinson for certain loss occasioned by acts carried out in the course of her employment. This includes loss occasioned by Ms Wilkinson's involvement in the publication of the interview of Ms Brittany Higgins on *The Project* (**Higgins Interview**). It is similarly agreed that Network Ten is vicariously liable for Ms Wilkinson's involvement in the publication of the program, and is liable to pay any damages and costs awarded to Mr Lehrman in the proceeding.
3. The dispute between the parties is limited to the question of whether Ms Wilkinson's 'loss' (being the costs of defending this proceeding (**Defence Costs**)) falls within the scope of the indemnity owed. The answer to this question turns on whether Ms Wilkinson's decision to engage separate legal representation, was objectively "reasonable" or "proper" within the meaning of the common law indemnity, such that

her Defence Costs are to be considered a necessary consequence of her involvement in the Higgins Interview.

4. Network Ten submits that this standard is simply not met. There is no objective reason which required Ms Wilkinson to engage separate legal representation in this matter.
5. For Network Ten to succeed in its cross-claim, it need not show that Ms Wilkinson or her legal representatives acted unreasonably within the meaning of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* or the *Federal Court of Australia Act 1975* (Cth). Network Ten does not dispute, and has never disputed, that Ms Wilkinson was entitled to engage separate representation for her own reasons, should she wish to do so. That entitlement however, is not coextensive with an entitlement that Network Ten would cover the costs of her doing so.
6. As has been apparent since the commencement of this proceeding, the interests of Network Ten and Ms Wilkinson in the defending the proceeding are wholly aligned. In particular, since Network Ten is vicariously liable for any damages (including aggravated damages) awarded in favour of Mr Lehrmann, it has always had the same interest as Ms Wilkinson in vigorously defending the allegations made against her. This has been proven true from the way the matter has unfolded during the hearing. The Court is well placed to form a view on this matter based on the conduct of the trial, the issues in play and the evidence which has been adduced.
7. Based on the evidence filed by Ms Wilkinson in support of her cross-claim, it is anticipated that Ms Wilkinson may make certain accusations of conflicts of interest which would have prevented Network Ten's chosen legal representatives from acting for Ms Wilkinson in this proceeding. Such allegations have no grounding in the facts of this matter and should be swiftly dismissed.
8. On Network Ten's case, this is the end of the matter. Having heard and observed the course of the trial between Mr Lehrmann and the respondents to this point, the Court can be satisfied that there are no separate and conflicting interests in the proceeding which required Ms Wilkinson to obtain her own legal representation.
9. To the extent Ms Wilkinson seeks to rely upon other reasons as to why she subjectively desired separate legal representation, such matters are irrelevant to the indemnity. What

emerges with crystal clarity from the evidence, is that Ms Wilkinson formed the view, on or about 11 February 2023, that this proceeding represented an opportunity to rehabilitate or otherwise improve her reputation, and that goal would be best achieved by engaging separate legal representation from Network Ten. While Network Ten does not agree with the underlying premise of this submission, to the extent it could be considered necessary for Ms Wilkinson to have had separate representation on that basis, it is a matter extraneous to the necessary defence of the allegations in the proceeding and therefore costs incurred in pursuing that goal do not fall within the scope of the indemnity.

## **B. LEGAL PRINCIPLES**

10. It has long been a principle at general law that:

*when an act is done by one person at the request of another which act is not manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the right of a third party, the person doing it is entitled to an indemnity from him who requested it should be done.*

*Sheffield Corporation v Barclay* [1905] AC 392, approved by the High Court in *The Crown v Henrickson & Knutson* (1911) 13 CLR 473 at 480-481, 484, 488.

11. This principle has been recognised in numerous contexts, including relationships of employee and employer, agent and principal, and guarantor and principal debtor. The indemnity is most commonly categorised as an implied term of contract (see, eg, *Re Famatina Development Corporation Ltd* [1914] 2 Ch 271 at 282), and is not defined in scope by the nature of the action brought against the indemnified person: *Ronneberg v Falkland Islands Company* (1864) 17 CB (NS) 13. The indemnity so described includes, in addition to any damages awarded to the injured third party, the costs of properly defending an action brought against the indemnified person: *Williams v Lister Co* (1913) 109 LT 699. Expressed another way, the Court has described the indemnity as applying to reimburse the indemnified person for the “necessary consequences” of the act carried out under the authority of the principal: *Ronneberg*.

