The Operation of Suppression and Non-Publication Orders and Access to Information in NSW Courts and Tribunals

NSW Law Reform Commission

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INTRODUCTION

As a law student at the University of Newcastle, I welcome the opportunity to make a submission to the Law Reform Commission (the Commission) on the operation of suppression and non-publication orders and access to information in New South Wales (NSW) courts. The *Court Suppression and Non-Publication Orders Act 2011* (NSW) (*CSNPO Act*) governs the granting of orders in NSW. This legislation will be a key focus of my submission, which considers issues with the operation of suppression and non-publication orders from a civil justice perspective. Namely, this submission will consider the following points which are drawn from the terms of reference identified by the Commission:

(1) The balancing of open justice, the proper administration of justice, commercial interests and confidentiality in civil proceedings;
(2) Appeals under s 14 of the *CSNPO Act*; and
(3) The difficulty of effectively enforcing orders in the digital environment.

(1) BALANCING OPEN JUSTICE, THE PROPER ADMINISTRATION OF JUSTICE, COMMERICAL INTERESTS AND CONFIDENTIALITY IN CIVIL PROCEEDINGS

(1.1) What is Open Justice?

The principle of open justice is essential to civil procedure and to the impartial administration of justice.[1] The transparent and publicly accessible nature of the justice system subjects the courts to public and professional scrutiny which helps to ensure that proceedings are conducted fairly and is said to maintain society's confidence in the integrity of the Australian legal system.[2] Despite this, open justice is not absolute and is subject to necessary exceptions;[3] one being the making of

[1] Jason Bosland and Ashleigh Bagnall, 'Suppression Orders in Victorian Courts' (2013) 35 *Sydney Law Review* 686.
[2] *Russell v Russell* (1976) 9 ALR 103, 122; *Rinehart v Welker* (2011) 93 NSWLR 311 [32]; BC Cairns, 'Suppression and Non-Publication Orders in Civil Litigation' (2018) 7(2) *Journal of Civil Litigation and Practice* 63.
[3] *Hogan v Hinch* (2011) 243 CLR 506 [20].

suppression and non-publication orders. Here, issues arise with determining the appropriate weight to give open justice and other competing interests such as commercial confidentiality.

(1.2) Exceptions to Open Justice

At common law, the threshold for departing from open justice is 'necessity'.[4] Section 8 of the *CSNPO Act* which identifies the grounds for making a suppression or non-publication order, seems to confirm this test, with each ground expressly stating that 'the order must be necessary'. While the Act offers little guidance as to what may constitute necessary, the High Court has stated that for an order to be necessary it must be more than 'convenient, reasonable or sensible, or [do more than just] serve some notion of the public interest'.[5]

Prior to the introduction of the *CSNPO Act*, it was accepted that exceptions to open justice were few and strictly limited.[6] However, the grounds set out s 8 seem to expand the situations in which orders may be granted and it is proposed that the courts have taken this as permission to make orders that do not meet the necessity threshold and are often not exceptional in nature.[7] This is best exemplified in the substantial increase in the number of orders granted by courts in NSW after the introduction of the Act. One report found that following the introduction of the *CSNPO Act*, 241 orders were made in NSW in 2011;[8] a vast increase from the 54 orders made over the two and a half years from January 2006 to June 2008.[9] This increase represents a dangerous shift in judicial thinking and if no action is taken to address the growing number of orders being made, NSW risks following in the footsteps of Victoria, which has become known as a 'minefield of suppression orders'.[10]

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[4] *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477; *Rinehart v Welker* (2011) 93 NSWLR 311 [27].
[5] *Hogan v Australian Crime Commission* (2010) 240 CLR 651 [31].
[6] *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 [19].
[7] Australia's Right to Know, Submission No 7 to Senate Standing Committees on Legal and Constitutional Affairs, *Access to Justice (Federal Jurisdiction) Amendment Bill 2011*, 1 February 2011, 1.
[8] Bosland and Bagnall, above n 1, 693.
[9] Ibid.
[10] Peter Bartlett, 'A minefield of suppression orders', *ABC News* (online), 29 September 2010 <https://www.abc.net.au/news/2010-05-04/33928>.

