Livestreaming: Peaks and Pitfalls

Chief Justice Debbie Mortimer*

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1 It is an honour to give the Malcom Blue memorial address. His Honour was a former president of this Association, a distinguished judge and lost too soon to his family and the profession.

INTRODUCTION

2 We start a new legal year with a topic that is going to occupy a lot of debate and discussion over the next few years.

3 Livestreaming of court proceedings is the latest in a series of technological developments which allow the wider community a different kind of access to court proceedings. Livestreaming as a form of access is the most complete form of remote access, and the most straightforward from the user perspective.

4 But livestreaming raises a number of issues, practical and legal—more than you may think at first blush. These are not only issues for courts, but for litigants, for the profession and for witnesses. There are peaks in terms of accessibility, but for every peak there is a pitfall. And courts, the legal profession and the community must learn to manage both. We will have to come to terms with the impacts of livestreaming, although many of those impacts are still being identified.

5 In this presentation I will start by giving you a little background on how the Federal Court came to the point it has reached presently about livestreaming of proceedings. I'll give you some factual information about the prevalence of livestreaming and the approach of the Court, and its individual judges, to the practice. Then I'll turn to the issues raised by the practice.

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* Chief Justice, Federal Court of Australia. This paper is an edited version of The Honourable Malcolm Blue Memorial Address to the South Australian Bar Association's Annual Conference on 22 February 2025. The written paper fills out some of the detail omitted in the oral presentation for reasons of time, and also provides references. My sincere thanks to Jordan Tutton, National Legal & Policy Adviser for the Federal Court of Australia, for his assistance in preparing this paper.

6 In terms of issues, I've divided them into three categories: issues for participants; issues for the community and in this category I include the media; and finally issues for the court. I've placed the court last, because the court must take account of issues raised in the first two categories.

7 At the outset, let me make it clear that the Federal Court doesn't yet have any formulated or "official" position on livestreaming, other than of course it is clear that it is one option that is available at both trial and appellate level.

8 At present, the decision about whether to livestream a proceeding, and if so to what extent, is for individual judges at trial level, and for a Full Court at appellate level. The same is true for the establishment of online files in a proceeding or in an appeal. For those who may not practice in the Federal Court, in essence online files function as a public version of CourtSA. Generally, in consultation with the parties, the Court controls what is placed on the online file. Once documents are placed on an online file, then through the Court's website, a third party can view pleadings, affidavits, exhibits and other materials, without requiring a user account. This gives the community, and the media, immediate access and avoids them having to make file inspection requests.

9 Our Court is fortunate to be one of the technology leading courts in Australia. We are well advanced in our digital court practices and digital document management facilitates technologies such as livestreaming, as well as related accessibility approaches such as online files. The technology is not the challenge—the human and litigation consequences are what loom large.

10 Last year, I spoke about the importance of both livestreaming and online files to the provision of what I described as "accessible justice", a term which I prefer to the malleable and misused term "open justice".[1] It is generally accepted that conducting proceedings in public can allow members of the community to understand how our legal system works, how trials and appeals operate in practice, and enables scrutiny of the exercise of judicial power. Further, by sitting in open courtrooms, the courts provide tangible demonstrations of judicial independence and—we hope—promote public confidence and trust in the courts.

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[1] Chief Justice Debbie Mortimer, 'Reflections on the Concept of "Open Justice"' (Seabrook Chambers Public Lecture, Melbourne Law School, 2 October 2024).

11 In last year's speech, I suggested that a focus on *accessibility*, rather than *openness*, causes us to think about the processes and practices that courts might adopt to engage directly with the community, and assist them to better understand our work.[2] It also directs attention to how our courts might use the tools of a modern information landscape to reach the "public" who may be unable to attend and observe court proceedings.

12 The reality is that the media are now not the sole conduits of information about court proceedings. Courts can deliver accessible justice in other ways. And if the media in its many forms are not seen by the public as trustworthy sources of reliable information, there is a real danger members of the public may bypass them altogether, and the demand for livestreaming may increase.

13 The purpose and objective of livestreaming is to *duplicate* the experience of attending court in person. It is not to provide access, directly or indirectly, to any recordings of what occurs in court. As far as possible, the experience for a member of the community or a member of the media who accesses a livestream should be the same as if they were sitting in court. No less, but also no more. That is the approach that the Federal Court takes to its livestreaming practices. Recording is prohibited and viewers are advised that doing so may be punishable as a contempt of court.

BACKGROUND

14 Some but not all issues raised by livestreaming are common to earlier debates about allowing cameras into Australian courtrooms, so let me briefly summarise that history.