12. The question of whether an action has been ‘properly’ defended, such that the costs occasioned are a ‘necessary consequence’ of the relevant act is a question of fact, to be

determined in each case by having regard to the particular circumstances of the case: *Tindall v Bell* (1843) 152 ER 786.

13. In *Broom v Hall* 7 CB (NS) 504 the question of whether defence costs should form part of the indemnity, was framed as whether “*in defending and incurring costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case*” (emphasis added).
14. In answering this question, the Court is concerned with determining what is fair and reasonable, having regard to the competing interests of the indemnified and indemnifier. The underlying rationale which emerges from the relevant case law described above, is that where a third party is potentially liable for an award of damages, some attempt must be made to limit the amount of those damages as appropriate (included by denying liability), and such attempts must be done reasonably, so that the third party, who may not have been sued directly, is not made liable for amount greater than it would have been, had it had the opportunity to intervene and defend the action itself. See *Mors-le-Blanch v Wilson* (1873) at 233; *Broom v Hall* at 913; *Denham v Foley* (1899) 20 LR (NSW) 95; *The Millwall* (1905) P 155.
15. For example, in *Roach v Thompson* (1830) 173 ER 1233, the co-surety who defended an action was not entitled to be indemnified for the costs of defending the litigation in circumstances where there was in fact no reasonable defence to the action brought. In *Tindall v Bell*, the plaintiff was not entitled to an indemnity for defending an action brought against him, because he had unreasonably tendered such a small amount into Court (in effect, by way of attempted settlement) in comparison to the true liability owing, that the Court found the costs of defending the proceeding after such an unreasonable offer was made, should not be recoverable.
16. Finally, the implied indemnity is limited to acts done by an employee that impose liability on employees to third parties, as distinct from personal losses than can be compensable by an action in tort at the suit of an employee (such as loss of reputation): *NRMA v Whitlam* at [94]. In *NRMA v Whitlam* [2007] NSWCA 81, the New South Wales Court of Appeal drew a distinction between the loss or damage suffered by an employee by reason of an action being brought against him, and the loss or damage suffered in the form of reputational harm. The Court found that Mr Whitlam was not entitled, by reason

of the general law indemnity, to be reimbursed for the costs he had incurred in prosecuting defamation proceedings, for the purpose of seeking to redress the consequences of actions he had taken as an employee: at [93]-[94].

17. Whether Ms Wilkinson should be indemnified by Network Ten for her costs incurred in defending the proceeding, is not coextensive with the question of whether a person was reasonably entitled to incur those costs in a more general sense, or within the meaning of the *Legal Profession Uniform Law* (NSW) or the *Federal Court Rules 2011* (Cth). The relevant question for the Court to determine is as was set out in *Broom v Hall*, and considered by the Court of Appeal in *NRMA*.
18. The separate question of the reasonableness of amount of those costs arises at the second stage of analysis, for the purpose of determining the quantum recoverable, *after* it is established that the relevant proceeding was properly defended. These two stages are not to be conflated.

### **C. NO SEPARATE INTERESTS RAISED BY DEFAMATION PROCEEDING**

19. The Court has now had the benefit of observing the way in which the proceeding has been defended by each of Network Ten and Ms Wilkinson, and is in a position to determine for itself, whether any conflict of interest existed between the respondents in this case, which would have prevented the respondents from engaging joint legal representation.
20. As should be immediately apparent, no such conflict ever existed. Where certain allegations were made specifically against Ms Wilkinson personally, such matters were merely additional to, and not in conflict with, the allegations made against Network Ten. There is no reason that Network Ten could not and would not have adequately defended those allegations on Ms Wilkinson's instructions.
21. Specifically, as Network Ten understands the position, the only pleaded specifically against Ms Wilkinson go to aggravated damages. Network Ten had every interest in vigorously defending those allegations in circumstances where it is vicariously (and therefore financially) liable for any damages awarded to Mr Lehrmann. This includes, for example, defending the integrity of Ms Wilkinson's journalism as part of the qualified privilege. The Court must accept, in the absence of convincing evidence to the contrary,

that Network Ten would have acted rationally in seeking to avoid any liability in the proceeding or findings of wrongdoing, and therefore in defending the conduct of both itself and Ms Wilkinson in the proceeding.

