Control of Government information in Legal proceedings:

Non-publication and suppression orders

Michael Rennie

6 St James Hall Chambers

INTRODUCTION

1. Sometimes sensitive information cannot be withheld from a Court through a privilege or public interest immunity claim. On those occasions sensitive material may still be used in Court, but managed carefully under specific orders so as to reduce any prejudice to the public interest or the legitimate concerns expressed. This paper will introduce the role of closed court, suppression, non-publication and restricted access orders in relation to sensitive information to be used in legal proceedings. This paper will cover:
   a. The source of power to make suppression or non-publication orders under both statute and the common law;
   b. The test to be met to satisfy the Court that the order sought should be made;
   c. Practical guidance and examples of methods to limit the risk of material escaping the protective orders that have been put in place.
2. This paper is focussed on government information, but will touch on the ability of private or commercial interests to seek to limit the spread or damage that might come from the disclosure of confidential information and material in Court.

A CONTEXT – RESPONSIBLE USE OF SUPPRESSION ORDERS

3. It is perhaps an unfortunate fact of life that governments necessarily have secrets that allow those governments to function. At the same time open justice is a "*fundamental rule of the common law*",[1] a crucial element of our legal system and the rule of law in Australia.
4. Where governments become involved in legal proceedings, and legitimate secrets risk exposure, properly balancing secrecy and open justice is vital. Not every secret must be kept. In some cases, a secret, however legitimate, *must* be disclosed.
5. *AB v CD; EF v CD* [2018] HCA 58 (***AB v CD***) reminds us of circumstances where information must be disclosed to ensure a fair trial. In that case the High Court ruled that, even where the death of the informant Nicola Gobbo (referred to as EF or Lawyer X) was regarded as "almost certain", the greater public interest in the rule of law in a fair trial for Ms Gobbo's clients

[1] *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing)

required disclosure of Ms Gobbo's role as an informant, so that her former clients' claims of an abuse of client legal privilege could be tested. The High Court unanimously stated:

> *"Generally speaking, it is of the utmost importance that assurances of anonymity of the kind that were given to EF are honoured. If they were not, informers could not be protected and persons would be unwilling to provide information to the police which may assist in the prosecution of offenders. That is why police informer anonymity is ordinarily protected by public interest immunity. <u>But where, as here, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield.</u> If EF chooses to expose herself to consequent risk by declining to enter into the witness protection program, she will be bound by the consequences. If she chooses to expose her children to similar risks, the State is empowered to take action to protect them from harm."*[2]
>
> (emphasis added)

6. *AB v CD* itself was then under several a suppression orders for some 4 months after the judgement was delivered, apparently to give Ms Gobbo a chance to adopt some practical steps to change or protect her identity before her name was released.[3]
7. It's not uncommon for evidence to arise from sensitive means, or to require sensitive treatment. In any criminal prosecution there might be such elements as:
   a. An application for a warrant based on police intelligence;
   b. The use of a human source or informant, perhaps a person that assisted authorities and received a discounted sentence in relation to their own involvement in criminal activity;
   c. A person in witness protection, or perhaps a person that while not formally in a witness protection program has relocated and taken steps to protect their identity against the risk of retaliation;
   d. An investigation by an undercover officer operating under an assumed identity;
   e. A controlled delivery under warrant;
   f. Matters of sensitive investigative methodology such as sophisticated surveillance mechanisms;
   g. Co-operation between other investigative agencies, both foreign and domestic;
   h. A witness or victim of conduct that, because of the nature of the evidence arising, would suffer ongoing harm as a result of public reporting of their identity or evidence; or
   i. Matters of national security.

[2] *AB v CD* [2018] HCA 58 at [12].
[3] The High Court relied on ss 77RE and 77RF within Part XAA of the *Judiciary Act 1903 (Cth)*, to make those orders. This paper discusses Part XAA in further detail below.

8. In civil matters, the field of civil penalty regulation matters often raises aspects of confidential methodology and protection of sources to regulatory agencies, in particular co-operation between agencies both domestic and international remains a strong concern. However, it is unwise to limit the characterisation of the usual manner in which a need to consider suppression might arise. The defamation proceedings concerning Ben Roberts Smith and certain media organisations also involved discussions of Australian military operations in Afghanistan that required careful monitoring and review by Commonwealth agencies.

9. That case provides an example of the manner in which the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**the NSI Act**)[4] may apply to the disclosure of national security information in the course of a civil dispute just as it may apply to criminal proceedings.[5] Although it predated the NSI Act, *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 is another example of a commercial dispute that involved a great deal of sensitive information concerning national security. That case concerned a dispute about performance under contract to deliver secure communications information technology between DFAT and its embassies around the world.

10. Private parties in civil matters also take confidential financial and client information and business strategies that might be dealt with in Court very seriously and make applications for strong protections against disclosure of that material.

B NON-PUBLICATION AND SUPRESSION ORDERS AT COMMON LAW

11. The common law position on the requirement is best summarised for present purposes in the following key decisions:
    a. *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506;
    b. *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465; and
    c. *Hamzy v R* [2013] NSWCCA 156.

B.1 Necessary to secure the proper administration of justice

12. In *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at paragraphs [20] to [21], French CJ stated:

> *"An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the*

[4] The NSI Act is a subject unto itself, and special procedures apply under that legislation where it is invoked in proceedings. This paper does not focus on the NSI Act but merely notes those aspects of its operation that inform the general topic of suppression orders.
[5] See s.6A of the NSI Act for the specific mechanism for invoking that Act in civil proceedings.

maintenance of public confidence in the courts. Under the Constitution courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.

"It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers. This may be done where it is ***necessary*** *to secure the proper administration of justice. In a proceeding involving a secret technical process, a public hearing of evidence of the secret process could "cause an entire destruction of the whole matter in dispute". Similar considerations inform restrictions on the disclosure in open court of evidence in an action for injunctive relief against an anticipated breach of confidence. In the prosecution of a blackmailer, the name of the blackmailer's victim, called as a prosecution witness, may be suppressed because of the "keen public interest in getting blackmailers convicted and sentenced" and the difficulties that may be encountered in getting complainants to come forward "unless they are given this kind of protection". So too, in particular circumstances, may the name of a police informant or the identity of an undercover police officer. The categories of case are not closed, although they will not lightly be extended. Where "exceptional and compelling considerations going to national security" require that the confidentiality of certain materials be preserved, a departure from the ordinary open justice principle may be justified. The character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open-court principle. The jurisdiction of courts in relation to wards of the State and mentally ill people was historically an exception to the general rule that proceedings should be held in public because the jurisdiction exercised in such cases was "parental and administrative, and the disposal of controverted questions … an incident only in the jurisdiction". Proceedings not "in the ordinary course of litigation", such as applications for leave to appeal, can also be determined without a public hearing."*
(emphasis added)

13. So at common law, closed court, non-publication or suppression orders may be made where they are necessary to secure the proper administration of justice.

B.2 The test of necessity also limits validity

14. In stating the principle of law in *Hogan v Hinch*, French CJ cited *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476-477 per McHugh JA, Glass JA agreeing at 467:

> *"The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really* ***necessary*** *to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is* ***necessary*** *to achieve the due administration of justice. The making of the order must also be reasonably* ***necessary****; and there must be some material before the court upon which it can reasonably reach the conclusion that it is* ***necessary*** *to make an order prohibiting publication. Mere belief that the order is* ***necessary*** *is insufficient. When the court is an inferior court, the order must do no more than is "****necessary*** *to enable it to act effectively within" its jurisdiction."*
> (emphasis added)

15. McHugh JA (as his Honour then was) held that, not only is necessity a precondition on the exercise of the power to make a suppression order, it also imposed a limit on the validity of the order. That is, necessity is both a precondition to, and a limit on, validity and the power to make the order. A suppression or non-publication order is invalid or without power to the extent that it might stray beyond that which is necessary.
16. Further, *John Fairfax & Sons Ltd v Police Tribunal (NSW)* establishes that there must be a basis for the Court to be satisfied of that necessity. Any application for suppression orders must include evidence or at least accepted facts on the question of necessity. That evidentiary basis will define what can reasonably be requested as necessary in the circumstances.