A short history

15 On rare occasions in the 1980s and 1990s, Australian courts would allow proceedings to be filmed and broadcast; South Australian courts were among the first.[3] In 1981, part of a South Australian District Court criminal trial was recorded for an ABC Four Corners episode.[4] In

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2 See also Chief Justice Ferguson, 'The Changing Nature of Open Justice' (Sir Zelman Cowen Address, *Melbourne University Law Review* Annual Dinner, 19 September 2019) at 3–5. See also Chief Justice Bathurst, '"Something More, Something Less": The Contemporary Meaning of Open Justice' (2019) 38(4) *Communications Law Bulletin* 10.

3 See generally Daniel Stepniak, *Electronic Media Coverage: A Report Prepared for the Federal Court of Australia* (1998) ch 7.

4 See Christopher Lane, 'On Camera Proceedings: A Critical Evaluation of the Inter-Relationship Between the Principle of Open Justice and the Televisation of Court Proceedings in Australia' (1999) 25(1) *Monash University Law Review* 54 at 55 n 12.

1992, Millhouse J allowed filming in a civil trial,[5] and in the late 1990s, the South Australian Magistrates Court allowed Channel 7 to film proceedings across five days for a documentary.[6]

16 In the early 21st century, Australian courts generally took a "cautious" approach to allowing cameras in the courtroom.[7] From time to time, the media were authorised to record sentencing remarks and the delivery of judgments. For example, judgment delivery was recorded in Federal Court proceedings relating to the Hindmarsh Island bridge, and the determination of native title in *De Rose v South Australia (No 2)*.[8]

17 In the 2010s, the potential to livestream proceedings—including trials—was considered in the Victorian Supreme Court in particular.[9] Members of the judiciary spoke of the advantages in doing so in civil proceedings, especially in matters of significant public interest and in class actions involving many, geographically dispersed group members.[10] Meanwhile, the High Court began to upload video-recordings of oral argument in many of its cases.[11]

18 During the COVID-19 pandemic, livestreaming was adopted by some courts to ensure that hearings could be observed by the public, who otherwise could not attend court.[12] Since then,

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5 See Duncan Ross, 'Media Access to Courts in South Australia' (1992) 12(2) *Communications Law Bulletin* 23.

6 See Sylvia Kriven, 'Ground Breaking TV Documentary' (1997) 19(7) *Law Society Bulletin* 15.

7 See Chief Justice Michael Black, 'Opening Address' (1991) 1 *University of Technology Sydney Law Review* 7 at 9; Justice Robert French, 'Radio and Television Broadcasting in the Magistrates' Courts: Is there a Future?' (Speech, Association of Australian Magistrates' Conference, Freemantle, 10 January 2006); Daniel Stepniak, *Audio-Visual Coverage of Courts: A Comparative Analysis* (Cambridge University Press, 2008) ch 5.

8 *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106 (von Doussa J); *De Rose v South Australia (No 2)* [2005] FCAFC 110 (Wilcox, Sackville and Merkel JJ). The recordings can be accessed online via Trove: <https://webarchive.nla.gov.au/awa/20230307120829/https://www.fedcourt.gov.au/digital-law-library/videos>.

9 See, eg, *Matthews v SPI Electricity Pty Ltd (Ruling No 14)* (2013) 39 VR 287; [2013] VSC 37 (in bushfire class action, J Forrest J permitted livestream of trial to be made available "to group members and their immediate families"); *Kamasaee v Commonwealth (No 9) (Live Streaming Ruling)* [2017] VSC 171 (in Manus Island Detention Centre class action, McDonald J permitted livestream of trial to the public—although the action settled before trial).

10 See also Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (Redmond Barry Lecture, 21 October 2013) at 19; Supreme Court of Queensland, *Electronic Publication of Court Proceedings* (Report, 2016); Supreme Court of Western Australia, 'Bushfires Trial to be Live Streamed by WA Supreme Court' (Media Statement, 12 July 2018).

11 High Court of Australia, *Annual Report 2013–14* at 15, 18.

12 Supreme Court of Victoria, *Annual Report 2019–20* at 15, 19, 56; Chief Justice TF Bathurst, 'Trust in the Judiciary' (2021) 14(4) *Judicial Review* 263 at 273–4. For specific examples in the Federal Court see, eg, Order of Middleton J in *In re Virgin Australia Holdings Ltd (admin apptd)* (NSD464/2020, 24 April 2020); Order of Rares J in *Brett Cattle Company Pty Ltd v Minister for Agriculture* (NSD1102/2014, 2 June 2020); Order of White J in *Palmer v McGowan* (NSD912/2020, 10 November 2020) *Jenkings v Northern Territory (No 5)* [2021] FCA 1585 at [15]–[17] (Mortimer J).

some courts have continued the practice. The High Court began livestreaming special leave applications before moving away from regular in person hearings, to the disappointment of many members of the profession, on my anecdotal understanding.[13]

19 As best I can tell, the South Australian courts do not livestream court hearings to the public. However, the South Australian Courts Administration Authority provides media representatives with helpful guidance about how they might apply for permission to film certain hearings.[14]

Current practice in the Federal Court

20 In the Federal Court, broadcasting proceedings is generally conducted in one of two ways. The Court's daily hearing lists may indicate that certain hearings can be observed by the public. Interested persons are invited to contact a judge's chambers if they wish to observe a hearing. Generally this involves using Microsoft Teams, through a link provided by chambers.

