



Ms Wilkinson's submissions on further orders on cross-claim

1. Ms Wilkinson's entitlement to indemnity from Ten in respect of her costs reasonably incurred in defending the applicant's claim against her has now been established by judgment of this Court on her cross-claim, and the dismissal of Ten's contrary cross-claim: *Lehrmann v Network Ten Pty Limited (Cross-claims)* [2024] FCA 102.
2. The orders sought by Ten in its dismissed cross-claim included, *inter alia*, its fallback contention that an assessment of whether Mrs Wilkinson's costs fell within the scope of the indemnity be determined on a "common" or "non-common" issues basis. That claim was dismissed by orders made on 14 February 2024. With the reasonableness of separate representation ultimately conceded, that fallback position could not sensibly be maintained and was not (for the reasons explained in Ms Wilkinson's closing written submissions on the cross-claims filed on 14 February 2024, paras 27 to 40). Paragraphs 41 to 52 of Ten's submissions on costs filed 22 April 2024 impermissibly seek to reargue that issue.
3. The indemnity in Ms Wilkinson's favour covers "costs reasonably incurred in defending" the applicant's claim: *National Roads and Motorists' Association v Whitlam* (2007) 25 ACLC 688; [2007] NSWCA 81 at [76]; *NSW v Tempo Services Ltd* [2004] NSWCA 4 at [21]. This has been conceded in the present case: *Lehrmann v Network Ten Pty Limited (Cross-claims)* [2024] FCA 102 at [3]. As a party with a contractual obligation to indemnify its employee in respect of costs she has incurred with her own lawyers, the amount payable by Ten to Ms Wilkinson are her reasonably incurred costs determined on the solicitor-client basis.
4. What remains to be determined is the quantum of the sum payable by Ten to Ms Wilkinson. It is understood that, in the absence of any agreement between Ten and Ms Wilkinson, the Court intends to refer that question to a referee for an inquiry and report, an approach with which Ms Wilkinson agrees. The orders proposed by Ms Wilkinson for the Court's consideration are as set out on the following page.
5. As to the applicant's costs liability to Ms Wilkinson, his claim having failed, then in the normal course costs would follow the event, meaning he is liable in respect of Ms

Wilkinson's costs. Subject to any contrary order being made, it is recognised that if such an order is made, the quantum of the applicant's liability in respect of Ms Wilkinson's costs would fall to be determined on a party-party basis.

6. Ms Wilkinson has, however, her indemnity from Ten in respect of costs incurred by her in defending the applicant's action. That being so, Ten (as the indemnifying party) is subrogated to the rights of the indemnified party (Ms Wilkinson) to recover her costs from the applicant, and may stand in her shoes and exercise those rights: *Coshott v Woollahra Municipal Council* [2008] NSWCA 176 at [12]. On that basis, there may strictly be no need for an order for costs against the applicant in Ms Wilkinson's favour. Instead, Ten may seek and obtain its own order against the applicant for payment by him to Ten of the proportion of the amount which Ten is obliged to pay Ms Wilkinson which represents the quantum, as determined, of the *inter partes* costs as between the applicant and Ms Wilkinson.
7. Should the Court take a different view, then Ms Wilkinson does seek her own costs order, albeit for Ten's ultimate benefit, and does so on the basis that Ten will be obliged to indemnify her in respect of the costs and expenses she incurs in seeking and attempting to recover under that order. Any such order, however, will not affect Ten's obligation to indemnify Ms Wilkinson for her costs, as noted above. Ten would have to pay Ms Wilkinson, and Ms Wilkinson would in due course account to Ten for any recovery from the applicant.

22 April 2024

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Federal Court of Australia

District Registry: NSW

Division: General

NSD103/2023

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LIMITED ACN 052 515 250

First Respondent

LISA WILKINSON

Second Respondent

PROPOSED SHORT MINUTES OF ORDER

JUDGE: JUSTICE LEE

DATE OF ORDER:

WHERE MADE: Sydney

THE COURT ORDERS THAT:

- (1) **Network Ten** Pty Ltd pay Ms Wilkinson's costs reasonably incurred in defending the applicant's claim in an amount to be agreed between them, or failing agreement, as determined by this Court following receipt of a report from a referee in accordance with the orders below.
- (2) Pursuant to s 37P(2) and s 54A of the *Federal Court of Australia Act 1976* (Cth) and r 28 of the *Federal Court Rules 2011* (Cth) (FCR):
 - a. the quantum of the costs payable by Network Ten to Ms Wilkinson under order (1), be referred to a referee (**Referee**) for the purposes of the Referee conducting an inquiry and providing a report in writing to the Court (**Reference**) stating, with reasons, the Referee's opinion on the quantum of costs payable pursuant to Order (1) and who should bear the costs of the Reference;
 - b. the Reference commence within 14 days of the making of these Orders or on such other date as ordered by the Referee;

- c. the Referee consider and implement such manner of conducting the Reference as will, without undue formality or delay, enable a just, efficient, timely and cost-effective resolution of the Reference to allow completion of the Report including, if the Referee thinks fit:
 - (i) the making of enquiries electronically, by telephone or in writing;
 - (ii) in order to facilitate the Referee implementing the just, efficient, timely and cost-effective resolution of the Reference, the Referee is to make such directions as the Referee considers appropriate as to the conduct of the Reference; and
 - (iii) without limiting (i) and (ii), to the extent the Referee considers it is necessary or appropriate for the Referee to obtain any submission from any party, the Referee may make any direction the Referee considers appropriate in relation to such submissions including that any submissions be provided wholly in writing and be limited in length and topic.
- (3) By 4pm on 5 June 2024, the Referee submit the Report to the Court of no more than ten pages, addressed to the District Registrar, in accordance with FCR 28.66.
- (4) Mr Stephen Lancken, Ms Kerri Rosati, or Mr Roland Matters, or such other person as the Court determines, be appointed as the Referee.
- (5) Ms Wilkinson deliver to the Referee forthwith a copy of these orders, together with a copy of FCR 28 and a copy of a briefing note and the tax invoices for the costs incurred by Ms Wilkinson that are the subject of the Reference.
- (6) The Referee have liberty to seek directions with respect to any matter arising in the Reference.

Date that entry is stamped: