Suppression and non-party access

This two-part article by Sandy Dawson and Fiona Roughley is concerned with questions that frequently arise in court proceedings but which equally often come into play in circumstances where there is little time for counsel to prepare. The questions are twofold:

- First, when, how and why can parties apply for a non-publication or suppression order over material relevant to proceedings. Common examples relate to the identity of a party, sensitivity over particular evidence, and in rare cases, the fact of the proceeding itself.
- Second, what information relevant to court proceedings may be accessed by non-parties, and how and when can that be effected.

A number of significant developments have occurred in the past two years. For example, the *Court Suppression and Non-Publication Orders Act 2010* (NSW) (CSPO Act) has altered the landscape applicable to applications for suppression or non-publication orders in proceedings; the CSPO Act 'provides a different emphasis, as well as different linguistic structure to the factors required to be considered by the court'.[1]

This article is intended to draw together the relevant threads and provide a practical guide for practitioners.

Part I is concerned with suppression and non-publication orders.

Part II, to be published in the next issue of *Bar News* is concerned with non-party access to information used in, or to be used in, proceedings.

Part I: Keeping it quiet

SUPPRESSION AND NON-PUBLICATION

As an incident of inherent or implied jurisdiction,[2] and by virtue of various statutory provisions,[3] state and federal courts have had power to order that certain information in proceedings be suppressed or the subject of non-publication orders. Those powers have given rise to various inconsistencies between jurisdictions and uncertainty over the scope and effect of orders made, for example, in so far as breach of an order is punishable as contempt, and the extent to which such an order might bind non-parties not present in the body of the court.[4]

Over a number of years, state and federal lawmakers, individually and in concert, have given attention to the creation of comprehensive and uniform statutory provisions concerning suppression and non-publication orders.[5] In May 2010, the Standing Committee of Attorneys-General endorsed a model law to address the issue: *Court Suppression and Non-publication Orders Bill 2010* (the model law).

With the enactment of the CSPO Act, New South Wales became the first jurisdiction to adopt the model law. It commenced on 1 July 2011. Its provisions apply to the Supreme Court, Land and Environment Court, Industrial Court, District Court, Local Court and Children's Court.[6]

Materially similar legislation relating to federal courts is proposed in Schedule 2 to the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011*. If enacted, the Bill will implement the model law (subject to one exception described below) in respect of the High Court, Federal Court, Family Court, Federal Magistrates Court and any other courts exercising jurisdiction under the *Family Law Act 1975* (Cth). The Bill is currently before the Senate.

No other jurisdiction has adopted or sought to introduce the model law.

THE MODEL LAW OF NON-PUBLICATION AND SUPPRESSION

The model law expressly does not limit or otherwise affect any inherent jurisdiction or powers that a court otherwise has to regulate its proceedings or to deal with a contempt of the court.[7] Further, pursuant to s 5, the model law does not limit or otherwise affect the operation of provisions concerning non-publication or suppression orders in other statutes. However, the ongoing role of other repositories of the power to make non-publication or suppression orders warrants closer examination.

First, in terms of design and intent, it was envisaged that each jurisdiction would, with the enactment of the model law, consolidate the statutory powers. Existing

provisions that, like the model law, give courts *discretion* to impose suppression or non-publication orders were to be repealed.[8] On the other hand, provisions providing a *direct prohibition or presumption against* publication or disclosure of information in connection with certain proceedings,[9] would remain.

In line with the drafters' intention, both the CSPO Act and the Commonwealth Bill both effect a measure of consolidation so as to cut down what would otherwise have been the duplicative effect of s 5. Schedule 2 to the CSPO Act repealed, for example, s 292 and 302 (1)(c)(d) and (3) of the *Criminal Procedure Act 1986* (NSW). Those provisions had provided for the making of non-publication orders in proceedings against a person for prescribed sexual offences or in relation to counselling communications made by an alleged victim of a sexual assault.

Provisions in the Commonwealth's *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* also provide for the repeal of specific, existing powers to exercise a discretion to make non-publication or suppression orders.[10] However, at the federal level courts have sometimes also relied upon a general statutory power (to make orders of such kinds as they consider appropriate)[11] as the repository of a power to make suppression and non-publication orders. The cognates of s 5 of the model law[12] do not expressly determine the continued operation of those general powers in so far as suppression and non-publication orders are concerned. That is because those provisions provide for the continued operation of provisions in *other Acts*, and the model law is, under the Bill, to take affect not as a standalone Act (as in New South Wales with the CSPO Act), but as a new part inserted into the relevant Act for each court. The explanatory memorandum to the Bill states that it is parliament's intention that those general powers should no longer be used as the repository of the power to make non-publication or suppression orders.[13] It remains to be seen whether, bearing in mind cardinal principles of statutory construction of provisions conferring jurisdictions or granting powers to a court,[14] 'should not' is also 'cannot'. It may be that parliament's intention properly goes to practice not power.

POWER AND GROUNDS FOR AN ORDER PURSUANT TO THE MODEL LAW

The statutory power to make the relevant orders is contained in section 7, entitling the court to restrict the disclosure of: (a) information tending to reveal the identity of, or otherwise concerning, any party, witness, or person related to such persons; or (b) information comprising evidence or other information about evidence given in proceedings before the court.

Section 8 provides the grounds for making the order.

> 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,
>
> (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 an act of indecency),
>
> (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.

Significantly, the Commonwealth's *Access to Justice (Federal Jurisdiction) Amendment Bill 2011* does not replicate provision for the ground identified in (e).