21 Alternatively, the Court may stream hearings via the Court's YouTube channel. Initially the YouTube channel was used only for matters of significant public interest. In 2024, YouTube was used in 47 different proceedings. More than 200 court events within these 47 proceedings were streamed overall. Of course, this is a small fraction of proceedings and hearings that were conducted throughout 2024; no more than 7% of all hearings were livestreamed.

22 Looking at 80 proceedings livestreamed on YouTube since 2022,[15] around 80% were in the Court's original jurisdiction and 20% of the livestreams were in the Court's appellate jurisdiction.

23 Those who practise in the federal jurisdiction will be familiar with how the Court's business is organised into specialised practice areas. As one might expect, most of the livestreamed proceedings were in the Court's two largest practice areas. Almost one third of proceedings

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[13] See also High Court of Australia, 'Media Release' (27 July 2023) (announcing that special leave hearings will be livestreamed).

[14] Courts Administration Authority, *A Guide for Media Reporting in South Australian Courts* (16 December 2024).

[15] This paragraph, as well as those immediately following, present data on livestreams conducted via the Court's YouTube channel between 1 January 2022 and 31 December 2024. These data do not include livestreams conducted through other streaming platforms, which occurs from time to time. Where the Court's YouTube channel has been used to stream proceedings in other jurisdictions (such as the Australian Competition Tribunal), those proceedings have been excluded. If proceedings were heard and determined together (or are otherwise related), they are only counted once. Appeals have been counted separately from matters in the Court's original jurisdiction.

were in *Administrative and Constitutional Law & Human Rights* national practice area (31%, N=25) and 28% were in the *Commercial and Corporations* practice area.

24 The other 40% of livestreamed proceedings are not as indicative of the Court's main workload, rather they are more reflective of the types of proceedings we know from experience attract high community and media interest. Defamation accounts for about 14% of livestreams (N=11), native title accounts for 10% (N=8), and a wide variety of proceedings make up the remainder (18%, N=14). These include employment, intellectual property and tax disputes, and criminal cartel proceedings. A significant number of class action proceedings across many national practice areas are livestreamed.

25 Historically, the Federal Court had sometimes allowed filming of judgment delivery, and on rare occasions, recording of pre-trial hearings and trials. Judgment delivery now accounts for about 10% of livestreams. Streaming has been used for case management and interlocutory hearings as well as trial and appeals.

26 The number of people viewing the Court's livestreams varies significantly. An interesting example arises from a single day earlier this month. The Court was streaming two matters at the same time as the Australian Parliament was streaming proceedings on YouTube. I am told that one Federal Court trial and the Senate had a similar number of concurrent viewers throughout the day: usually between 100 and 200 people. The number of people watching the House of Representatives was generally higher; it had an audience of more than 1,000 people during question time. Meanwhile, on average 2,500 people were observing the proceeding brought by Ms Antoinette Lattouf against the ABC at all times on that day.[16] A peak of 5,000 concurrent viewers was reached during the evidence of one witness.

27 With that background, I will turn to some of the issues raised by livestreaming.

ISSUES

28 In this discussion, I've drawn on experiences communicated to me privately by individuals involved in livestreamed proceedings. I have also been provided with Australian research into

[16] Proceeding NSD189/2024. See Federal Court of Australia, 'Lattouf v ABC', *Online Files* (Web page, 18 February 2025).

related issues,[17] as well as the recent evaluation of suppression orders by the South Australian Law Reform Institute.[18] The views reported in the Institute's report are valuable in understanding the opportunities and challenges arising from publicity of court proceedings. Many of you will be familiar with that evaluation, and may have participated in it.

29 In short, I am grateful that much thought has been, and continues to be, given to these issues. The Court's approach will no doubt be influenced by what has been shared by practitioners throughout Australia.

Issues for participants

30 We know that court proceedings, whether civil or criminal, involve many participants: judicial officers, court staff, barristers, solicitors, litigants, defendants, complainants, witnesses, jurors and so on. Even in circumstances where proceedings are always conducted in public unless orders have been made to close a court, livestreaming has greater implications for what I will call the privacy of all these people. While privacy might not seem quite the correct term, it is, because of the ripple effects of livestreaming, and because of the opportunities for intrusive behaviour by members of the community, non-participants, to continue well after a day in court has ended.

31 Livestreaming may also add to the nervousness or anxiety that is a human reaction to being broadcast online to strangers. I can say that because it is a not an uncommon reaction amongst some judges to feel some additional or at least different pressure when a matter is being livestreamed. Streaming also presents specific risks for specific groups of court participants.