B.3 What is meant by "necessary"?

17. As to what is meant by necessity, *Hamzy v R* [2013] NSWCCA 156[6] establishes that necessary is not given narrow construction. The test does not require that the suppression order be necessary to permit the trial to proceed, but rather necessary to prevent an

[6] Hamzy v R [2013] NSWCCA 156 itself refers to and quotes *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.

unacceptable outcome. Further, what may or may not be necessary will vary in the particular circumstances.

18. As an example, a former member of a criminal organisation turned police informer can be required to give evidence, and a fair trial would be able to proceed, but exposure of that person's identity would expose them to a risk of reprisal action and a threat upon their life, and perhaps that of their family. It would be necessary in order to protect the safety of that person, and to preserve the option of such people assisting police, to make non-publication and suppression orders in relation to the true identity of that witness. Pseudonym's are often assigned for the purposes of any public reporting of that witness' evidence. Such orders are "necessary" whether or not such a witness is formally a participant in a witness protection program.

19. The relevant passage is per Hoeben CJ at [39]:

> *"[8] In par [46] of his judgment, Basten JA has expressed the view that the meaning of 'necessary' depends on the context in which it is used. I agree that what is necessary in any given case will depend on that context. It will depend on the particular grounds in s 8 of the Suppression Orders Act relied upon and the factual circumstances said to give rise to the order. I agree that the variables that Basten JA refers to in par [46] are all relevant to what will be necessary in a particular context. Although it is not sufficient, in my opinion, that the orders are merely reasonable or sensible, I agree that the word 'necessary' should not be given a narrow construction. What was said by Hodgson JA in R v Kwok … at [13] adopting the remarks of Mahoney JA in John Fairfax Group Pty Ltd (Receivers & Managers Appointed) v Local Court (NSW) … is equally applicable to the legislation in question.*
>
> > *'However, the requirement of necessity is not to be given an unduly narrow construction. I respectfully adopt what was said by Mahoney JA in John Fairfax Group Pty Ltd …:*
> >
> > *'This leads to the consideration of what is meant by 'necessary to secure the proper administration of justice' in this context. The phrase does not mean that if the relevant order is not made, the proceedings will not be able to continue. Plainly they can. If the name of an informer is not hidden under a pseudonym, the proceeding will go on: at least, the instant proceeding will. And if the name of a security officer is revealed, the administration of justice or of the country will not collapse. The basis of the implication is that if the kind of order proposed is not made, the result will be - or at least will be assumed to be - that particular consequences will flow, that those consequences are unacceptable, and that therefore the power to make orders which will prevent them is to be implied as*

necessary to the proper function of the court. The kinds of consequences that, in this sense, will be seen as unacceptable may be gauged by those involved in the cases in which statutory courts have been accepted as having restrictive powers. Thus, there will be hardship on the informer or the security officer or the blackmail victim; the future supply of information from such persons will end or will be impeded; and it will be more difficult to obtain from such persons the evidence necessary to bring offenders before the courts and deal with them. It is not necessary to attempt to state exhaustively the considerations relevant in this regard: it is to considerations of this kind or of an analogous kind on which the principle stated by McHugh JA is based.'

"[9] It follows that I agree with what Basten JA has said in par [48] of his judgment. I also agree that the requirement imposed by s 6 of the Suppression Orders Act, namely that in making an order the Court is required to take into account that a primary objective of the administration of justice is safeguarding the public interest in open justice, should not impede the Court from making an order when it is of the opinion that one of the grounds in s 8 is made out and that its importance will vary depending on the extent that any such order would interfere with that principle."

C NON-PUBLICATION AND SUPRESSION ORDERS UNDER STATUTE

20. The statutory approach to suppression orders showed promise of a uniform approach, but Federalism had its way in the end. The Standing Committee of Attorney's General considered the law on this issue in the late 2000's.[7] In the period 2010 to 2013 a few jurisdictions had implemented a model law on the topic, with minor variations. The common approach is a focus on whether a suppression order is necessary, as per the common law discussed above.

C.1 The Commonwealth

C.1.1 The model approach for each of the Commonwealth Courts

21. At the Commonwealth level, the *Access to Justice (Federal Jurisdiction) Amendment Act 2012 (Cth)*[8] featured Schedule 2, which inserted a new part in each of the following legislation, to address suppression and non-publication orders:

a. The *Judiciary Act 1903 (Cth)* (**the Judiciary Act**) received the new Part XAA;

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[7] The Second Reading speech for the passage of the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* spelt out this history to the legislation. See Hansard for the Senate on 27 February 2012, Senator Joe Ludwig.

[8] See the Second Reading speech of the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011*, Hansard for the Senate on 27 February 2012, Senator Joe Ludwig.

b. The *Federal Court of Australia Act 1976 (Cth)* (**the Federal Court Act**) lost s.50 to repeal and received the new Part VAA;

c. The *Family Law Act 1975 (Cth)* (**the Family Law Act**) received Part XIA;

d. The then *Federal Magistrates Act 1999 (Cth)* received lost s.61 to repeal and received Part 6A.

22. In relation to the Federal Circuit and Family Court of Australia, Division 1, the former Family Court, retains power under Part XIA of the Family Law Act. Division 2 of the Court derives its power to make suppression or non-publication orders from the *Federal Circuit and Family Court of Australia Act 2021 (Cth)* (**the FCFCoA Act**) Chapter 4, Part 7. That Part mirrors the other parts discussed here and, as such, the Commonwealth approach is largely consistent.

23. Each of the relevant parts listed above have the following key features:

a. Division 1 – Preliminary:

i. **Definitions**[9] establishing such matters as:

> ***non-publication order*** means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)
>
> ***publish*** means disseminate or provide access to the public or a section of the public by any means, including by:
>
> (a) publication in a book, newspaper, magazine or other written publication; or
>
> (b) broadcast by radio or television; or
>
> (c) public exhibition; or
>
> (d) broadcast or publication by means of the internet.
>
> ***suppression order*** means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

ii. **Powers of a Court not affected** – "*This part does not limit or otherwise affect any powers that a court has apart from this Part to regulate its proceedings or to deal with a contempt of the court.*"[10] Effectively, the common law powers relied on in in decisions such as *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 are preserved to operate alongside the specific empowering legislation.

[9] Section 102P of the Family Law Act, s.37AA of the Federal Court Act, and s.77RA of the Judiciary Act. These definitions are not defined within Chapter 4, Part 7 of the FCFCoA Act, but instead these terms are included in the general definitions with s.7 of that Act.

[10] See sections 102PA of the Family Law Act, s.37AB of the Federal Court Act, s.77RB of the Judiciary Act and s.226 of the FCFCoA Act.

iii. **Other laws not affected** – "*This Part does not limit or otherwise affect the operation of a provision made by or under any Act (other than this Act) ….*"[11] Specialist legislation such as the NSI Act is not limited or diminished by the requirements of the powers of the Court under this enabling legislation.

b. Division 2 – Suppression and non-publication orders:

i. **Safeguarding public interest in open justice** – "*In deciding whether to make a suppression order or 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.*"[12]

ii. **Power to make orders:**[13]

(*1*) *The [Court] may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:*

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or

(b) information that relates to a proceeding before the Court and is:

(i) information that comprises evidence or information about evidence; or

(ii) information obtained by the process of discovery; or

(iii) information produced under a subpoena; or

(iv) information lodged with or filed in the Court.

