# NOTICE OF FILING

## Details of Filing

| | |
|---|---|
| Document Lodged: | Outline of Submissions |
| Court of Filing | FEDERAL COURT OF AUSTRALIA (FCA) |
| Date of Lodgment: | 5/12/2023 12:53:05 PM AEDT |
| Date Accepted for Filing: | 5/12/2023 12:53:09 PM AEDT |
| File Number: | NSD103/2023 |
| File Title: | BRUCE LEHRMANN v NETWORK TEN PTY LIMITED ACN 052 515 250 & ANOR |
| Registry: | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA |


Registrar

## Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

In the Federal Court of Australia

**NSD 103 of 2023**

**BRUCE LEHRMANN**

Applicant

**NETWORK TEN PTY LIMITED**

First respondent

**LISA WILKINSON**

Second respondent

**SECOND RESPONDENT'S OUTLINE OF SUBMISSIONS ON APPLICATIONS OF NEWS LIFE MEDIA PTY LTD AND THE AUSTRALIAN BROADCASTING CORPORATION**

1. News Life Media Pty Ltd and the Australian Broadcasting Corporation by an outline of submissions dated 30 November 2023 seek orders in respect of settlement deeds they have entered into with the applicant. Each media organisation seeks orders to the extent the deeds are tendered, preventing public access to each deed from the Court under r2.32 *Federal Court Rules* 2011 and a non-publication order under in respect of each deed under s37AF *Federal Court Act* 1976.

2. The non-publication orders are purportedly sought on the grounds of s 37AG(1)(a) of the Act.

3. The media organisations have served no evidence in support of the orders they seek.

**Relevant legal principles**

4. Pursuant to s 37AE of the Act:

> *In deciding whether to make a suppression order or a non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.*

5. In the scheme of Part VAA of the Act, the primacy of the public interest in open justice is enshrined in the adoption of a test of "*necessity*" for the making of suppression or non-publication orders in s 37AG(1).

6. In *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30]-[31], speaking of the former s 50 of the Act, the High Court held:

> *As it appears in s 50, "necessary" is a strong word. Hence the point made by Bowen CJ in* Australian Broadcasting Commission v Parish *[(1980) 43 FLR 129 at 133], that the collocation of necessity to prevent prejudice to the administration of justice and necessity to prevent prejudice to the security of the Commonwealth "suggests Parliament was not dealing with trivialities"….*
>
> *It is insufficient that the making or continuation of an order under s 50 appears to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some "balancing exercise", the order appears to have one or more of those characteristics.*

See also *Rinehart v Welker* (2011) 93 NSWLR 311 at [27]-[31] per Bathurst CJ and McColl JA, concerning the near-identically worded s 8(1) of the *Court Suppression and Non-Publication Orders Act* 2010 (NSW).

7. The onus is on the applicant for suppression or non-publication orders to demonstrate that orders sought under s 37AF are justified under one of the grounds set out in s 37AG(1), and the threshold to be met is a high one: see *Oreb v Australian Securities & Investments Commission* [2016] FCA 321 at [80] per Markovic J.

8. The fundamentality of the principle of open justice warrants a strict and narrow construction of any statutory power to derogate from it: *W v M* [2009] NSWSC 1084 at [17] per Brereton J; *Rinehart* at [26] per Bathurst CJ and McColl JA.

9. The corollary of the public interest in open justice is that anybody is entitled to publish a fair report of proceedings, including the names of the parties and witnesses and the evidence that has been given: *Hogan v Hinch* (2011) 243 CLR 506 at [22] per French CJ. Clearly, in order that fair and accurate reports of proceedings may be published, it is necessary for the public to have access to the primary materials from which to make such reports – the pleadings, the evidence, and the ability to attend court and watch the proceedings. The restriction of public access to such information not only hampers fair and accurate reporting – it fosters *unfair* and *inaccurate* reporting. As McHugh JA observed in *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 481, it makes it more likely that court proceedings will become "*the subject of the rumours, misunderstandings, exaggerations and falsehoods which are so often associated with secret decision making*".

10. Embarrassment and stress are insufficient to warrant making such an order: *Lehrmann v Network Ten Pty Limited* [2023] FCA 1452 at [6] per Lee J and the authorities their cited.

11. The second respondent understands that the orders under r 2.32 are sought as an adjunct to the non-publication orders, and that there is no basis to make such an order if a non-publication order is not otherwise made.