32 The ways that publicity in criminal proceedings can impact on participants are well known to you. Participants in the Law Reform Institute's consultations recognised there are circumstances where observation of, or reporting on, court proceedings could have unacceptable effects for a defendant, a complainant, a witness and jurors.[19] Sometimes publicity of any kind is prohibited because Parliament recognises how publicity might interfere

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[17] See especially NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication* (Report No 149, 2022) ch 14; Supreme Court of Queensland (n 10). See also Justice Raynor Asher, Justice Ron Young and Judge Russell Collins, *Report to Chief Justice on In-Court Media Coverage* (2015) ("New Zealand report").

[18] Jemma Holt et al, *Stemming the Unstoppable Tide? An Evaluation of the Role and Operation of 'Suppression Orders' in South Australia* (South Australian Law Reform Institute, 2024).

[19] Ibid at 23 [1.6.3], ch 5.

with the proper administration of justice.[20] Given the fundamental importance of the right to a fair trial, the subject matter of many criminal proceedings, and the risks that audio-visual coverage presents for a criminal trial, it is unsurprising that Australian judges and lawyers largely appear to reject audio-visual coverage of criminal proceedings, except perhaps for sentencing remarks or appeals.[21] A wider degree of audio-visual coverage has been permitted in other jurisdictions such as New Zealand, including at least portions of evidence in criminal trials,[22] so we should not assume the Australian practice is the only one considered reasonable and appropriate.

33 But what of participants in civil proceedings? Occasionally litigants do request that their matter be livestreamed, and some litigants express support for the Court's proposal to stream the matter.[23] Publicity is unlikely to be the objective of most litigants, or witnesses, but it is the case that there is a minority of litigants where publicity provides a collateral opportunity. Like the practice of doorstop interviews outside court, it is a matter for individuals. However, the difference between livestreaming and a doorstop interview is that livestreaming is *not* intended to be publicity as such, rather, it is real time access to how a proceeding unfolds. That difference calls for greater care and scrutiny about the practice.

34 The conduct of litigation—and giving of evidence—can often be stressful and embarrassing.[24] These effects are tolerated by our legal system to ensure that courtrooms are open to the public, and to promote fair and accurate reports of proceedings.[25] However, it does seem to be a different matter for courts to enable these moments to be observed anonymously, from anywhere in the world, and by an audience of thousands. That may be especially troubling in

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[20] See, eg, *Evidence Act 1929* (SA) s 71A(2), (4); *Criminal Law Consolidation Act 1935* (SA) s 246(1); *Children and Young People (Safety) Act 2017* (SA) s 162(2)(b).

[21] Supreme Court of Queensland (n 10) at [303]–[309], [311]–[314]; compare House of Commons Justice Committee, *Open Justice: Court Reporting in the Digital Age* (Paper 339, 5th Report of Session 2022–23, November 2022) at 38 [11].

[22] See, eg, Chief Justice of New Zealand, *Annual Report for the period 1 January 2023 to 31 December 2023* at 75 (regarding the Whakaari-White Island trial), see also 51 (regarding the Masjidain attack coronial inquiry).

[23] See, eg, *Matthews* (2013) 39 VR 287 at 292 [16], [18] (J Forrest J); *Kamasaee* [2017] VSC 171 at [1] (McDonald J); *Lehrmann v Network Ten Pty Limited (Livestream)* [2023] FCA 1452 at [9], [26] (Lee J); *Parthy v Grow MF Pty Ltd* [2024] FCA 96 at [18] (Hespe J).

[24] Sharyn Roach Anleu and Kathy Mack, *Judging and Emotion: A Socio-Legal Analysis* (Routledge, 2021) at 34–7, 124–43.

[25] *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at 667 [43]; *Ogawa v President of the Australian Human Rights Commission (Pseudonym)* (2022) 294 FCR 221; [2022] FCAFC 160 at 227 [26]–[27] (Rares, Perry and Hespe JJ).

circumstances where the court has limited capacity to prevent those moments from being recorded and distributed even with an express prohibition on those actions.[26]

35 Despite our rules and the prospect of contempt, the reality is that recording is likely to occur. As is distribution of a recording. In some cases (and I have had some) community members simply may not have heard or read, and may not know of, the Court's prohibition on recording. So it is not necessarily a deliberate contravention of the Court's prohibition. On the other hand, there are likely to be people who will deliberately flout the Court's rules and the Court will not be able to detect them. We need to be realistic about this as a consequence of livestreaming, and that realism must take account of the runaway pace of technology and distribution of material and misinformation across the internet. While our objective is to duplicate the experience of sitting in court, the reality is far from the same experience and has quite different consequences.

36 Livestreaming evidence also presents challenges for "preserv[ing] the freedom and integrity of witnesses".[27] Many witnesses are likely also to be social media users. What might be the effects on them of knowing, at the end of each day if their testimony goes over more than one day, or even the end of a morning or an afternoon, what is being said about them on social media by all those who watched the livestream? We do not yet have enough of an evidence base to know.