(2) The [Court] may make such orders as it thinks appropriate to give effect to an order under subsection (1).[14]

iii. **Grounds for making an order:**[15]

[11] See sections 102PB of the Family Law Act, s.37AC of the Federal Court Act, s.77RC of the Judiciary Act and s.227 of the FCFCoA Act.
[12] See sections 77RD of the Judiciary Act, s.37AE of the Federal Court Act, s.102PD of the Family Law Act, and s.229 of the FCFCoA Act.
[13] See sections 77RE of the Judiciary Act, s.37AF of the Federal Court Act, s.102PE of the Family Law Act, and s.230 of the FCFCoA Act.
[14] This sample is drawn from s.77RE of the Judiciary Act, which refers to the High Court, but the language is reflective of the approach adopted across all of the Commonwealth legislation as considered above.
[15] See sections 77RF of the Judiciary Act, s.37AG of the Federal Court Act, s.102PF of the Family Law Act, and s.231 of the FCFCoA Act.

(1) *The [Court] may make a suppression order or non-publication order on one or more of the following grounds:*

(a) *the order is necessary to prevent prejudice to the proper administration of justice;*

(b) *the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;*

(c) *the order is necessary to protect the safety of any person;*

(d) *the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).*

(2) *A suppression order or non-publication order must specify the ground or grounds on which the order is made.*[16]

iv. **Procedure for making an order**[17] – The Court can make an order on its own initiative or on the basis of an application of a party or anyone else that the Court considers has a sufficient interest. Government agencies, news publishers and people with sufficient interest can be heard on whether the order should be made. Order can be made at any time, including after proceedings. The order can feature exceptions and conditions as appropriate.

(5) *A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that he court order is limited o achieving the purpose for which it is made.*

v. **Interim orders**[18] – Without having to reach a final view, the Court can make an interim order until the application for the order is determined, although the Court must determine the application as a matter of urgency if it does so.

vi. **Duration of orders**[19]— The Court must determine a duration for any such order that it makes. There is authority on the equivalent NSW provision that expressly rules out orders operating indefinitely or "until further order" under an equivalent

[16] This sample is drawn from s.77RF of the Judiciary Act, which refers to the High Court, but the language is reflective of the approach adopted across all of the Commonwealth legislation as considered above.

[17] See sections 77RG of the Judiciary Act, s.37AH of the Federal Court Act, s.102PG of the Family Law Act, and s.232 of the FCFCoA Act.

[18] See sections 77RH of the Judiciary Act, s.37AI of the Federal Court Act, s.102PH of the Family Law Act, and s.233 of the FCFCoA Act.

[19] See sections 77RI of the Judiciary Act, s.37AJ of the Federal Court Act, s.102PI of the Family Law Act, and s.234 of th FCFCoA Act.

provision: *DRJ v Commissioner of Victims' Rights* [2020] NSWCA 136 per Leeming JA at [47].[20]

vii. **Exemption for court officials**[21] – Although the relevant sections refer to Court officials in their respective titles, the text of the sections refers to "a person … in the course of performing functions or duties or exercising powers in a public official capacity":

1. In connection with the conduct of a proceeding, or the recovery or enforcement of any penalty imposed in a proceeding;[22] or
2. In compliance with any procedure adopted by the [Court] for informing a news publisher of the existence of and content of a suppression order or non-publication order made by the Court.

viii. **Contravention of order**[23] – It is an offence to contravene a non-publication or suppression order. The penalty at the Commonwealth level remains set at 12 months imprisonment, 60 penalty units or both. The Court can also choose to punish such conduct as a contempt of Court, or vice versa, so long as the person is not liable to being punished twice for the conduct.

C.1.2 The Administrative Appeals Tribunal

24. The Administrative Appeals Tribunal (**the AAT**) does not follow this system and is not bound by the requirement that the orders be necessary to secure the proper administration of justice.[24]

25. Section 35 of the *Administrative Appeals Tribunal Act 1975 (Cth)* (**the AAT Act**) is of the broadest application to hearings in the AAT. It states:

> ***35 Public hearings and orders for private hearings, non-publication and non-disclosure***
>
> *Public hearing*

[20] If there is a need to protect the identity of a witness who, as an adult, has assisted police and is at risk of reprisal, I am aware of instances where NSW Courts have imposed a duration of 60 years on an order not to disclose that witness' identity.

[21] See sections 77RJ of the Judiciary Act, s.37AK of the Federal Court Act, s.102PJ of the Family Law Act, and s.235 of the FCFCoA Act.

[22] On its terms, while court officials would likely be covered, arguably so would any public official answering a subpoena to a court involved in the conduct of a proceeding. See *Nationwide News Pty Ltd v JS and SD* [2022] NSWSC 774 per Basten AJ at [44]. The situation often arises where a previous order may apply to material sought under subpoena, and the receiving court may need to replicate the prior order on the application of the government agency answering that subpoena.

[23] See sections 77RK of the Judiciary Act, s.37AL of the Federal Court Act, s.102PK of the Family Law Act, and s.236 of the FCFCoA Act.

[24] Sections 35, for general matters, and 35AA, for matters in the Security Division are not as stringent as considered below.

(1) Subject to this section, the hearing of a proceeding before the Tribunal must be in public.

Private hearing

(2) The Tribunal may, by order:

(a) direct that a hearing or part of a hearing is to take place in private; and

(b) give directions in relation to the persons who may be present.

Orders for non-publication or non-disclosure

(3) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:

(a) information tending to reveal the identity of:

(i) a party to or witness in a proceeding before the Tribunal; or

(ii) any person related to or otherwise associated with any party to or witness in a proceeding before the Tribunal; or

(b) information otherwise concerning a person referred to in paragraph (a).

(4) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure, including to some or all of the parties, of information that:

(a) relates to a proceeding; and

(b) is any of the following:

(i) information that comprises evidence or information about evidence;

(ii) information lodged with or otherwise given to the Tribunal.

(5) In considering whether to give directions under subsection (2), (3) or (4), the Tribunal is to take as the basis of its consideration the principle that it is desirable:

(a) that hearings of proceedings before the Tribunal should be held in public; and

(b) that evidence given before the Tribunal and the contents of documents received in evidence by the Tribunal should be made available to the public and to all the parties; and

(c) that the contents of documents lodged with the Tribunal should be made available to all the parties.

However (and without being required to seek the views of the parties), the Tribunal is to pay due regard to any reasons in favour of giving such a direction, including, for the purposes of subsection (3) or (4), the confidential nature (if applicable) of the information.

Not applicable to Security Division review of security assessment

(6) This section does not apply in relation to a proceeding in the Security Division to which section 39A applies.

Note: See section 35AA.

26. Subsections 35(2), (3) and (4) permit closed court, non-publication and suppression orders, that may extend to identities of persons involved (s.35(3)), and evidence or information provided to the Tribunal (s.35(4)).

27. Subsection 35(5) establishes the test for granting the order, and the factors to be considered in deciding whether to make such an order. There is no test of necessity. It is a simple exercise of discretion, although subject to the factors in s.35(5). Those factors are:
    a. Hearings **should** be in public: s.35(5)(a).
    b. Evidence **should** be made available to the public and to all the parties: s.35(5)(b).
    c. Documents submitted to the Tribunal **should** be made available to all the parties: s.35(5)(c).

28. These sections highlight how far the AAT legislation departs from the principles of open justice as a "fundamental rule of the common law". The Security Division of the AAT is apparently the only jurisdiction in Australia where an applicant for merit review is not entitled to examine the evidence against them, but that exceptional process is confined to review of a security assessment conducted by ASIO. Section 35 also reduces the protection of open justice from, to paraphrase, "only abrogate where necessary" to "should be open", as if it is nice to have if possible. It is a significantly different test and approach from that considered by the Judiciary Act or the Federal Court Act.