Particular issue is also found with s 8(e) which provides that a court may make a suppression or non-publication order where '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'. This subsection is far too broad and as Bosland and Bagnall contend, 'any competent barrister will easily argue it [a suppression or non-publication order] is in the public interest'.[11] This, coupled with broad judicial discretion this subsection allows is thought to also be responsible for the significant increase in orders made.[12] Interestingly, the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) which is based on the same model bill of the Standing Committee of Attorney-General as the *CSNPO Act*, omits the 'public interest' ground for making orders due to concerns relating to the impact of allowing such broad discretion.[13] The successful operation of this Act in the federal jurisdiction demonstrates that the four other grounds identified in s 8 of the *CSNPO Act* sufficiently cover situations where it may be necessary to grant an order. Accordingly, it is submitted that s 8(e) should be repealed from the *CSNPO Act* to reduce the number of unnecessary suppression and non-publication orders granted in NSW.

(1.3) Confidentiality and Commercial Sensitivity

With respect to civil disputes, there is an emerging attitude that confidentiality is automatically grounds for a suppression or non-publication order.[14] However, as was emphasised by the Court in *Hogan v Australian Crime Commission*, the 'inherently confidential' nature of material does not automatically pertain to a necessary departure from open justice.[15] Further, even if parties have contracted for disputes to be resolved confidentially, it may still be unnecessary to grant an order.[16] To put it simply, 'it is the price of open justice that allegations about individuals are

[11] Bosland and Bagnall, above n 1, 696.
[12] Ibid.
[13] Ibid; Senate Committee, Federal Parliament, *Access to Justice (Federal Jurisdiction) Amendment Bill Senate Committee Hearing: Questions on Notice* (2012) 2.
[14] BC Cairns, 'Suppression and Non-Publication Orders in Civil Litigation' (2018) 7(2) *Journal of Civil Litigation and Practice* 63.
[15] (2010) 240 CLR 651 [38].
[16] *Rinehart v Welker* (2011) 93 NSWLR 311.

aired in open court'.[17] Therefore, a desire for privacy or confidentiality during proceedings does not alone provide grounds for an order.

However, despite the above arguments, it is acknowledged that where orders are truly necessary, they play an essential role in securing the proper administration of justice in civil proceedings. An area of particular relevance to civil disputes is the suppression of commercially sensitive information. Examples of situations when it may be appropriate to grant a suppression or non-publication order to protect commercially sensitive information include where:

- information about pricing would lead to the proceedings being 'a vehicle for advantaging or prejudicing trade rivals';[18]
- the release of pricing or rates information would disturb the market in an unfair and arbitrary manner;[19]
- the integrity of the litigation process would be jeopardised by allowing commercial competitors to benefit from the disclosure of business secrets;[20] and
- exposure of a litigants' margins, risks, profitability and commercial sensitivities could cause significant economic harm to the litigant and/or other innocent third parties.[21]

Ultimately, the importance of open justice cannot be overstated. However, as French CJ observed in *Hogan v Hinch*, open justice is 'a means to an end, and not an end it itself' and consequently, there will always be situations where suppression and non-publication orders are necessary to provide justice.[22]

[17] Ibid at [55].
[18] *ACCC v Origin Energy Electricity Ltd* [2015] FCA 55 [58].
[19] *ACCC v Air New Zealand Limited (No 4)* [2012] FCA 1439 [25].
[20] *Motorola Solutions Inc v Hytera Communications Corporation Ltd (No 2)* [2018] FCA 17 [8].
[21] *Lend Lease (Millers Point) Pty Ltd v Barangaroo Delivery* Authority (2014) 30 BCL 254 [62].
[22] (2011) 243 CLR 506 [20]-[21].

(2) ISSUES RELATING TO APPEALS UNDER S 14 OF THE *CSNPO ACT*

(2.1) Appeals Under Section 14

Section 14 of the *CSNPO Act* currently provides for appeals by way of rehearing. Notably, s 14(5) prescribes that on appeal, parties may give 'fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision'. On its face, this provision appears to be inconsistent with the traditional understanding of an appeal by way of rehearing and instead, more accurately describes the concept of a hearing de novo.[23] As the High Court explained in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission,* an appeal by way of rehearing is generally conducted 'by reference to the evidence given at the first instance'.[24] In contrast, during a hearing de novo, the case is heard 'afresh'.[25] Given that s 14(5) allows for both additional and substituted evidence to be admitted, I am in agreeance with the Court in *Fairfax Digital Australia and New Zealand Pty Ltd and Others v Ibrahim and Others* where it was held that appeals under s 14 are by way of hearing de novo.[26]