37 The other category of participants I want to focus on is counsel.

38 Accounts from barristers suggest livestreaming of high-profile trials may, in part, contribute to anti-social behaviour towards them. For example, in a speech to the legal profession last year, Matthew Collins AM KC described the experiences of appearing in such trials. It was a balanced and thoughtful presentation: Dr Collins recognised the advantages of livestreaming,

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[26] Different views have been expressed about the capacity for courts to control use of their livestreams, the ability of courts to adequately respond to misuse of livestreams, and the risks associated with misuse: Supreme Court of Queensland (n 10) at [259]–[261]; *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 34)* [2022] FCA 532 at [9], [13] (Besanko J); *Lehrmann v Network Ten Pty Limited (Livestream)* [2023] FCA 1452 at [19]–[20], [35] (Lee J). For examples in other jurisdictions see, eg, *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167 (QB) at [51]–[54]; House of Commons Justice Committee (n 21) at 356 [106]; *Canadian Society for the Advancement of Science in Public Policy v British Columbia* [2022] BCSC 2108 at [31], [47]–[51], [74].

[27] *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445 at 450 (Kirby P). See, eg, *Kamasaee* [2017] VSC 171 at [24]–[25] (McDonald J); Supreme Court of Queensland (n 10) at [114]–[122].

and accepted that counsel must expect scrutiny of their conduct and "some loss of privacy".[28] Nonetheless, he did make these points:

- "barristers in high profile cases have become a part of the story" contrary to the "proper conception of the barrister, who is not a public figure, but rather a servant to the administration of justice, and bound by the cab rank rule";[29]
- appearing in these trials had become "extremely stressful" in part "because of the presence of the live stream." Dr Collins describes being "conscious of it all the time", and gives examples of how it influences interactions among counsel and the examination of witnesses;[30] and
- barristers in these matters can be the subject of personalised commentary in traditional and social media; received disturbing and highly inappropriate communications online and in other forms; were approached in public by those who observed them on the livestream or from media reporting; and had justified concerns about their physical security.[31]

39 Dr Collins' experiences are not isolated and other counsel have made similar observations. Counsel also recognise the need to strike a balance between the different interests in the administration of justice.[32]

40 Other counsel have said to me that when a proceeding is being livestreamed, especially if it is high profile, it is tempting to forget that your true audience is the judge or judges and them alone.[33] Counsel have reflected on the temptation to modify their presentation of the case, and their court conduct generally, so as to appeal to a different arbiter—those watching the livestream. This could be the media, counsels' wider client group or the solicitors' firm (not just the instructor in court). In this sense, where a proceeding is being widely reported and scrutinised, livestreaming can intensify the pressure to "win" the battle for headlines in the next

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[28] Matthew Collins, 'Zeitgeist Litigation' (Keynote Address, Australian Lawyers Alliance National Conference, 16–18 October 2024) at 10.

[29] Ibid at 5; see also 10–11.

[30] Ibid at 5–6.

[31] Ibid at 8–11.

[32] Ibid at 11.

[33] For other commentary and research see, eg, Supreme Court of Queensland (n 10) at [158]–[159]; New Zealand report (n 17) at [46].

day's reporting or social media commentary; all of which is a distraction from counsel's true role in a proceeding.

41 Can I say here that we in the legal profession might tend inaccurately to discount the widespread and ever-present use of social media. In 2019, so six years ago, the ACCC reported that of a population of 25 million (21 million being more than 13 years old): "[e]ach month, approximately 19.2 million Australians use Google Search, 17.3 million access Facebook, 17.6 million watch YouTube (which is owned by Google) and 11.2 million access Instagram (which is owned by Meta, formerly Facebook)".[34] An ACMA report, relying on data collected in June 2023, found that many Australians choose social media as their primary source of news: 20% nominated it as their main source, up from 17% in 2022.[35] Among 18–24-year-olds, the percentage is 46%.

42 As a profession we are perhaps lower users of social media. Indeed, some of us might dismiss it. We may not be users precisely because of the work we do. We are not representative of the Australian community in that regard. Can we therefore claim to be the best assessors of the full impacts of livestreaming?

43 There is much more that could be said about the impact on witnesses than I can do justice to in this presentation. Again of course, the higher profile the proceeding, the more acute the effects are likely to be. The effects are not restricted to how a witness might feel knowing their evidence is being livestreamed, and not knowing who is listening, as they would if they were in a courtroom. There are the after effects: the comments, potential for adverse treatment and ridicule, greater levels of embarrassment if they have given evidence about private or personal matters or been cross examined about such matters. In legal terms victimising a person because they gave evidence may be contempt.[36] But in the real world of ordinary Australian witnesses, and their interactions with friends, family, strangers and all comers, it may be unlikely that a witness who has been victimised on social media or through digital platform communications after giving evidence in a livestreamed trial will come forward so that a contempt prosecution might be launched, even if the authorities were willing to do so.