22. To date, Ms Wilkinson has struggled to identify with any level of precision, those matters which she says gave rise to a separate and conflicting interest in the proceeding: *Lehrmann v Network Ten Pty Limited (Cross-Examination)* [2023] FCA 1477 at [17]. It is a matter for Ms Wilkinson to now make clear exactly how it is said that Network Ten's interests in the proceeding diverged from her own.
23. To the extent Ms Wilkinson seeks to rely upon nuances which arise in the manner in which certain legal issues were approached or pleaded in the defences, such differences merely represent the natural consequence of seeking advice from different sets of lawyers on matters upon which reasonable minds may differ. Those differences are not evidence of some conflict between the defences run.

#### **D. MS WILKINSON'S SUBJECTIVE REASON FOR SEPARATE REPRESENTATION**

24. What emerges with singular clarity from Ms Wilkinson and Mr Jefferies' evidence, is that Ms Wilkinson's decision to engage separate legal representation, was driven by a subjective belief that she would be better able to protect and rehabilitate her reputation, by engaging separate legal representation.
25. The evidence of the instructions Ms Wilkinson provided to her legal advisors is revealing of her reputation being her preeminent concern in defending the proceeding:
  - (a) the advice provided by Bret Walker SC and Patrick George (**Walker Advice**), states that by her conduct of the proceeding, Ms Wilkinson "*will be seeking to protect her reputation as the primary objective*": Exhibit LW-1 at 175.
  - (b) in his affidavit evidence, Mr Jefferies notes "*it was obvious to me that there was a stark difference between TEN's objectives and interests and those of Ms Wilkinson when it came to the way in which her reputation should be protected*": Affidavit of Anthony Jefferies sworn 8 December 2023 (**Jefferies Affidavit**) at [55];

- (c) at the conference between Ms Wilkinson, Mr Jefferies and Ms Chrysanthou SC on 12 February 2023, Ms Wilkinson expressed her concern that by being jointly represented with Network Ten she would be “*constrained in defending herself and her reputation*”: Jefferies Affidavit at [55];
  - (d) during Ms Wilkinson’s meeting with Ms Saunders on 9 February 2023 (prior to choosing to engage separate legal representation), Ms Wilkinson expressed that she was “*keen for her part, not to mention that it’s on the public record that LW was not warned*” in the proceeding: Exhibit MRS-1 at 354; and
  - (e) during Ms Chrystanthou’s submissions to the Court, one of Ms Wilkinson’s “individual interests” was identified as being the fact that the proceeding “*affected her reputation*”: *Lehrmann v Network Ten Pty Limited (Cross-Examination)* [2023] FCA 1477 at [17].
26. Indeed, in considering the Walker Advice as a whole, it is startling to note its failure to acknowledge that at least an equally important objective of an indemnified party to a proceeding should be minimise the exposure under the indemnity, or at the very least, to successfully defend the proceeding.
27. To the extent that issues concerning Ms Wilkinson’s reputation arose directly as a consequence of the proceeding, for the reasons already explained, there was no divergence of interests between Ms Wilkinson and Network Ten. For example, in relying on the defence of qualified privilege, there is no logical reason why Network Ten would not have sought to defend the integrity of Ms Wilkinson’s journalism, consistently with its defence of its own conduct and that of its journalists. The protection and advancement of Ms Wilkinson’s reputation at large, is outside the scope of the indemnity.

**E. MS WILKINSON’S ALLEGED LOSS OF CONFIDENCE IN NETWORK TEN AND ITS LEGAL REPRESENTATIVES**

28. It is understood that in the alternative to there being some actual conflict of interest, Ms Wilkinson submits she was entitled to separate legal representation (at Network Ten’s expense), because she had lost all confidence in Network Ten and its legal representatives, such that she formed the view her interests (expressly being her

reputational interests) would not be adequately represented without separate legal representation.