(2.2) The Just, Quick and Cheap Resolution of Appeals

From an efficiency perspective, issues arise with s 14. Firstly, a hearing de novo with volumes of fresh and/or substituted evidence is no doubt time consuming for the courts. [27] In a court system riddled with delays, this is less than ideal or as the Court phrased it in *Fairfax Digital Australia and New Zealand Pty Ltd and Others v Ibrahim and Others*, 'unattractive'.[28] Further, it is a well-established principle that civil proceedings shall be conducted in a just, quick and cheap manner.[29] This is the

[23] *Fairfax Digital Australia and New Zealand Pty Ltd and Others v Ibrahim and Others* (2012) 83 NSWLR 52 [22].
[24] (2000) CLR 194 [13]
[25] Ibid.
[26] (2012) 83 NSWLR 52 [6]
[27] Sandy Dawson and Fiona Roughley, 'Suppression and Non-Party Access' [2013] *Bar News: The Journal of the NSW Bar Association* 52.
[28] Kim Economides, Alfred A Haug and Joe McIntyre, 'Towards Timeliness in Civil Justice' (2015) 41(2) *Monash University Law Review* 414; (2012) 83 NSWLR 52 [23].
[29] Chief Justice James Spigelman, 'Just, Quick and Cheap: A New Standard for Civil Procedure' (2000) 38(1) *Law Society Journal* 7.

overriding purpose of the *Civil Procedure Act 2005*,[30] and is reflected in numerous judgments of NSW Courts.[31] Expensive, time-consuming appeals by way of hearing de novo are certainly not in line with the just, quick and cheap resolution of proceedings. Moreover, under s 14(3)(d) and (e) news media organisations and 'any person who… has a sufficient interest in the decision' is entitled to appeal a decision about a suppression or non-publication order. As such, not only are the appeals inefficient time and money wise, persons who are not even a party to the proceedings may appeal the decision. Such appeals considerably increase the time taken to resolve the original matter which is particularly unjust for litigants who no doubt desire a quick resolution of their case.[32] As the saying goes, 'justice delayed justice is denied',[33] and in the case of suppression and non-publication orders, this legal maxim certainly rings true.

Take for example the litigation that Gina Rinehart commenced in 2011. Initially, her application for a suppression order was successful in the Supreme Court.[34] She then applied to the Court of Appeal for a broader suppression order and this too was granted.[35] Following this, the suppression order was appealed by the media. The Court of Appeal discharged the suppression order on the grounds that it did not meet the necessity threshold.[36] Rinehart then applied for special leave to appeal to the High Court. French J and Gummow J who heard the special leave application ruled in favour of open justice, agreeing with the Court of Appeal's finding that a suppression order was not necessary for the proper administration of justice.[37] The numerous, lengthy Rinehart appeals used a significant amount of court resources

[30] Section 56(1) of the *Civil Procedure Act 2005* (NSW) stipulates 'the overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in proceedings'.
[31] For example, see *Australian Securities and Investments Commission v Rich and Another* (2009) 236 FLR 1 [5] where the Supreme Court held it was obliged 'to facilitate the just, quick and cheap resolution' of the case. Similarly, in the matter of *Punters Show Pty Limited* [2017] NSWSC 605 the just, quick and cheap resolution of the issues was at the forefront of the matter.
[32] Bosland and Bagnall, above n 27.
[33] Famously attributed to William E Gladstone, the Former British Prime Minister. However, it is thought the statement was first expressed in the early writings of Pirkei Avot 5:8. See Tania Sourdin and Naomi Burstyner, 'Justice Delayed is Justice Denied' (2014) 46 *Victoria University Law and Justice Journal* 46 for further discussion.
[34] *Welker v Rinehart* [2011] NSWSC 1094 [16]-[17].
[35] *Rinehart v Welker* [2011] NSWCA 345.
[36] *Rinehart v Welker* (2011) 93 NSWLR 311.
[37] *Rinehart v Welker & Ors* [2012] HCATrans57 (9 March 2012) 1193.

and ultimately demonstrate the need for the Commission to consider how appeals under s 14 could better facilitate the just, quick and cheap resolution of proceedings.