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[34] ACCC, *Digital Platforms Inquiry* (Final Report, 2019) at 6.

[35] ACMA, *How We Access News: Executive Summary and Key Findings* (Communications and Media in Australia series, February 2024) at 1.

[36] See *Moore v Clerk of Assize, Bristol* [1971] 1 WLR 1669; David Rolph, *Contempt* (Federation Press, 2023) at 384–7. For statutory prohibitions with the same effect see, eg, *Criminal Law Consolidation Act 1935* (SA) ss 244(3), 248(1), 248(2); *R v Robinson* [2024] SASCA 118 at [31]–[32] (Lovell, Doyle and Bleby JJA).

44 Livestreaming may make witnesses feel like they have become public figures, especially where they are not one of the litigants and so have not chosen to participate. Resentment may affect the substance of their evidence, and no doubt their assessment of the experience. We do not need people to dread any more than they do the compulsion to participate as a witness in a proceeding. What might livestreaming do to the willingness of individuals to cooperate with investigators and prosecutors?[37] Investigators and prosecutors will not be able to predict whether a court may livestream a proceeding, and can give no assurance one way or the other. Even if an assurance can be given that a party may oppose such streaming; the decision is one for the individual judge.

45 Bruce Lehrmann's defamation trial was livestreamed to the general community over YouTube over the objections of Network 10, the first respondent. You can read the competing submissions on the Court's online file.[38] Now, Network 10 is of course not an investigator or a prosecutor. However, in the *Roberts-Smith* proceeding, reliance was placed by the respondent on the cooperation of many witnesses, who were also part of various investigations being undertaken about the role played by Australian soldiers in Afghanistan. Although their identities were generally suppressed, as I explain elsewhere in this paper, there were attempts by people who had seen the livestream to find out who these witnesses were and identify them. Time will tell whether the prospect of trials being livestreamed may affect the willingness of individuals to cooperate with investigators and prosecutors before a matter reaches court.

46 These are weighty issues. Reasonable judicial minds will differ about them. While a court such as the Federal Court might be criticised for not having a practice to be applied to every proceeding, it is my view—and I believe the view of the majority of Federal Court judges—that the time has not come for that level of prescription. Given the novelty and complexity of the consequences of livestreaming, more consultation, reflection and experience are needed.

Issues for the community, including the media

47 I turn now to issues for the community.

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[37] For other commentary and research see, eg, Supreme Court of Queensland (n 10) at [120], [124]; New Zealand report (n 17) at [134]–[135].

[38] Federal Court of Australia, 'Bruce Lehrmann v Network Ten', *Online Files* (Web page, 16 December 2024).

48 As I have said, in my view the tangible advantages of livestreaming lie in how it makes the work of the judicial branch of government more accessible to the community we serve.[39]

49 Former Chief Justice Doyle spoke some time ago on the broad relationship between the courts, public and media, suggesting that, as institutions, courts should "try to reach those who choose not to exercise the right [to access courtrooms] in person and to inform them of what the courts are doing and why they do it."[40] His Honour reasoned that "courts must do this because Australians have a democratic right to be told what the courts are doing", and public confidence can rest on public understanding.[41]

50 The former Chief Justice suggested the courts need to explain their function. By the practice of livestreaming, courts might not be explaining anything and perhaps that is another problem. A person may view the raw broadcast without knowing the broader context of the evidence, pleadings, hearing or perhaps even the judicial function. Might that practice erode confidence in the courts rather than encourage it? We don't know yet.

51 Nevertheless there are ways that livestreaming can enhance public understanding. On 15 January 2024, Charlesworth J delivered judgment in *Munkara v Santos NA Barossa Pty Ltd*.[42] The matter involved issues of significant public interest: Aboriginal people from three Tiwi Island clans "alleged that there is a risk that the construction of [an underwater] pipeline, and its existence on the sea bed, [would] significantly impact on their cultural heritage".[43] The litigation concerned with the respondent's compliance with environmental regulations, and some complex and technical questions.

52 Justice Charlesworth livestreamed the delivery of judgment on YouTube. Viewers heard the Court summarise the background to the case, the critical issues to be determined, and the Court's key findings of fact and law.[44] There were on average 450 concurrent viewers throughout the summary: these people were not left to individually work through the 1,322-

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39 Sometimes viewership figures are used to illustrate how streaming can allow courts to reach many more in our community: see, eg, Chief Justice Anne Ferguson, Address to the 2022 Australian Bar Association Conference (State Library of Victoria, 29 April 2022) at 3–4.

40 Chief Justice John Doyle, 'The Courts and the Media: What Reforms are Needed and Why?' (1999) 1(1) *UTS Law Review* 25 at 26.

41 Ibid.

42 *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9.

