

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LTD and another

Respondents

**FIRST RESPONDENT'S SUBMISSIONS
LIVE STREAMING OF THE TRIAL**

1. These submissions address whether the forthcoming trial in this proceeding should be livestreamed on the YouTube channel of the Federal Court of Australia. For the reasons developed below, the first respondent submits that, in the unusual circumstances of this case, it would not be in the interests of the administration of justice for the trial to be livestreamed on an uncontrolled platform accessible to any member of the public, anywhere in the world.
2. The first respondent submits that the public interest in the open administration of justice could, however, be facilitated through the imposition of a regime that permits AVL access to journalists, instructing solicitors and other interested persons upon the making of an appropriate application to the court. The physical court room, of course, will remain open and accessible to the public, subject to any orders of the court and restrictions on capacity. Proposed orders reflecting the first respondent's proposed regime are appended to these submissions for the court's consideration.
3. The Federal Court of Australia has much experience in televising and more recently livestreaming proceedings. It was the first Australian court to livestream a judgment summary on the internet at 9.15am on 3 August 1999: *Australian Olympic Committee Inc v Big Fights Inc* [1999] FCA 1042. The livestreaming of proceedings arose in recent years through the necessity of conducting proceedings remotely, and thereafter because of capacity restrictions that were placed on the number of persons permitted into a court room during trials. The first respondent applauds the court for making appropriate trials of matters of public interest available on YouTube. Livestreams of trials serve to enhance

open justice and public scrutiny of the administration of justice. However, the livestreaming of court proceedings to the world at large will not be appropriate in every case: any general practice in favour of livestreaming must yield where necessary having regard to the interests of the administration of justice in the particular case.

4. The first respondent submits that, on balance, the interests of justice tell against the livestreaming of the trial of this proceeding to the world at large, for at least four reasons.
5. **First**, the circumstances to be examined in the course of this trial have received an inordinate amount of public attention over several years, including on social media. Much of that coverage has been deeply intrusive, offensive and no doubt distressing to its targets.
6. Witnesses will naturally and understandably be concerned about the notoriety they might attract as a result of giving evidence. In the context of the present matter, it is foreseeable, if not inevitable, that members of the public with access to an uncontrolled livestream of the trial would breach the court's prohibition on making recordings and screenshots. Such breaches might include the posting of content out of context (far removed from the fair and accurate reports of proceedings of the kind the mainstream media can be expected to prepare), after electronic or AI manipulation, or in the form of degrading memes, in circumstances that are for all practical purposes incapable of being restrained by the court.
7. The mere concern that conduct of those kinds might occur is apt to have a distorting effect on the participants in the proceeding, including the applicant and witnesses.
8. The interests of the administration of justice demand that witnesses feel comfortable to give full, frank, candid and unvarnished evidence. There is a real prospect in the present matter that a witness' knowledge that the trial was being livestreamed to the world could interfere with their concentration and focus or divert their attention (although in a very different context, see the observations of Harrison J in *Prothonotary of the Supreme Court of New South Wales v Rakete* [2010] NSWSC 5 at [43], [44]). The existence of an uncontrolled livestream could thus potentially impact on the integrity, completeness or accuracy of a witness' evidence, and the court's ability to assess its credibility.
9. These concerns are not abstract. As the court knows, information apparently originating from material compulsorily produced and obtained in the ACT criminal proceedings, but not deployed in those proceedings, has been published during the interlocutory stages of

this proceeding. It is anticipated that witnesses in this proceeding will give evidence about how the disclosure of that information has eroded their confidence about participating in this legal process and caused them to be concerned about the disclosure of their private and personal information through their participation as witnesses: Lauren Gain, [67]-[70], Nikita Irvine, [96] and Angus Llewellyn, [148]-[149].