29. Section 35AA applies in relation to certain hearings in the Security Division and states:

> ***35AA Orders for non-publication and non-disclosure—certain Security Division proceedings***
>
> *(1) This section applies in relation to a proceeding in the Security Division to which section 39A applies.*
>
> *(2) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:*
>
> *(a) information tending to reveal the identity of:*
>
> *(i) a party to or witness in the proceeding; or*
>
> *(ii) any person related to or otherwise associated with any party to or witness in the proceeding; or*
>
> *(b) information otherwise concerning a person referred to in paragraph (a); or*
>
> *(c) information that relates to the proceeding and is any of the following:*
>
> *(i) information that comprises evidence or information about evidence;*
>
> *(ii) information lodged with or otherwise given to the Tribunal; or*
>
> *(d) the whole or any part of its findings on the review.*

30. Notably, s.35AA does not refer to any caution or factors that would weigh against making such an order. The section is confined to the grant of power, and that power is extensive. Further than s.35, s.35AA permits the AAT's findings on the review to be the subject of the order.

C.1.3 The Criminal Code

31. Within Part 5.2 of the Commonwealth Criminal Code, the Schedule to the *Criminal Code Act 1995 (Cth)*, which concerns espionage and related offences s.93.2 provides for hearings in camera etc. On its face, s.93.2 is not confined to espionage and related offences. The section provides:

> ***93.2 Hearing in camera etc.***
>
> *(1) This section applies to a hearing of an application or other proceedings before a federal court, a court exercising federal jurisdiction or a court of a Territory, whether under this Act or otherwise.*
>
> *(2) At any time before or during the hearing, the judge or magistrate, or other person presiding or competent to preside over the proceedings, may, if satisfied that it is in the interests of Australia's national security:*
>
> *(a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or*
>
> *(b) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or*
>
> *(c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.*
>
> *(3) A person commits an offence if the person contravenes an order made or direction given under this section.*
>
> *Penalty: Imprisonment for 5 years.*

32. Section 93.2 is confined to matters involving national security, and can be seen as an avenue of power to control access to the Court in matters where the NSI Act is not invoked. Although the power in s.93.2(2)(c) is expressed to apply to all persons, there is nothing in the Code that supports the inference that it could permit an unfair trial.

C.1.4 Other mechanisms

33. As noted above, the NSI Act is a specialty mechanism that can apply non-publication and suppression orders to both civil and criminal proceedings. This paper doesn't provide an in-

depth consideration of the NSI Act. It's a specialty mechanism, invoked and applied to proceedings by the Commonwealth Attorney-General. It isn't so much an application for a suppression order as a suite of mechanisms that apply to litigation that involves national security.

34. There are also specialty mechanisms for certain non-publication and suppression orders in relation to proceeds of crime proceedings, witnesses in witness protection programs and interstate extradition under the *Service and Execution of Process Act 1992 (Cth)*. The CDPP has an excellent paper that introduces those mechanisms.[25]

C.2 New South Wales

35. New South Wales passed the *Court Suppression and Non-publication Orders Act 2010 (NSW)* (**the CSNPO Act**).

36. It is largely identical to the model Commonwealth Legislation considered above. There are some differences that it is useful to highlight:

a. Section 7 concerns the power to make orders and is drafted in briefer form than the Commonwealth approach as extracted above, whether or not there is any meaningful difference in the coverage of the section:

> ***7 Power to make orders***
>
> *A court may, by making a suppression order or non-publication order on grounds permitted by this Act, prohibit or restrict the publication or other disclosure of—*
>
> *(a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or*
>
> *(b) information that comprises evidence, or information about evidence, given in proceedings before the court.*

b. Section 8 concerns the grounds for making an order and adds some elements not found in the equivalent Commonwealth sections extracted above:

> ***8 Grounds for making an order***
>
> *(1) A court may make a suppression order or non-publication order on one or more of the following grounds—*
>
> *(a) the order is necessary to prevent prejudice to the proper administration of justice,*

[25] https://www.cdpp.gov.au/sites/default/files/NLD-Supression-Orders-Non-Publication-Orders-and-Pseudonym-Orders.pdf

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

(c) the order is necessary to protect the safety of any person,

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including sexual touching or a sexual act within the meaning of Division 10 of Part 3 of the Crimes Act 1900),

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

(3) Despite subsection (1) (d), a court may make a suppression order or non-publication order on the grounds that the order is necessary to avoid causing undue distress or embarrassment to a defendant in criminal proceedings involving an offence of a sexual nature only if there are exceptional circumstances.

(emphasis added to show additions)

c. Section 15 concerns the exemptions, but the title of the section is "Disclosures that are not prevented by suppression orders". The terms of the section otherwise closely match those of the Commonwealth provisions considered above. In that form the section has been held to apply, on its face, to police performing their duties: *Nationwide News Pty Ltd v JS and SD* [2022] NSWSC 774 per Basten AJ at [44].

37. There are other differences in phrasing in some sections, but the overall effect is a very similar structure and effect from that adopted by the Commonwealth Courts in 2012.

38. Pursuant to s.11(2) the operation of the order is not limited to NSW and can be made to apply anywhere in the Commonwealth, if it is necessary to do so: s.11(3).

C.3 Victoria

39. The *Open Courts Act 2013 (Vic)* (**the Open Courts Act**) follows the model law approach in that its terms adopt the test of necessity. However, the drafting appears more complex, and is in a different form. If it was possible to merely change the references to the section numbers between NSW and Commonwealth applications, that approach cannot be adopted when making an application in Victoria.

40. Victoria has kept the test of "necessity" or the order sought being necessary in the circumstances. That principle is embodied in s.4, which states:

> ***4 Principle of open justice prevails unless circumstances require displacement***
>
> *(1) A court or tribunal is to have regard to the primacy of the principle of open justice and the free communication and disclosure of information in determining whether to make a suppression order.*
>
> *(2) A court or tribunal is only to make a suppression order if satisfied that the specific circumstances of a case make it* ***necessary*** *to override or displace the principle of open justice and the free communication and disclosure of information.*
>
> (emphasis added)

41. There are however, a couple of key departures from the Commonwealth approach.

42. Rather than keep the common law as a co-existing source of power to make such orders, the Open Courts Act expressly abrogates the operation of the common law. In Victoria, applications may only be made under he Open Courts Act. Section 5 states:

> ***5 Abrogation of common law and no implied jurisdiction***
>
> *(1) Nothing in this section limits or otherwise affects the inherent jurisdiction of the Supreme Court.*
>
> *(2) Any common law power to make an order prohibiting or restricting the publication of information in connection with any proceeding is abrogated.*
>
> *(3) A court or tribunal has no implied jurisdiction to make an order prohibiting or restricting the publication of information in connection with any proceeding.*

43. The power to make a "proceeding suppression order" conferred in s.17 is phrased to apply to the whole or any part of a proceeding. In effect, they permit a whole of a case to be withheld from the public under the Open Courts Act.[26] The Commonwealth and New South Wales legislation referred to material before the Court, not the whole of the proceeding. The concept of a "proceeding suppression order" under s.17 also seems to co-exist with a normal "suppression order" made in County and Magistrates Courts.

44. In relation to the other aspects of the model law considered above:

    a. **Definitions** – Section 3 of the Open Courts Act does not maintain a distinction between a non-publication order and a suppression order. Both concepts come within the manner in which the suppression order is defined. Publish is defined in a very similar

[26] I note that the Witness J case was a criminal prosecution in the ACT that was completely withheld from the public under the NSI Act. The Attorney-General has called for a complete review of the NSI Act as a result of that case, among other issues.

manner to the Commonwealth approach considered above. As mentioned above, there is a distinction between types of suppression order. A proceeding suppression order is made under s.17 and may relate to the whole or part of a proceeding. A "suppression order" is made by either the County Court under s.25, or the Magistrates Court under s.26.

b. **Other laws not affected** – Subsection 8(1) states that the Open Courts Act does not limit or affect the operation of a provision made under other legislation, including Commonwealth legislation that deals with non-publication, suppression or closed court orders. Subsection 8(1A) states that a Court or Tribunal must not "double up" or make suppression orders in respect of material that is already the subject of a suppression order, although an order that does so isn't invalid: s.8(3).

c. **Safeguarding the public interest in open justice** – Section 4 as set out above expresses the importance of open justice. The grounds for making an order in s.18 also applies the necessity test to abrogate open justice.