**Orders sought by either media organisation should not be made**

12. The Court should not make any of the orders the media organisations seek because the proposed orders are not "*necessary*", in the sense in which that term has been explained in the authorities, for preventing any risk of prejudice to the proper administration of justice.

13. The media organisations recognise at AS[22] that there is no binding or on-point authority that supports the novel proposition they advance against open justice in these proceedings.

14. Instead they rely upon a characterisation of what Jagot J explained in *Porter v Australian Broadcasting Corporation* [2021] FCA 863 in completely different circumstances. In all the authorities the media organisations rely at AS[12]-[24] the Courts were dealing with applications under r 2.32 at stages other than final hearing where there was no adjudication on evidence or pleadings and where the proposed orders were sought in the proceedings as part of or to facilitate or protect the settlement itself. Each of those cases involved serious allegations made under absolute privilege.

15. None of those authorities stand for a principle that in contrast to the high onus that an applicant ordinarily must meet in seeking a suppression order, that there is a principle that parties that settle litigation will ordinarily obtain an order under s 37AF to protect any confidential terms because settlements should be encouraged and protected: c.f. *Jenkings v Northern Territory of Australia (No 4)* [2021] FCA 839 at [22]-[28] per Mortimer J.

16. Where this Court is required to approve settlements the appropriateness of s 37AF orders to protect confidential terms or related settlement documents is assessed on a case-by-case basis. Such cases, however, provide no assistance for a person, such as the media organisations, who seek non-publication orders in different proceedings to those that were settled and where the proceeding will continue to judgment.

17. In *Duma v Fairfax Media Publications Pty Limited (No 4)* [2023] FCA 159 on which the media organisations rely, Katzman J in noting the agreed fact, observed at [55]:

> *No evidence was adduced concerning the amount Mr Duma received or agreed to receive. Presumably this was a deliberate decision on the respondents' part because they did not want the amount to be disclosed and did not consider that there was any basis upon which the Court could make a suppression or non-publication order*. [emphasis added]

*Duma* was a case where both parties to the settlement agreed in the subsequent litigation (which concerned the same parties) to keep the amount confidential. Katzman J gave no reasoning for not disclosing the agreed fact or amount in her Honour's final judgment.

18. In this matter, the second respondent relies on the amounts paid as part of these settlements on the question of damages, including reduction of damages, causation of damage claimed by Mr Lehrmann in his evidence in chief, and for the purposes of challenging his hurt to feelings evidence. Given the heightened public interest and scrutiny of these proceedings it would seem very undesirable that damages would be assessed by reference to an earlier settlement payment or payments without disclosure of the reasons why. Similarly, if the second respondent's submissions about damages by reference to these settlements are not accepted by the Court, the reasoning for rejecting those submissions should be transparent, including as to the amounts in question.

19. The media organisations advance no special or unique circumstances, let alone a combination of the circumstances, that discharge the heavy onus to establish that the proposed orders are necessary.

20. To the contrary there are significant countervailing factors that weigh against non-publication orders in this proceeding in respect of either deed:

    a) Both settlement deeds and the proposed orders permit any party to disclose that the media organisation made a contribution towards the applicant's legal costs. The fact that payments were or will be made is not confidential. Given the public disclosures about the nature of the payments there is a strong public interest in knowing the amount to assess if the amount is commensurate with the non-confidential characterisation as "*a contribution to legal costs*". Given the quantum of the amounts, the second respondent does not accept that the public statements about the amounts are accurate.

b) There are significant issues in this proceeding as to how the other proceedings, the settlement of the other proceedings and any payments received mitigate any damages, and at later stage potentially costs, that would be otherwise be awarded to the applicant that makes the quantum highly relevant.

c) The significant public interest in this proceeding means that open justice, the primary objective in any such applications, is of heightened importance because of the arguably unparalleled public scrutiny and viewership of these proceedings – a judgment about mitigation such as occurred in *Duma* would be entirely undesirable in the unique circumstances of this proceeding and non-publication could have the tendency to bring the administration of justice into disrepute.

d) The circumstances surrounding the claims the applicant brought are so unique that the settlement amounts, particularly in light of the public disclosures, could not have any commercial value. It may be inferred that the real concern by the media organisations is embarrassment they may face from the quantum of money paid to Mr Lehrmann and the public statements made about those payments; and

e) As to the ABC, they are subject to mandatory disclosures in Commonwealth Parliament – any order will be futile and therefore the orders not *necessary*.

21. The Court should not make the orders the media respondents seek.

Sue Chrysanthou 5 December 2023

Barry Dean

Counsel for the second respondent