29. For this submission to succeed, it is not enough to prove that Ms Wilkinson subjectively believed these propositions to be true. The Court must be satisfied that Ms Wilkinson acted as a prudent and reasonable person would have done in all the circumstances.
30. Specifically, Ms Wilkinson alleges that:
  - (a) insofar as Network Ten would be required to instruct the external lawyers, Network Ten would not make decisions in respect of the proceedings with any regard to her interests: Wilkinson [85];
  - (b) had Thomson Geer and/or Dr Collins QC been instructed by Ms Wilkinson as well as Network Ten, they would have preferred Network Ten's interests and instructions to any competing interests or instructions of Ms Wilkinson: Wilkinson at [89].
31. There are four difficulties with this submission:
  - (a) *first*, it pre-supposes there was some actual likelihood of competing interests or instructions with respect to the matters raised by the proceeding. For the reasons already addressed at [19] to [22] above, that is denied;
  - (b) *second*, the real "interest" Ms Wilkinson was concerned with, was the protection of her reputation which as explained at [23]-[25] above, is a matter extraneous to the defence of the proceeding, and costs incurred in pursuit of that do not fall within the scope of the indemnity;
  - (c) *third*, even if the Court finds Ms Wilkinson's reputation was not an extraneous concern, the evidence does not reveal any objective basis for Ms Wilkinson's belief that Network Ten, Ms Saunders and/or Dr Collins would not have acted in a manner consistent with protecting her (see [30]-[55] below); and
  - (d) *fourth*, the claims as to Ms Wilkinson having felt "abandoned" etc by Network Ten, are inconsistent with the contemporaneous records (see [56]-[59] below).



**E.1 Lack of objective basis for Ms Wilkinson’s belief that Network Ten an/or Ms Saunders would not act in her interests in its defence of the proceeding**

32. The submissions in this section set out Network Ten’s key responses to the potential complaints raised by Ms Wilkinson in her affidavit evidence. A detailed chronology will be provided to the Court ahead of the hearing, which sets out the factual matters in more detail ahead of the hearing.
33. In her evidence, Ms Wilkinson seems to form her opinion that Network Ten and/or Ms Saunders would not have acted in accordance with her best interests, because of the way in which Network Ten and Ms Saunders handled the contempt concerns arising from the Logies Speech, Ms Wilkinson’s role as a witness in the Criminal Proceeding and the Drumgold Inquiry more generally.
34. However, contrary to the impression given by the Wilkinson and Jefferies affidavits, a review of the objective documentary evidence reveals that Network Ten and Ms Saunders acted at all times in a responsible and fair manner, consistently with their obligations as employer/ solicitor, over a prolonged period of time, demonstrating sensitivity and a genuine concern in responding to Ms Wilkinson’s needs. Network Ten did not, as Ms Wilkinson suggests, prefer its own interests over that of Ms Wilkinson. As with this proceeding, following the stay of the criminal proceeding, Ms Wilkinson’s and Network Ten’s interests were wholly aligned.
35. Ms Wilkinson’s core complaint appears to be that Network Ten did not do enough to correct the public record, with respect to the alleged warning given by Mr Drumgold, not to deliver a speech at the Logies. The relevant background to this complaint is as follows.

*Stay judgment of 21 June 2022*

36. After the delivery of Ms Wilkinson’s speech at the Logies (**Logies Speech**), during the afternoon of 20 June 2022, Mr Lehrmann approached the ACT Supreme Court on an urgent basis, seeking a stay of the criminal proceeding against him (**Criminal Trial**), on the basis of publicity caused by the Logies Speech. That evening, Ms Smithies received an email from the Associate to McCallum CJ: Exhibit TTS-1 at 52-53, which alerted Network Ten to Mr Lehrmann’s application, and said:

*Any statement concerning the trial of the accused or the allegations made by Ms Higgins or commentary about the fact that she came forward with them, and what should be the response to her allegations, is likely to jeopardise the commencement of the trial on Monday. Her Honour would be grateful if you would refrain from publishing such material tonight.*