d. **Power to make orders** – Section 17 confers power to make a proceedings suppression order. Section 25 permits the County court to grant an injunction, that is also defined as a suppression order under s.3. Section 26 permits orders in the Magistrates Court that are "necessary" to secure the proper administration of justice, or to protect the safety of any person.

e. **Grounds for making an order** – Section 18 specifies grounds for making an order similar to the Commonwealth and New South Wales legislation as follows:

> ***18 Grounds for proceeding suppression order***
>
> *(1) A court or tribunal other than the Coroners Court may make a proceeding suppression order if satisfied as to one or more of the following grounds—*
>
> *(a) the order is **necessary** to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;*
>
> *Example Another reasonably available means may be directions to the jury.*
>
> *(b) the order is **necessary** to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;*
>
> *(c) the order is **necessary** to protect the safety of any person;*
>
> *(d) the order is **necessary** to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sexual offence or a family violence offence;*

(e) *the order is **necessary** to avoid causing undue distress or embarrassment to a child who is a witness in any criminal proceeding;*

(f) *in the case of VCAT, the order is **necessary**—*

(i) *to avoid the publication of confidential information or information the subject of a certificate under section 53 or 54 of the Victorian Civil and Administrative Tribunal Act 1998;*

(ii) *for any other reason in the interests of justice.*

(2) *The Coroners Court may make a proceeding suppression order in the case of an investigation or inquest into a death or fire if the coroner constituting the Coroners Court reasonably believes that an order is **necessary** because disclosure would—*

(a) *be likely to prejudice the fair trial of a person; or*

(b) *be contrary to the public interest.*

(emphasis added)

f. **Procedure for making an order** – There is a notice requirement of 3 business days under s.10 although, thankfully, s.10(3) allows the application to proceed if there is a good reason or otherwise in the interests of justice that the application proceed. Section 11 provides for notifications to relevant news organisations. Section 14 makes it explicit that evidence or sufficient credible information are required to make the order. Section 19 otherwise provides for a procedure to be followed in relation to a proceeding suppression order and is similar to the Commonwealth approach.

g. **Interim orders** – Section 20 provides for interim orders in a similar manner to the Commonwealth approach outlined above.

h. **Where a proceeding suppression order applies** – Similar to s.11 of the NSW CSNPO Act, the order can specify where it applies, and is not limited to Victoria, and may apply throughout the Commonwealth, where it is necessary to do so: see s.21.

i. **Duration of orders** – Section 12 also requires that the duration of any order be fixed. There are some further provisions that, if conditional upon a future event, that the duration not be more than 5 years.

j. **Exemption for public officials** – Section 22 has a different approach to the title of the section,[27] but a very similar approach to the wording of the exemption for persons performing functions or duties or exercising powers in a public official capacity.

[27] Exceptions for conduct of proceeding, enforcement or informing persons of existence of proceeding suppression orders or interim orders

k. **Contravention of order** – Section 23 establishes an offence for a contravention of the proceeding suppression order, level 6 imprisonment, 5 years or 600 penalty units, or both.

45. The Open Courts Act also makes specific provision for closing the court in section 28.

C.4 Queensland

46. Queensland does not follow the test of necessity, or the model law approach. The Supreme Court and District Court bench book for Queensland lists a variety of specific, factually dependent exemptions to the rules of open court.[28] The bench book lists 12 examples that primarily relate to circumstances where the court should be closed, I don't propose to cover here. Many of the situations relate to child offenders, informants, or sexual assault matters.

47. As one example, the *Justices Act 1886 (Qld)* applies to matters in the Magistrates Court and provides:

> ***70 Open court***
>
> *(1) The room or place in which justices sit to hear and determine any complaint upon which a conviction or order may be made, shall be deemed an open and public court, to which all persons may have access so far as the same can conveniently contain them.*
>
> *(2) However, in any case in which, in the opinion of the justices, the interests of public morality require that all or any persons should be excluded from the court, the justices may exclude such persons therefrom accordingly.*
>
> *(3) But such power shall not be exercised for the purpose of excluding the defendant's lawyer.*
>
> ***71 Exclusion of strangers***
>
> *The room or place in which justices take the examinations and statements of persons charged with indictable offences for the purpose of committal for trial and the depositions of the witnesses in that behalf shall not be deemed an open court, and the justices may order that no person shall be in such room or place without their permission, but they shall not make such order unless it appears to them that the ends of justice require them so to do.*

48. General powers and common law may support specific orders for non-publication or suppression of the proceedings before the Court.[29]

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[28] https://www.courts.qld.gov.au/__data/assets/pdf_file/0007/86065/sd-bb-64-closed-court-exceptions-to-the-general-rule-of-openness.pdf

[29] Section 103ZA of the *Civil Procedure Act 2011 (Qld)*

C.5 South Australia

49. South Australia has codified its approach to suppression orders in section 69A of the *Evidence Act 1929 (SA)*. It does not adopt the test of necessity but expresses the test as the Court being satisfied that the order should be made to either prevent prejudice to the proper administration of justice, or to prevent undue hardship to a victim of crime, a witness, or a child. Subsection 69A(1) provides:

> ***69A—Suppression orders***
>
> *(1) Where a court is satisfied that a suppression order should be made—*
>
> *(a) to prevent prejudice to the proper administration of justice; or*
>
> *(b) to prevent undue hardship—*
>
> *(i) to an alleged victim of crime; or*
>
> *(ii) to a witness or potential witness in civil or criminal proceedings who is not a party to those proceedings; or*
>
> *(iii) to a child,*
>
> *the court may, subject to this section, make such an order.*

50. The importance of open justice is reiterated in s.69A(2), which states:

> *(2) If a court is considering whether to make a suppression order (other than an interim suppression order), the court—*
>
> *(a) must recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequential right of the news media to publish information relating to court proceedings; and*
>
> *(b) may only make a suppression order if satisfied that special circumstances exist giving rise to a sufficiently serious threat of prejudice to the proper administration of justice, or undue hardship, to justify the making of the order in the particular case.*

51. The remainder of section 69A addresses such matters as:

a. Interim orders are addressed in s.69A(3);
b. Exceptions and conditions to the order are expressly addressed in s.69A(4);
c. Persons able to address the court on whether to make an order are listed in s.69A(5);
d. Variations and revoking the order are dealt with in s.69A(6);
e. The standard of evidence is the balance of probabilities, for disputed matters, evidence is not required for matters on which there is no serious dispute: s.69A(7);

f. Once made, orders are to be provided to the Registrar and make a report to the Attorney-General: s.69A(8). Variations are to be forwarded as soon as reasonably practicable: s.69A(9).

52. Section 69AB concerns review of suppression orders and compels the court making any suppression order to review that order at the end of the proceedings. Section 69AC permits appeals in relation to suppression orders and sets out the categories of people that have a right to be heard on any such appeal.

C.6 Western Australia

53. Western Australia chose not to participate in the adoption of the model law on suppression orders.[30]

54. In the criminal jurisdiction,[31] s.171 of the *Criminal Procedure Act 2004 (WA)* provides for closure of the court and restrictions on publication of Court proceedings. Instead of the concept of "necessity", the legislative approach requires the Court to be satisfied that the order is in the interests of justice. Section 171 states:

> ***171. Court to be open, publicity***
>
> *(1) In this section, unless the contrary intention appears —*
>
> ***proceedings** means proceedings on or in relation to a case.*
>
> *(2) Subject to this section, all proceedings in a court are to be in open court and the courtroom where the court sits is to be open to the public unless this Act or the rules of court or another written law provides otherwise.*
>
> *(3) On an application by a party to the case, or on its own initiative, a court may order a person who may be called as a witness in proceedings, other than the accused —*
>
> *(a) to leave the courtroom and to remain out of hearing of the courtroom until called to give evidence;*
>
> *(b) not to discuss his or her evidence with a person or persons specified by the court.*
>
> *(4) On an application by a party to the case, or on its own initiative, a court may, if satisfied it is in the interests of justice to do so —*

[30] The Law Society of Western Australia made a submission in relation to the NSW *Court Suppression and Non-Publication Order Bill 2009*: https://www.lawsocietywa.asn.au/wp-content/uploads/2015/09/submission-supression-nonpublication-orders-march-2010.pdf That submission noted this history of the Standing Committee of Attorney's-General, and the progress that had been made, commended the bill and noted that the WA Attorney-General had chosen not to proceed with the model law at that time.