43 Ibid at [4].

44 The judgment summary can be accessed online: <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0009/summary/2024fca0009-summary>.

paragraph judgment, or dependent on the media to summarise it for them. These are tangible accessibility benefits, and promote a wider and more well informed understanding of the Court's work.

53 More generally, community feedback received by the Court is positive about the livestreams. Feedback from the media, received through the Court's Media Committee, is particularly positive about livestreaming.[45] Journalists indicate that the increased accessibility of hearings makes it easier to report on matters, allows them to cover a greater range of hearings (such as those listed in States or Territories where they are not based), and promotes the accuracy of reporting.

54 The point about accuracy is particularly important. Although viewers are prohibited from recording the stream, it is no doubt easier for journalists to make accurate written reports from their desks, rather than a notebook on their lap. One might hope this also assists media representatives to focus on the broader context of oral submissions or reasons.

55 Having said that, it is an open question whether this increased accessibility might encourage people with strongly held views to treat the Court as some kind of public square. Or as nothing more than the Australian version of Judge Judy. The analogy with the public square highlights the potentially damaging and uncontrollable side of social media, particularly algorithmic social media. Instead of people being present in a group in one place like a town square, and perhaps shouting out their views for all to hear and assess, when watching a livestream, members of the public can simply publish their commentary on the livestream by whatever digital platform they choose, or exchange commentary between smaller connected groups on a digital platform. Unlike the shouting in the public square, they are not audible to everyone but only to those such members of the community select through platforms they use. It might be said to be a recipe for the spread of misinformation, disinformation and prejudice. That said, misinformation and prejudice are part of any modern life with digital communications, and perhaps it is just that livestreaming exposes courts more acutely to this part of community life than otherwise. Another reason for caution perhaps.

56 Livestreaming also enables an international audience to follow a proceeding. This can be about much more than curiosity. People may have interests that are directly impacted by the litigation,

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[45] See also NSWLRC (n 17) at 413 [14.14], 414 [14.20]; Camilla Nelson, 'The "Most Maligned" Witness in the Christopher Dawson Case: Gender, Power, Media and Legal Culture in the Digitally Distributed Live-Streamed Court' (2023) 20(1) *Crime, Media, Culture* 83 at 91.

but are based overseas. Practitioners or litigants considering similar litigation in other jurisdictions may wish to observe how a particular kind of case, or how particular arguments, are received in Australia.

57 Another challenge for the community is for a large, lay, and anonymous audience to understand exactly what it is that they are watching. I'm grateful to a colleague for this observation, and I agree with it. Members of the public who attend court in person secure a more continuous and consistent understanding of a proceeding. One of the last trials I conducted before being appointed Chief Justice was a racial discrimination trial, over nine weeks, about the treatment of Jewish students at a state high school in Victoria. Many members of the Melbourne Jewish community attended that trial every day. By my observation they came to understand with a considerable level of nuance the ins and outs of the trial process, and to appreciate the acutely balanced issues in the case of each side. That trial was not livestreamed. If it had been, I would have worried about members of the community dipping in and out of witnesses' testimony, and not having an appreciation for the complexity of the factual and legal issues on both sides. And not getting a sense, as those in court did, of the very real human dimensions and impacts on individuals who were parties and witnesses, no matter which side they were on.

58 Livestreaming may tempt a wider audience to circumvent or undermine suppression orders. This became an issue in *Roberts-Smith v Fairfax Media Publications Pty Ltd*, a trial with considerable and carefully justified identity suppression of witnesses. Initially recordings of the trial were being uploaded to the Court's YouTube channel because access to the Court building was limited by COVID-19 restrictions.[46] However, later in the trial, the Court received evidence "that persons located outside of Australia appear to be making use of information" uploaded to YouTube, in combination with other information, "to then publish information which identifies, or tends to identify" the protected witnesses.[47] Justice Besanko acknowledged that "any facility which made easier the possible intimidation of witnesses should be carefully considered", remarked that "[t]he requirements of open justice [were] satisfied without" the YouTube videos, and decided that recordings would no longer be uploaded.[48]

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46 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 26)* [2022] FCA 46 (Besanko J).

47 *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 34)* [2022] FCA 532 at [9] (Besanko J).

48 Ibid at [12]–[14].

Issues for the Court

59 You can see, I trust, that even this summary canvassing of issues for participants and the community provides judges with a number of considerations to weigh up in the decision whether to livestream a hearing, or part of a hearing.

60 Like many other aspects of the Court's practice, and in some respects reflective of the prominence of the docket system in the Federal Court, these are matters of individual judges.

61 Some judges are well persuaded that the benefits of livestreaming outweigh disadvantages, or perhaps that disadvantages can be contained and controlled by the Court.

62 Some judges might not be troubled by the additional limelight that comes with livestreaming.

63 Some judges are far less persuaded about the benefits of the practice at trial level, especially because of the dangers of unlawful recordings, and because of the potential consequences for counsel, litigants and witnesses of the kind I have described above.