37. The following day, McCallum CJ delivered a judgment *R v Lehrmann* (No 3) (2022) 369 FLR 458 (**Stay Judgment**), and made orders “*regrettably, and through gritted teeth*” to vacate the commencement of the Criminal Trial: at [37], Exhibit TTS-1 at 85-93. During the reasons for judgment, her Honour made the following findings and comments:
- (a) despite a “clear and appropriate” warning given to her by Mr Drumgold (**Drumgold Warning**), Ms Wilkinson delivered the Logies Speech in which she openly referred to and praised the complainant in the present trial: Stay Judgment at [21], Exhibit TTS-1 at 90;
  - (b) the combination of the Logies speech, together with a social media post made by Brittany Higgins repeating the remarks made by Ms Wilkinson, amounted to Ms Wilkinson endorsing the credibility of Ms Higgins who, in turn, celebrated Ms Wilkinson’s endorsement of her credibility: Stay Judgment at [24], Exhibit TTS-1 at 90;
  - (c) the prejudice of such representations (being the creditability of Ms Higgins) so widely reported so close to the date of empanelment of the jury cannot be overstated: Stay Judgment at [29]; Exhibit TTS-1 at 91;
  - (d) the publicity had the capacity to “*obliterate*” the important distinction between an untested allegation and one accepted by a jury according to the evidence, and in accordance with their respective oaths and affirmation: Stay Judgment at [36]; Exhibit TTS-1 at 92.
38. At around the time of delivering judgment, her Honour also asked Mr Drumgold whether he would be pressing charges for contempt, and whether he would be seeking injunctions against Network Ten or Ms Wilkinson: Exhibit MRS-1 at 2.

39. The clear message to Network Ten and Ms Wilkinson, by combination of the Stay Judgment, the questions asked of Mr Drumgold and the email to Ms Smithies the evening prior, was that there was a significant risk that the Chief Justice of the ACT Supreme Court, had formed a preliminary view, that Mr Wilkinson's conduct in giving the Logies Speech, amounted to contempt of Court.
40. It is not in dispute that the alleged Drumgold Warning was never in fact given. However, any legal advisor acting rationally in these circumstances would have considered that the greatest immediate concern facing both Ms Wilkinson and Network Ten, was avoiding the possibility that either Mr Drumgold, or McCallum CJ of her own motion, would refer Ms Wilkinson and/or Network Ten for contempt. Unsurprisingly, this was the overriding concern that shaped the advice given by Ms Saunders, and Dr Collins: Affidavit of Marlia Saunders affirmed 25 January 2024 (**Saunders Affidavit**) at [18]; Affidavit of Tasha Smithies sworn 25 January 2024 (**Smithies Affidavit**) at [61].

*Legal advice following the Stay Judgment*

41. Immediately following the delivery of the Stay Judgment, Network Ten retained Ms Saunders: Saunders Affidavit at [11]. In the light of the questions asked by McCallum CJ, Ms Saunders spoke to Mr Drumgold that evening: Saunders Affidavit at [13]. Mr Drumgold indicated that he did not intend to press contempt charges and would not seek an injunction if appropriate assurances or an undertaking could be given to the Court, that no publication of potentially prejudicial material would be published by Network Ten or Ms Wilkinson: Exhibit MRS-1 at 2.
42. On 22 June 2022, Ms Wilkinson, Mr Peter Fitzsimons (Ms Wilkinson's husband), Mr Nick Fordham (Ms Wilkinson's agent), Ms Smithies, Ms Saunders and Dr Collins attended a conference to discuss the Stay Judgment. The advice given at that meeting is described at Saunders Affidavit [17]-[19], and Smithies Affidavit at [60]-[64]. At the meeting, it was decided that:
  - (a) Network Ten would send a letter to the Associate to McCallum CJ, providing an assurance that all future commentary on Network Ten's platforms and by its journalists concerning Mr Lehrmann, Ms Higgins and the Criminal Trial would be strictly limited to general news reporting, such as the reporting of

the proceedings as they are conducted in open court, until the conclusion of the trial (**Assurance Letter**);