[31] My research has not been able to identify a similar provision for civil matters in WA.

(a) order any or all persons, or any class of persons, to leave or be excluded from the courtroom during the whole of the proceedings, or a part of them specified by the court;

(b) make an order that prohibits the publication outside the courtroom of the whole of the proceedings, or a part or particular of them specified by the court;

(c) make an order that prohibits or restricts the publication outside the courtroom of any matter that is likely to lead members of the public to identify a victim of an offence.

(5) The powers in subsection (4) may be exercised by a court at any time after an accused is charged with an offence and before or after the accused first appears in the court on the charge.

(6) An order made under subsection (4) may be made subject to conditions specified by the court.

(7) If a court of summary jurisdiction makes an order under subsection (4)(b) or (c) in a case that involves an indictable charge in respect of which the accused is committed to another court for trial or sentence, the court to which the accused is committed may set aside the order, whether or not it also makes an order under this section.

(8) A person who, under section 172(3), is entitled to act on behalf of a party to the proceedings must not be excluded from the courtroom under this section.

(9) If a person contravenes an order to leave the courtroom, the court may order the person to be removed from the courtroom.

(10) A person who contravenes an order made under this section commits an offence.
Penalty:

(a) for an individual, a fine of $12 000 or imprisonment for 12 months;

(b) for a corporation, a fine of $60 000.

(11) In proceedings for a contravention of an order made under subsection (4)(c) it is a defence to prove —

(a) that prior to the publication of the matter the victim, in writing, authorised the publication; and

(b) that at the time the victim authorised the publication, the victim had reached 18 years of age and was not a person who, because of mental impairment (as defined in The Criminal Code), was incapable of making reasonable judgments in respect of the publication of such matter.

C.7 Tasmania

55. Tasmania has not followed the model law approach, and has certain factually specific prohibitions on publication unless there is an order of the Court permitting publication. For example, Chapter 5 of the *Evidence Act 2001 (Tas)*, covering miscellaneous matters, includes the following provisions:

    a. **Section 194J** – If the court "is of the opinion" that the printing or publication of any evidence may prejudice a fair trial, the court may "forbid" the publication of that material.

    b. **Section 194K** – In relation to certain offences of indecency against a child, incest, rape and abduction, a person must not publish anything that would identify a potential victim of that crime, or a witness to that crime, without an order of the Court. The Court is not to make such an order permitting such a publication unless it is satisfied that it is in the public interest to do so. The punishment is that of contempt of court.

    c. **Section 194L** – In civil cases, "*[t]he court may forbid the publication of any evidence or argument, … that involves an allegation of any kind of sexual assault if it is of the opinion that the printing or publication of the evidence, argument or particulars may cause a witness to be degraded, distressed or humiliated.*"

    d. **Section 195** – improper or credibility questions that have been disallowed by the Court must not be published without the permission of the Court.[32]

56. There are also restrictions on reporting on proceedings under the *Youth Justice Act 1997 (Tas)*, s.31.

57. The Supreme Court maintains a registry of suppression orders made.[33] From a brief review, the typical form of order does not refer to enabling legislation, and appears to have been made as part of the inherent jurisdiction of the Supreme Court and the common law.

C.8 Australian Capital Territory

58. Apart from certain case specific examples, suppression orders in the ACT appear to rely on the inherent and implied power of the Courts derived from the common law.

C.9 Northern Territory

59. Northern Territory has a codified power to make suppression orders in Part 8 of the *Evidence Act 1939 (NT)*, "Publication of Evidence", which provides:

[32] Section 195 is part of the model Evidence law, and is a feature of the Act for those jurisdictions that have adopted it. Sections 194J to L are not part of the model Evidence Law, and are specific to Tasmania.

[33] https://www.supremecourt.tas.gov.au/the-court/media/suppression-orders/

PART 8 – PUBLICATION OF EVIDENCE

57. Prohibition of the publication of evidence and of names of parties and witnesses

(1) Where it appears to any court:

(a) that the publication of any evidence given or used or intended to be given or used, in any proceeding before the court, is likely to offend against public decency; or

(b) that, for the furtherance of, or otherwise in the interests of, the administration of justice, it is desirable to prohibit the publication of the name of any party or intended party to, or witness or intended witness in, the proceeding;

the court may, either before or during the course of the proceeding or thereafter, make an order:

(i) directing that the persons specified (by name or otherwise) by the court, or that all persons, except the persons so specified, shall absent themselves from the place wherein the Court is being held while the evidence is being given; or

(ii) forbidding the publication of the evidence, or any specified part thereof, or of any report or account of the evidence, or any specified part thereof, either absolutely or subject to such conditions, or in such terms or form, or in such manner, or to such extent, as the court approves; or

(iii) forbidding the publication of the name of any such party or witness.

(2) Where the court makes an order under subsection (1)(iii), the publication of any reference or allusion to any party or witness, the name of whom is by the order forbidden to be published, shall, if the reference or allusion is, in the opinion of the court hearing the complaint for the alleged offence, intended or is sufficient to disclose the identity of the party or witness, be deemed to be a publication of the name of the party or witness.

(3) When the court makes an order under subsection (1)(ii) or (iii), forbidding the publication of any evidence or any report or account of any evidence, or the publication of any name, the court shall report the fact to the Director of Public Prosecutions, and shall embody in its report a statement of:

(a) the evidence or name, as the case may be, by the order forbidden to be published; and

(b) the circumstances in which the order was made.

60. Section 58 of Part 8 of the Act permits a temporary prohibition on the publication of a witness' evidence when they are ordered out of court for a moment, such as to deal with an objection. The test is where "*it appears to the court that … in the interests of the administration of justice, it is desirable to prohibit for any period the publication of any evidence given or used in the proceeding, the court may make an order forbidding, for such period as the court thinks fit, the publication of the evidence or any specified part thereof.*"
61. Section 59 makes a contravention of orders made under ss.57 and 58 an offence, punishable by 40 penalty units or imprisonment for 12 months.

D PRACTICAL GUIDANCE WHEN SEEKING SUPPRESSION ORDERS

D.1 Protections must not prejudice the conduct of the hearing

62. It is often highly valuable to discuss proposed orders with the parties to a proceeding to see if they can identify any specific mechanisms that may need to be adjusted, or where some assistance might be required.
63. It is a common misconception that an application to restrict information can prejudice the fair determination of legal proceedings. Particularly in the case of a non-publication or suppression order, the parties to the proceedings have full and equal access to the sensitive information for the determination of the proceedings. That information is merely kept from disclosure or publication outside of the proceedings. In the case of a successful PII claim, the sensitive information is excluded from use in the proceedings by all parties.
64. As such, parties can often be quite co-operative or even support the application for non-publication orders. For example, as long as the conduct of a full and frank defence is not compromised, restricting publicity of the proceedings is often in the parties interests to secure a fair trial.
65. Non-publication, closed court and pseudonym orders allow the parties to use the information, but restrict use outside of the proceedings. It is possible that a witness' name might be changed through a pseudonym order, but the accused must be able to obtain enough information to be able to examine the witness as to their credibility, and their involvement in the specific events that are the subject of evidence. The underlying information or evidence from that witness may still be freely used in the proceedings, but the information might be prevented from release to the public. That can be achieved through partial redaction of sensitive information from the publicly available transcript, or a pseudonym order for reporting of the case.
66. In a case where it is required that certain witnesses or topics will be required to be dealt with in closed court, the orders will have to give the parties and the Court sufficiently clear guidance as to those "triggers" so that the orders can be enforced. Such orders are often amended to

make them more workable to the parties' conduct of the trial, even where the public might be excluded.