(3) EFFECTIVE ENFORCEMENT IN THE DIGITAL ENVIRONMENT

The digital world has significantly impacted the court's capacity to suppress information. The age of the internet – particularly the rise of social media, blogs and online journalism – has substantially increased the probability of suppression and non-publication orders being contravened.[38] In particular, it is the global, free and easily accessible nature of information on the internet and the permanency of online information that threatens the effectiveness of suppression and non-publication orders.[39]

As a basic rule, the court ordered suppression of information is only effective where it can be enforced outside of the court room.[40] In order to ensure effectiveness in cases where the relevant material has been published on the internet, it must be either removed from any website or platform that can be accessed from NSW or people living in NSW must be prevented from accessing it.[41] In an ideal world, media platforms, website owners and search engines would monitor the material they publish, removing or restricting access to offending material as orders are granted.[42] Realistically though, it is unlikely this will ever become common practice as it would require copious amounts of time, money and resources.[43] This issue has attracted much debate, however little action has been taken by the courts to actually address the problem.

A potential solution was proposed by Spigelman CJ who suggested that parties' legal representatives should conduct a search for offending material on the internet

[38] Jonathan Barrett, 'Open Justice or Open Season? Developments in Judicial Engagement with New Media' (2011) 11(1) *Law and Justice Journal* 18.
[39] Ibid.
[40] BC Cairns, above n 14, 75.
[41] *Fairfax Digital Australia & Zealand Pty Ltd and Others v Ibrahim and Others* (2012) 83 NSWLR 52 [79].
[42] Roxanne Burd, 'Is There a Case for Suppression Orders in an Online World?' (2012) 17 *Media & Arts Law Review* 107.
[43] Ibid.

and request for it to be removed.[44] However, it is often not this simple. As was discussed in *Fairfax Digital Australia & Zealand Pty Ltd and Others v Ibrahim and Others*, enforcing a suppression or non-publication order requires binding those who control the websites and platforms that contain offending material and/or those who operate search engines.[45] It is often extremely difficult to identify those parties. Further, even in cases where the parties can be identified, if they do not reside or operate in NSW, enforcement of a suppression or non-publication order is 'impracticable, if not impossible'.[46]

While these issues are substantial and should be considered by the commission, it is submitted that they do not render suppression and non-publication orders completely ineffective. Firstly, it should be noted that many of the major search engines (such as Google, Yahoo!, Bing and MSN) and social medial platforms (including Twitter and Facebook) have offices in NSW.[47] This presence within the jurisdiction means it is not impossible for courts to enforce an order. Further, many social media platforms possess the technical ability to block people in certain areas from viewing material.[48] For example, Twitter has a feature called 'country withheld content' that prevents users in a certain jurisdiction from accessing content when a valid court order is made.[49]

Although the above suggestions provide some guidance on how suppression and non-publication orders can be enforced effectively in the digital environment, I concur with Ashley AJ who in *R v Dupas (No 3)*, stated that the rise of the internet will inevitably lead to a 'reduction in acceptable standards of fairness'.[50] Essentially, there will always be cases where offending material has been published on the internet but due to the inability of NSW courts to bind the world at large, no effective order can be made to remove this material.[51]

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[44] Chief Justice James Spigelman, 'The Internet and the Right to a Fair Trial' (2006) 7 *Judicial Review* 403, 411.
[45] (2012) 83 NSWLR 52 [78].
[46] Ibid.
[47] Brian Fitzgerald and Cheryl Foong, 'Suppression orders after Fairfax v Ibrahim: Implications for internet communications' (2013) 175 *Aust Bar Review* 187.
[48] Ibid.
[49] Twitter, *About Country Withheld Content* <https://help.twitter.com/en/rules-and-policies/tweet-withheld-by-country>.
[50] (2009) 28 VR 380 [191].
[51] Fitzgerald and Foong, above n 47.

CONCLUSION

As this submission has explored, there are significant issues with the operation of suppression and non-publication orders in NSW courts. As such, it is recommended that the Committee take action on the issues identified in this submission to ensure that orders made are necessary, effective and facilitate the just, quick and cheap resolution of cases. I look forward to hearing the Commission's findings on this inquiry.