- (b) Ms Saunders would ask Mr Drumgold to tender a copy of the letter in open court, thereby ensuring the letter would become part of the public record;
  - (c) neither Ms Wilkinson nor any representative of Network Ten would attend the Court, given the risk of inadvertently increasing publicity, the general lack of standing in the proceeding, and the potential that an appearance would further inflame McCallum CJ's strong views.
43. Taking into account the above context, it is telling that the complaint Ms Wilkinson now raises in respect of the advice given at this juncture, is that the advice did not address what she describes as being "*the heart of the problem*" – namely, the misreporting on the alleged Drumgold Warning: Wilkinson Reply Affidavit at [8(e)]. For the reasons given above, this complaint overlooks the objective seriousness of the matters at issue at the time (primarily being the real risk of a criminal prosecution being commenced against Ms Wilkinson) and misconceives the legal options available to Network Ten in the circumstances.

*General legal advice following Letter of Assurance*

44. The general tenor of Ms Wilkinson's affidavit evidence is that throughout the six months following the Stay Judgment, Network Ten did not take sufficient steps to correct the public record with respect to the Drumgold Warning. This submission is not only inconsistent with the objective record, but wholly ignores the restraints placed on Network Ten by the continuation of the Criminal Trial and later the Drumgold Inquiry.
45. As noted above, further to the assurances given to the Court not to comment on the Criminal Trial, Network Ten was on clear notice of McCallum CJ's view that almost any reporting by Ms Wilkinson or Network Ten in relation to the Criminal Trial could be considered a contempt of Court. Network Ten and its legal advisors were keenly aware of the risk that posed to Ms Wilkinson as an individual and acted entirely reasonably in taking that risk into account when providing legal advice. In addition, it is important to remember that at this point in time, Ms Wilkinson was on notice to be called as a witness in the Criminal Trial.

46. For these reasons, and once it became clear that Mr Drumgold had not tendered the Assurance Letter in open court on 23 June 2022, it was decided that the most appropriate course with respect to correcting the public record was to request Mr Drumgold to make a statement himself. Ms Saunders expended considerable effort in seeking to achieve this outcome: Saunders Affidavit at [12]-[13], [20], [31], [40], [41], [42], [48]-[49], [60]-[63]; Exhibit MRS-1 at 1-2, 4, 49-51, 61-62, 80-84, 116-118. On a number of occasions, Mr Drumgold even assured Ms Saunders that he would do so: Saunders Affidavit at [13] and [20]; Exhibit MRS-1 at 2-4. Regrettably, that never came to pass.
47. Whether reasonable minds may differ as to the advice that was ultimately given and then followed by Network Ten over this period is not to the point. Ms Wilkinson must demonstrate some actual failing by Network Ten, Thomson Geer and/or Dr Collins QC, capable of grounding a reasonable belief in the allegations set out at [29] above.
48. Further, to the extent that Ms Smithies and Ms Saunders considered public statements could be made, without risking falling foul of the assurance given to McCallum CJ, Network Ten did so. Immediately after the delivery of the Stay Judgment on 21 June 2022, Network Ten released a statement expressing that it “*fully supports Ms Wilkinson*”: Exhibit TTS-1 at 72-81. The wording of this statement was approved by Ms Wilkinson’s personal agent: Exhibit TTS-1 at 69. On the 23 June, in light of the media coverage about Ms Wilkinson, Network Ten released a further statement, noting that “*recent reporting on Lisa Wilkinson by some media organisations has been inaccurate and unfair*” and “*there are significant facts that cannot be disclosed until after the trial has concluded*”. The statement also requested that media organisations “*cease this harassment to allow Lisa the best opportunity to give her evidence in Court*”: Supplementary Bundle (SB) Tab 44.