10. An uncontrolled livestream of witness testimony is likely to deepen those concerns.
11. These consequences are not limited to parties and witnesses. Experienced counsel in high profile matters have now become accustomed, following appearances in matters that have been livestreamed via YouTube or the subject of intensive media and social media attention, to receiving threatening and other correspondence, and being attacked on social media. In extreme cases, counsel have been advised to increase their personal security and alter the routes they take when travelling from home to chambers. Livestreams in matters such as the present give rise to genuine workplace health and safety concerns.
12. **Secondly**, the subject matter of this proceeding is an alleged sexual assault. In criminal trials in other courts involving prescribed sexual offences, statutory provisions apply to protect vulnerable persons and reduce the stress and trauma experienced by such persons in giving evidence. Such provisions include the adoption of special procedures during the evidence of a complainant: see, for example, s 291(1) of the *Criminal Procedure Act 1986* (NSW), which requires evidence of a complainant to be held *in camera* unless otherwise directed by the court, even if the evidence is to be given outside the courtroom via CCTV as provided in s 294B(3).
13. The first respondent will call Ms Higgins to give evidence about the alleged sexual assault central to the first respondent's defence of justification. Whilst Ms Higgins' identity is well known because of the peculiar background to this proceeding, and she gave evidence in the ACT criminal proceeding, the rationale behind the provisions that apply to the giving of evidence by a complainant in a criminal trial is nevertheless relevant to the determination of whether such evidence should be livestreamed to the world on YouTube. We understand that the trial in the ACT criminal proceeding was not livestreamed in any capacity.
14. An uncontrolled livestream of the trial would inevitably increase the stress and trauma experienced by Ms Higgins, who would be required to give all of her evidence *viva voce*

in the courtroom to a global audience watching in real time, with the fear of what malignant onlookers might do with the livestream.

15. **Thirdly**, the applicant was recently identified as having been charged with two counts of raping a woman in Toowoomba in October 2021. He has not yet been committed to stand trial, and any trial is likely to be some time away.
16. Nonetheless, there is an inherent risk that an uncontrolled livestream of the trial in this proceeding could prejudice the applicant's right to a fair trial in any future criminal proceedings. While the mainstream media can be expected to report on the present trial in a way that has an eye not to prejudicing the administration of justice in respect of the Toowoomba matter, the same cannot be said of all other viewers of a livestream. If members of the public were to record parts of the livestream and post them online, that could be problematic for any jury trial to be conducted in the future.
17. **Fourthly**, while a livestream would increase public access to the trial of this proceeding, it is not a case in which, in the absence of the livestream, the public would not be properly informed. The trial will inevitably be closely followed and reported on by most or all mainstream media organisations. There will be no shortage of scrutiny. There is no risk of the public not being informed of what occurs in the course of the trial.

9 November 2023

M J COLLINS

T SENIOR

Counsel for the First Respondent

Federal Court of Australia
District Registry: New South Wales
Division: General

No: NSD 103/2023

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LIMITED (ACN 052 515 250) and another

Respondents

PROPOSED ORDERS

JUDGE: JUSTICE LEE

DATE OF ORDER:

WHERE MADE: Sydney

The Court notes that the trial of this proceeding is not to be livestreamed on the YouTube channel of the Federal Court of Australia.

THE COURT ORDERS THAT:

1. Access to an audio visual link to the trial of this proceeding is granted to the parties and the legal representatives of the parties.
2. Access to an audio visual link to the trial of this proceeding may be granted to any other person, upon application to Justice Lee and upon the applicant delivering to the Associate to Justice Lee a signed undertaking in the form of the Annexure to this Order.

Date:

**Annexure
Undertaking**

No: NSD 103/2023
Federal Court of Australia
District Registry: New South Wales
Division: General

BRUCE LEHRMANN

Applicant

NETWORK TEN PTY LIMITED (ACN 052 515 250) and another
Respondents

I, [name and address of party], undertake to the Federal Court of Australia that I will not:

1. disseminate the audio-visual link to the trial of this proceeding to anyone other than with the prior leave of the Court;
2. record or cause to be recorded, in any manner, including by audio-visual or audio recording, photography or the making of screenshots, the proceedings of the court;
3. publish or cause to be published any recording of the proceedings of the court.

For the avoidance of doubt, the above undertakings do not limit the entitlement of the undertaking party to publish or cause to be published a fair and accurate report of the proceedings of the court.

Date:.....

Name:.....

Signature:.....