64 Some judges are unlikely ever to livestream a trial they are presiding over, finding the additional publicity and its endless and unquantifiable nature a distraction to the discharge of their judicial role.

65 A larger proportion of Federal Court judges support livestreaming of appeals. In this context, the accessibility benefits are clear, and the risks are lower. The same is true of livestreaming judgments and the reading out of any summaries that accompany the Court's formal reasons. And the same is true of case management hearings.

66 Many judges can see the benefits in class action and native title proceedings, which share a common feature of having groups, sometimes very large groups, of people who are behind or with an applicant in a proceeding. It is their litigation. They can be spread all over Australia, sometimes in remote or rural locations.

67 Another issue, like the ones I have discussed about counsel, are the possible effects on judges from livestreaming. Does it mean we intervene less, because we are conscious our questions and interventions are being broadcast more widely, and perhaps viewed by an audience with more polarised views? Some counsel have told me they have indeed experienced this judicial reluctance, or perhaps better described as cautiousness. The higher profile the case, perhaps the greater cautiousness. Does this mean judges might not ask questions or intervene and then leave themselves with more questions than otherwise would when they return to their chambers?

Time will tell. Another possible consequence is that judges worry more about seeming to be disposed to one side or the other, especially by people who are not privy to the whole trial and tune into a livestream only for bits and pieces, yet they may wish to comment on social media about what they see. Finally, less questions and interventions than a judge might usually make can—as this audience knows—make the advocate's job all the harder; you can be less sure whether you need to expand on a point, or whether you can move on. Some of these effects may take time to crystallise.

68 On the other hand, livestreaming might encourage more interventions. The research and commentary indicate this is a particular concern for courts of other jurisdictions.[49] Might judges who are gregarious, who perhaps consider themselves witty and enjoy the banter between bench and bar table be encouraged to intervene more often, to produce quips that might not otherwise be uttered? Will judges feel under pressure to be entertaining? And even if some judges are naturally enthusiastic about being entertaining on a livestream, will there be longer term repercussions for the reputation of the court for such behaviour? Will public perception of the court change; we can agree, I trust, that seeing the courtroom as a place for entertainment creates altogether the wrong impression of the work of a court.

69 Some of the effects might be less tangible and we may need experience over time to reach any mature conclusions about the effects of livestreaming on the character of court proceeding. A confined group of human beings, in a solemn atmosphere like a courtroom tends to elevate the seriousness of the event. Clients and witnesses who are physically present can have impressed upon them more easily the gravity of what they are participating in. There is silence, there are rules and rituals—standing, bowing, robing, language. When all watching a proceeding are present in the single courtroom, I imagine most of you would agree there is an added gravity to the atmosphere. Individual members of the public in a courtroom tend in my experience to respect the gravity of the situation—with some notable exceptions of course. When people are simply watching proceedings on the internet, they are not subject to these influences. They might be drinking or eating. They might be watching with friends or family. They might be exchanging stories about matters unrelated to the proceeding. They might be scrolling through social media or watching television. They might drift in and out of watching. They might be

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[49] For other commentary and research see, eg, Supreme Court of Queensland (n 10) at [158], [164]; New Zealand report (n 17) at [45].

watching as they work. They might be just as busy watching the social media commentary as the livestream itself. This is the world in which we live, and in which courts do their work.

70 What might the effects of this informality be on the administration of justice? Might they be real or are we imagining them only because we are too wedded to our traditional ways of undertaking proceedings?

71 You can see the weight of these issues. It is time for a grounded and practical conversation about the concepts of livestreaming and its consequences, not relying on malleable concepts like open justice, nor clinging for the sake of it to the methods for conducting trials and appeals with all persons present in court. The administration of justice in contemporary Australia is more nuanced than that, and what contemporary Australia looks like is also changing fast. We must strive for better information about all the effects and consequences of livestreaming, and we must discuss and reflect upon its advantages and disadvantages. We have to be clear about what the purpose of livestreaming is. This is a conversation in which all of the legal profession should be involved.

72 There is an issue of judicial legitimacy[50] attached to livestreaming practices. The Federal Court is likely to engage closely with the profession over the short term to gather more comprehensive information to feed back to our judges, so that as a Court we can determine how best to navigate the effects of new technology, and what we consider its place is in helping our Court to deliver accessible justice.

[50] For recent commentary by judicial officers on the need to maintain public confidence and trust in Australian courts (and various contemporary practices adopted by courts to support legitimacy), see Justice Jacqueline Gleeson, 'Advancing Judicial Legitimacy: The Stakes and the Means' (2023) 15(1) *The Judicial Review* 1; Justice Sarah C Derrington, 'Without Fear or Favour' (2023) 48(3) *Monash University Law Review* 1; Chief Justice AS Bell, 'Truth Decay and Its Implications for the Judiciary: An Australian Perspective' (Paper, 4th Judicial Roundtable at Durham University, 23–26 April 2024).