*Ms Wilkinson’s interests’ adequately represented*

49. At all times, Ms Wilkinson was involved in and consulted about any steps taken in relation to the Criminal Trial and the Drumgold Inquiry. Ms Wilkinson was always represented by her personal agent who was able to provide independent advice, and advocate on her behalf. It also appears that from around at least November 2022, Mr Jefferies had a “watching brief” in relation to the Criminal Trial and Ms Wilkinson’s interests: Saunders Affidavit at [190]. Network Ten did not at any point seek to dissuade

Ms Wilkinson from involving her personal representatives, or at times her personal lawyer.

50. Network Ten proceeded on the basis that Ms Wilkinson was accepting the advice provided to her, as it was entitled to do. The evidence demonstrates that to the extent Ms Wilkinson had concerns or questions about the legal advice given, she had no hesitation in raising those concerns and discussing the matters with Ms Smithies or Ms Saunders.
51. For example, on a number of occasions Ms Wilkinson raised concerns regarding the publications she considered to be defamatory of her, and sought advice on what steps could be taken: see, eg Exhibit TTS-1 at 125. In response, Ms Smithies explained that her concern in writing to any publication, was that it could cause further publicity, and could be seen by McCallum CJ as having been instigating by Network Ten or Ms Wilkinson: Exhibit TTS-1 at 130. Ms Wilkinson replied to this email noting: *“I understand. For now, for the sake of the trial, and all other further complications, I just have to wear it”*: Exhibit TTS-1 at 130.
52. There was no reason for Network Ten to believe that Ms Wilkinson strongly disagreed with this advice and felt she had no choice but to accept the legal advice given to her: Wilkinson Affidavit at [32]; Wilkinson Reply Affidavit at [10(c)], [16].

*Assistance given to Ms Wilkinson as a witness in the criminal proceeding*

53. Network Ten went to considerable effort to assist Ms Wilkinson in her role as a witness in the Criminal Trial of Mr Lehrmann. The steps taken are set out in detail by Ms Smithies in her affidavit at [85]-[100]; Exhibit TTS-1 at 133-153; and by Ms Saunders in her affidavit at [28], Exhibit MRS-1 at 20-33.
54. In summary, Network Ten instructed Ms Saunders to assist Ms Wilkinson and Network Ten in relation to matters concerning the Criminal Trial, including:
  - (a) responding to subpoenas received by Ms Wilkinson from Mr Lehrmann's lawyers; negotiating categories for production, reviewing documents and advised Ms Wilkinson on production;
  - (b) retaining a criminal barrister, Louise Jardim, to assist Ms Wilkinson in preparation for her role as a witness in the Criminal Trial; and

- (c) arranging witness conferences with Ms Wilkinson and Ms Jardim to help prepare Ms Wilkinson for cross-examination: Exhibit TTS-1 at 133-150.
55. Network Ten also arranged for Ms Smithies and Ms Saunders to attend the Criminal Trial as Wilkinson’s “support persons” at Ms Wilkinson's request: SB Tabs 52, 53 and 55.

*Drumgold Inquiry*

56. On 21 December 2022, the Board of Inquiry into the Criminal Justice System in the Australian Capital Territory (**Inquiry**) was announced. By January 2023, Network Ten made the decision that it did not intend to submit a voluntary submission to the Inquiry: Smithies Affidavit at [179]; Saunders Affidavit at [101]. Network Ten, as its own legal entity, was clearly entitled to do so.
57. Given Ms Wilkinson made it clear that she wanted to make a submission to the Inquiry, Network Ten arranged for Ms Saunders to act solely for Ms Wilkinson in respect of the Inquiry (at Network Ten’s cost), so that Ms Wilkinson could ensure she could prepare her submission with the support of a legal team, and without needing to go through the in-house lawyers at Network Ten: Saunders Affidavit at [95]-[99]; Exhibit MRS-1 at 251-255; Exhibit TTS-1 at 433. Ms Saunders had a telephone conference with Ms Wilkinson to discuss how best to progress her submission to the Drumgold Inquiry on 7 February 2023. During that call, Ms Wilkinson asked Ms Saunders to confirm the process for making a submission and noting that she would begin a draft for Ms Saunders to review: Saunders Affidavit at [99]; Exhibit MRS-1 at 260-264.
58. It is not immediately apparent how it is suggested that this was an unreasonable or unsupportive course for Network Ten to take. Indeed, even after Ms Wilkinson decided to engage separate legal representation in respect of the Inquiry, from time to time Ms Wilkinson would request Ms Saunders’ input: Wilkinson Affidavit at [71]; Saunders Affidavit at [115]; Exhibit LW-1 at 127.