D.2 Process by which an application is made

67. There is often a close correlation between making a public interest immunity claim and seeking suppression or non-publication of material. The processes often go hand in hand, and involve a very similar mechanism: a notice of motion seeking orders in relation to sensitive material, where that notice of motion is supported by an "open" affidavit, that the parties may read, and a "confidential" affidavit. A confidential affidavit often reveal sensitive information in it and is often the subject of a public interest immunity (**PII**) claim itself, that the judge alone has regard to its contents.
68. As such, the process of making the application to restrict the information itself may involve the Court accepting confidential submissions and evidence, often including the protected information itself and a description of why the release of that information would cause harm. Often to determine an application for suppression orders, the Court may need to access the specific information that is sought to be protected, along with an explanation as to what harm would follow from the release of that information. Once the application is resolved, that evidence is returned to the applicant, often unseen by any of the parties, even though the parties get access to certain information for use in the proceedings.
69. The evidence read in in support of the application for suppression orders is not admissible in the hearing itself. In that way it is not dissimilar from a judge receiving evidence on a *voir dire* for the purposes of an objection, such as hearsay or opinion evidence, determining that the evidence is inadmissible, and proceeding to determine the case without regard to that inadmissible material.
70. When presenting confidential evidence to the Court, the best practice is to take on the obligations of disclosure as if it was an *ex parte* application. That is, your confidential affidavit should also deal with those matters that are known to the deponent or government agency that would weigh against the order sought being made. Such candour and responsible use of the privilege of the use of confidential evidence should be seen as part of being a model litigant in such applications.
71. The nature of the hearing is interlocutory, on the civil standard of proof.
72. By analogy to PII claims, it would be rare for the Court to require the deponent to be present in Court or available for cross-examination: *Young v Quin* (1985) 59 ALR 225 at per Bowen CJ at 228. While cross-examination can and has occurred in some matters, the risk that the cross-examination might reveal matters from the confidential affidavit that are inherently sensitive is high. Further, the nature of the evidence is often that of the operational concerns

of a law enforcement agency. It is difficult to see how such evidence might properly be tested by cross-examination.

D.3 Preparing the application

D.3.1 Identify the information to be protected

73. Before making an application for suppression orders, the information to be protected must be identified with some precision. That information will need to be described accurately for the purposes of the orders designed to protect it. Without intending to be prescriptive, a lawyer briefed on a PII claim should work together with the client agency to consider the following issues before any application:
    a. What is the sensitive information and why is it required in the proceedings?
    b. Why would it be bad, or what is the harm, if the sensitive information would be released?
    c. Has there been any prior disclosure of any part of the sensitive information that needs to be taken into account?
    d. What exactly can be said about the application openly without risking harm or inadvertent disclosure?
    e. Are there any public interest immunity claims that surround or permeate this material?
    f. How will the parties need to use this information in the proceedings?
    g. Will it be prudent to close the court for certain witnesses or topics of evidence so that information is not inadvertently released to the public?
    h. How will the parties know how to manage the information?
    i. Is the sensitive information so sensitive that specific undertakings will be required for access?
    j. Is the sensitive information something that the legal representatives will need to get full instructions on, or is this a matter where it is appropriate to confine the sensitive information to legal representatives only? Are any orders regarding the handling of the information required?
    k. Is a watching brief required wither to make any PII claims or to assist the parties and the Court manage the complicated set of orders regarding the use of the sensitive information?
    l. Is there any room for discussion with the other side as to their agreement or opposition to various aspects of the protections sought?
    m. Do any specific legislative provisions apply to this material, such as the identity of an undercover officer, or the witness protection program etc?
74. The subject matter of the application might also determine further issues to be considered. In the case of a sensitive witness, will the accused need to see this witness, or is the witness' appearance itself sensitive? Are restrictions on cross-examination required? Will an

application to give evidence by audio-visual link be prudent? If the witness is required to be brought to court, what, if any, extra precautions will need to be devised for that witness' safe attendance at Court?

75. Many of these questions will shape both the orders that you seek and the matters that will need to be considered in the evidence in support of the application.

D.3.2 Identify your deponent

76. It is also useful to identify your deponent who will execute the affidavits in support of the application at an early stage. Ideally that person is a senior official of the client organisation, and as noted above, there is often a close correlation between supporting non-publication orders and being a deponent in support of any PII claims.

77. The legal team may never meet that deponent in person, but it is useful to confirm that the instructing officer from the client agency has identified the person that they will need to draw on and started making arrangements for access. Often they will need some time with any draft affidavits in order to make sure that the deponent has properly turned their mind to the factual matters set out therein.

78. Often when discussing the harm that arises from public disclosure of the sensitive information, the deponent will need to explain how that information interacts with the overarching operational concerns of a government agency to fulfil that agency's function. That requirement often means that only senior leadership of the organisation will be suitable. Often these are busy people.

D.3.3 Timeframes

79. There is specific authority on the fact that, while they have to be prompt, public interest immunity claims do need and can demand some time to properly prepare: see *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 43. However, while analogous, that authority does not strictly apply in relation to an application for non-publication or suppression orders.

80. In practice, an application for suppression orders often causes an intervention or interruption into an ongoing proceeding. While some time should be granted to allow the state agency to prepare the claim, it is clear that the time must be "reasonable", whatever that might mean in the context of a particular trial. As considered above, where interim orders are permitted under statute, that often creates an obligation to have the application dealt with on a final basis as soon as practicable in the circumstances. As is often the case with state agencies, the Court and the parties often expect such agencies to have limitless resources of the State at their disposal. In certain cases, every moment until the suppression order is made may also increase the risk of harm through disclosure. Applicants should act quickly.

D.3.4 Preparing the affidavits in support

81. The affidavits that are to be prepared must also be quite detailed and given by senior officials within the relevant agency. In sensitive matters the open affidavit may be necessarily short. However the obligation on an applicant for suppression orders is a heavy one. Ideally an affidavit in support of a PII claim will include the following:
    a. Senior deponent;
    b. Paragraph 2 would state clearly who could access the affidavit and the underlying material. The open affidavit could state for example:

        > "This is an open affidavit and may be provided to the accused and his/her representatives. I also make another affidavit in these proceedings of today's date. That affidavit deals with information that would tend to reveal the precise nature of the information that is to be protected by the claim for public interest immunity. I request that that affidavit and its annexures be treated in confidence by the Court and be kept only for the presiding judge and my representatives in Court for the purposes of this claim. If detailed oral submissions are required in relation to that material I request that such discussion take place in closed Court, in the absence of the accused and his/her representatives."

    c. The basis of the making of the affidavit. That is own knowledge, instructions from the relevant line areas, documents referred to in the affidavit, consideration of the underlying material and so on as relevant;
    d. The background and qualification of the deponent. The deponent is essentially providing opinion evidence to the Court as to the harm that would derive from the disclosure of information. As such it is useful to consider them as being similar to an expert. Their background, qualifications and role within the agency making the application is a crucial element of the evidence that the deponent provides;
    e. The body of the affidavit should commence the task of explaining the overall functions of the agency, how the material subject to the claim fits in, and the specific harm that is, in the opinion of the deponent, likely to result from the disclosure of that information.
82. The Confidential affidavit may repeat some of the matters from the open, but the intention with such an affidavit is to focus on those elements that cannot be said openly to the parties. For example, if investigating agencies have specific knowledge of a threat to a witness discovered through an ongoing investigation, or direct attempts by organised crime or adverse foreign interests to access the sensitive information, that might be set out in the confidential affidavit, but not in the open material.
83. It is also prudent to go into as much detail as possible in the confidential affidavit. It is often preferrable to have an abundance of material in support of obtaining the orders sought than to have the application rejected for a lack of effort or detail in the first application. It is difficult

to get lost credibility back. Further, a detailed confidential affidavit is often the best defence against the risk that the deponent might be required for cross-examination.

D.4 Example orders

D.4.1 Protecting a witness' identity in NSW

84. As set out above, a few jurisdictions such as Tasmania maintain a register of suppression orders. These examples below do not follow that approach, but there are a number of sources of approaches to making such orders.

85. As an example set of orders adapted from some applications in NSW:

1. Leave be granted to file this Notice of Motion in Court.
2. This Notice of Motion to be returnable *instanter*.
3. The Court be closed for the purposes of hearing the Notice of Motion.
4. The true identities of the witness JOHN DOE be suppressed until further order of the Court pursuant to s. 7 of the *Court Suppression and Non-Publication Orders Act 2010 (NSW)* ("**the CSNPO Act**"), together with any evidence, submission, discussion, document or information that might facilitate identification of the true identity of JOHN DOE, except as might be necessary for the proper conduct of the proceedings, on the following grounds:
    a. the order is necessary to prevent prejudice to the proper administration of justice: s. 8(a) of the CSNPO Act;
    b. the order is necessary to protect the safety of a person, namely JOHN DOE: s. 8(c) of the CSNPO Act; and
    c. the order is otherwise necessary in the public interest and that public interest significantly outweighs the public interest in open justice: s. 8(e) of the CSNPO Act.
5. Until further order, evidence on the following subjects, or information about such evidence, shall be taken to be information that might facilitate identification of the true identity of the witness under Order 4 above and also be suppressed pursuant to s. 7 of the CSNPO Act, on the grounds set out in Order 4(a) to (c) above, except as might be necessary for the proper conduct of the proceedings:
    a. details of the witness' residential addresses as at the time of the matters alleged in these proceedings; and

b. any personal details such as dates of birth, drivers' license details or car registration details of the witness or his family.

6. Any visual or other description or depiction of the physical appearance or other identifying features of the witness be suppressed pursuant to s. 7 of the CSNPO Act, on the grounds set out in Order 4(a) to (c) above, except as might be necessary for the proper conduct of the proceedings.

7. The Court be closed for:

    a. the duration of the evidence of JOHN DOE;

    b. any evidence, submission, discussion or document in trial that refers to the evidence of JOHN DOE; and

    c. any evidence, submission, discussion or document that identifies or might tend to identify any person as a police source or police informer.

8. The cross-examination of JOHN DOE, and officers of the Police, be limited so as to exclude questions concerning any activities undertaken to assist the witness with ongoing safety and security, specifically:

    a. details of where the witness or witnesses, or any member of his family, currently live;

    b. details of where the witness or witnesses, or any member of his family, currently work;

    c. whether or not the witness or his family have relocated;

    d. whether or not any monies have been provided to them for such relocations;

    e. details of any name changes or other changes to identity; and

    f. details of any other measures taken (if any) or monies spent (if any) to secure the security of the witness.

9. The Court be closed during the reception of any evidence, submission, discussion, information or document in the trial of the accused person that identifies or might tend to identify any person as a police source or a police informer.

10. Any evidence, submission, discussion, information or document in the trial of the accused person that identifies or might tend to identify any person as a police source or a police informer be suppressed until further order of the Court pursuant to s. 7 of the Act, on the grounds set out in order 4(a), (b) and (c) above.

11. The publicly available transcript of the trial of the accused person be redacted to remove any reference that could identify or might tend to identify any person as a police source or a police informer.

12. Orders 4, 5, 6 and 10:

    a. shall apply throughout the Commonwealth of Australia; and

    b. shall operate for a period of **60** years.

13. These orders do not operate to prevent reference being made during the course of the proceedings to the identity of JOHN DOE in closed court for the proper conduct of the proceedings. For the purposes of references to the witness in open Court, the witness may be referred to by the pseudonym Witness A.

14. Such further order or orders as the Court sees fit.

D.4.2 Restricting access to documents

86. An example set of orders might include:

    1. That the Accused's access to the material produced in answer to the subpoena to produce issued to the GOVERNMENT AGENCY in these proceedings on DATE ("the subpoena material") be restricted to the copy watermarked "MATERIAL PRODUCED IN ANSWER TO THE ACCUSED'S SUBPOENA TO PRODUCE ISSUED TO THE GOVERNMENT AGENCY ON DATE" provided to the legal representatives of the Accused and that otherwise the Accused not be provided with any other copy of the subpoena material and the Accused shall not copy or publish the subpoena material in any way.
    2. That there be no copying or other disclosure of the subpoena material other than for the purposes of the Accused's trial or any application or appeal associated with the Accused's trial and that all copies of the subpoena material be held securely by the Accused's legal representatives and be returned to the Commissioner of NSW Police, via the Crown Solicitors Office, at the conclusion of the Accused's trial or any other application or appeal related to the Accused's trial.

87. In the case of material to be inspected by legal representatives only:

    1. The Commissioner produces the material the falls within the terms of paragraph 3 of the Subpoena ("the paragraph 3 material") subject to orders (a) to (c) below:

a. access to the paragraph 3 material is restricted to the Trial Judge, the legal representatives of the Accused and the Director of Public Prosecution in these proceedings;
b. there be no uplift or copying of the paragraph 3 material,
c. the paragraph 3 material be returned to the Commissioner at the conclusion of these, or any related, proceedings, including the Accused's sentencing hearing and any appeal.

OR

2. The Accused's access to the subpoena material be restricted to the copy watermarked "*SUBPOENA- PRODUCED ON [DATE]*" provided to his legal representatives and that otherwise, the Accused not be provided with any other copy of the subpoena material and the Accused shall not copy or publish the subpoena material in any way.

3. There be no copying of the subpoena material other than for the purposes of the Accused's trial or any application or appeal associated with the Accused's trial and that all copies of the subpoena material be held securely by the Accused's legal representatives and be returned to the [LEGAL REPRESENTATIVES OF THE GOVERNMENT AGENCY], at the conclusion of the Accused's trial or any other application or appeal related to the Accused's trial.

4. That any copies of the subpoenaed materials made for the purposes of order 2 be either destroyed or returned to the Court or the [LEGAL REPRESENTATIVES OF THE GOVERNMENT AGENCY] at the conclusion of these proceedings.

5. Such further or other order or orders as the Court might deem fit.

E PRIVATE INTERESTS AND SUPPRESSION ORDERS

88. As set out above, there is nothing within the model legislation considered above that restricts private parties from bringing applications under the various legislation such as the Judiciary Act, the Federal Court Act, the Family Law Act, the FCFCoA Act, the CSNPO Act, the Open Courts Act etc.

89. While the *Rinehart v Welker* litigation was ultimately unsuccessful in obtaining non-publication or suppression orders,[34] the Court found that the application had failed to properly establish that the orders were necessary to prevent prejudice to the administration of justice, not that a private litigant was prevented from bringing such an application.

[34] See *Rinehart v Welker* [2011] NSWCA 403 per Bathurst CJ and McColl JA at [55].

90. Common law recognises many instances where it is appropriate to restrain disclosure of sensitive information, where to do so would destroy the value of the information. Legal professional privilege and intellectual property represent two deep fields of law where restraints against disclosure are routinely made.

91. In the context of employment law, an employer can seek injunctions against a current or former employee preventing the disclosure of the employer's confidential information where there is a reasonable basis to apprehend that such conduct might occur.[35]

F CONCLUSION

92. Non-publication and suppression orders are an important tool available to lawyers seeking to protect sensitive matters, whatever the source of that information. The authority and legislation considered in this paper identifies a consistent theme, that any such application must still be carefully made, and infringe on open justice only so far as it must.

93. With those obligations in mind, this paper has attempted to introduce some of the tradecraft in relation to preparing and making an application for a suppression order.

94. Work in this field can be demanding, but answering the difficult questions about the balance between open justice and the need to protect sensitive information is important work.

Michael Rennie
6 St James Hall Chambers
March 2023

[35] *Wright v Gasweld Pty Ltd* (1991) 22 NSWLR 317