**E.2 Contemporaneous records of Ms Wilkinson’s subjective beliefs**

59. Ms Wilkinson’s evidence that she felt “abandoned” and “unprotected”, by Network Ten during this time, is inconsistent with the contemporaneous records: Wilkinson Affidavit at [55].

60. On numerous occasions, Ms Wilkinson and her agent, Mr Fordham, expressed their gratitude for the effort which Network Ten and Ms Saunders were putting in, to provide advice and manage the situation. For example, after the Assurance Letter had been sent to the Court, Ms Wilkinson sent an email to Ms Smithies and others, “*Thanks so much Tasha, I in turn have to thank all of you for your ongoing and absolutely unwavering support since Sunday.*” Shortly afterwards, Mr Fitzsimons sent an email: “*And allow me to say in turn, how much we appreciate YOU, Sarah, and everyone. This was what we call in the trade, a shower of shit, but we have come a long way forward in 48 hours.*” Mr Fordham then replied: “*Thank you team. We will get through this*”: Exhibit TTS-1 at 122-124. As late as 8 February 2024, after Ms Wilkinson had been named as a respondent in this proceeding, and had had a productive conference with Ms Saunders in relation to the proceeding, she sent a text message to Ms Saunders, “*thanks for everything today Marlia. I can’t tell you how much I appreciate all your advice and assistance*”: Exhibit MRS-1 at 355.
61. Further, as noted in paragraph [48] above, when Ms Wilkinson did have a problem or concern, she voiced it. The Court can infer that the lack of contemporaneous evidence supporting what Ms Wilkinson now expresses as ongoing concerns, are concerns she now raises are made with the benefit of hindsight.
62. The clear pattern that emerges from the evidence is that Ms Wilkinson was struggling or had concerns about the way in which matters were progressing, she voiced her concerns to Ms Smithies and Ms Saunders, who would provide reasonable and well considered legal advice. Ms Wilkinson would then inevitably ultimately always accept the legal position when explained to her. The contemporaneous records demonstrate that Ms Wilkinson ultimately understood that Network Ten and herself were limited in what steps they could take publicly to address her concerns.

## **F. ADDITIONAL CONFLICTS OF INTEREST**

### *Thomson Geer*

63. To the extent it is submitted that Thomson Geer was conflicted from acting for Ms Wilkinson, by reason of its role in providing pre-publication advice to *The Australian*, that allegation is rejected.



64. Ms Saunders, the solicitor on the record for Network Ten in the proceeding, was engaged by Network Ten in June 2022 to “*advise Network Ten and Lisa Wilkinson in relation to issues arising from the R v Lehrmann proceedings in the ACT Supreme Court, including preparing a letter to the Court and liaising with the Director of Public Prosecutions in connection with the Court's decision to vacate the trial*”: Engagement Letter of M Saunders dated 23 June 2022.
65. Ms Saunders has at no point been retained, or asked, to provide advice to Ms Wilkinson on any potential claims of defamation she might have against *The Australian* or other related actions Ms Wilkinson could take against *The Australian* in respect of articles published about her.
66. Further, at no point since Ms Saunders was retained by Network Ten in June 2022, has she been involved in providing pre-publication advice to *The Australian* in respect of articles concerning Ms Wilkinson. There was therefore no real risk of any misuse of confidential information.

*Dr Collins QC*

67. To the extent it is submitted that Dr Collins was prevented from acting for Ms Wilkinson, by reasons of comments he made on Sunrise on 21 June 2022, that allegation is rejected. It would be fanciful to suggest that because Dr Collins had expressed views based on information contained in a publicly available judgment, he would have been in some way inhibited in his ability to act in the best interests of his client, once furnished with the full set of facts and any confidential information.



**Robert Dick   Zoe Graus**  
Counsel for Network Ten

9 February 2024