Section 6 provides an overriding obligation that, in deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

Three decisions of the New South Wales Court of Appeal on the CSPO Act provide helpful guidance on the operation of the model law provisions. The first, *Rinehart v Welker* [2011] NSWCA 403 involved a non-publication order sought over information disclosed in civil proceedings. The second, *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCA 125 involved criminal proceedings in which 'take down' and non-publication orders were made concerning

information having no direct connection with the proceedings except in its capacity to affect the fairness of the current and future trials of the three accused. The third, *New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 concerned civil proceedings relating to alleged sexual assaults in which applications were made for orders suppressing the plaintiff's name as well as those of medical and legal practitioners involved in the state's defence.

Rinehart v Welker

The procedural background to the decision in *Rinehart v Welker* was somewhat complicated. Proceedings had been commenced in the Supreme Court of New South Wales by the children of the first defendant (Mrs Gina Rinehart). The children were beneficiaries of a trust of which their mother was trustee. Three of the four children sought orders pursuant to the *Trustees Act 1962* (WA), and by later amendment, in the court's inherent equitable jurisdiction, to the effect that their mother be removed as trustee. The trustee sought a stay of the proceedings and a suppression order on the basis that the proceedings were an abuse of process, having been commenced without prior compliance with mediation and arbitration procedures for which the relevant trust deed provided, and which provided that 'the decision of the mediation and/or arbitration shall be kept confidential'.[15] Brereton J originally granted the suppression order, but following his Honour's decision to refuse the stay application, the first suppression order ceased and an interim suppression order was made pending determination of an application for leave to appeal to the Court of Appeal.[16] Notices of motion filed in the proceedings for leave to appeal sought a fresh suppression order on the ground referred to in s 8(1)(a) of the CSPO Act (necessary to prevent prejudice to the proper administration of justice). That order was made by Tobias AJA.[17] Certain media organisations who had intervened, sought a review of the decision of Tobias AJA pursuant to s 46 of the *Supreme Court Act 1970* (NSW). That was the procedural background by which the CSPO Act first came before a full bench of the Court of Appeal.

As identified by Young JA, the 'basal propositions' of those attacking the order made by Tobias AJA were that, pursuant to section 6, the CSPO Act makes it clear that open justice is the primary aspect of the administration of justice on which the Act is focused and that the orders made by Tobias AJA 'effectively allow a private agreement as to confidentiality to outflank the purpose of the Act'.[18] Those defending the decision of Tobias AJA submitted, consistent with their position before Tobias AJA, that publication of the material filed in the proceedings would render any appeal nugatory, negate the purpose of the confidentiality provisions in the trust deed, and circumvent the rights of the applicants to have such disputes resolved by confidential mediation or arbitration in the event that any appeal succeeded.[19]

The Court of Appeal unanimously discharged the suppression orders made by Tobias AJA. The proper course in proceedings brought by a party in breach of an arbitration or mediation agreement was to stay proceedings.[20] The fact that parties had covenanted for the confidential resolution of disputes, or that embarrassment and damage to reputation might be caused by proceedings taking place in open court, did not in this case make it 'necessary' to suppress information in the proceedings.

In their joint judgment, Bathurst CJ and McColl JA outlined the proper approach to construing the CSPO Act. Their honours observed:

> The principle of legality favours a construction of legislation such as the CSPO Act which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle and common law freedom of speech and, where constructional choices are open, so as to minimise its intrusion upon that principle.[21]

All members of the court understood the content of 'open justice' in s 6 of the CSPO Act as referable to its justification at common law.[22] Citing *Scott v Scott* [1913] AC 417 at 463, Bathurst CJ and McColl JA explained that it is a concept based on the premise that 'in public trial is [to be] found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means of winning for it public confidence and respect'.[23] The entitlement to the media to report on court proceedings is a corollary of the right of access to the court by members of the public.[24]

Open justice is a means for ensuring the proper administration of justice. However, as noted by Young JA, 'the means of achieving the purpose must not be elevated above the purpose'.[25] Numerous exceptions to open justice exist where the openness of court

proceedings would destroy the attainment of justice.[26] Protection of blackmail victims or informers who might not otherwise come forward, or the commercial value of a trade-secret, are obvious and well-known examples.

The real question is what is the appropriate weight to give to competing interests and how is an assessment for or against open justice in any particular case to be made. The decision in *Rinehart v Welker* confirmed that the threshold test for departure from open justice is that it be 'necessary' to do so.

Necessity is the operative condition expressly provided for in all of the s 8(1) grounds in the CSPO Act. *Rinehart v Welker* confirms that the same considerations which underlie the test of necessity under s 50 of the *Federal Court Act 1976* (Cth), which were explained by the High Court in *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [30], and which prevailed at common law, apply directly to the meaning and application of the test of necessity pursuant to s 8(1) of the CSPO Act. Thus CSPO Act orders 'should only be made in exceptional circumstances'.[27]

The practical consequence of the decision is that, consistent with *Hogan v Australian Crime Commission*, an order is not 'necessary' if it appears to the court only

> to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some 'balancing exercise', the order appears to have one or more of those characteristics.[28]

Nor is it sufficient that the information is 'inherently confidential' or would result in 'embarrassing publicity' as distinct from personal or commercial information the value of which as an asset would be seriously compromised by disclosure.[29] What is required is that disclosure will prejudice the proper exercise of the court's adjudicative function.[30] Those are the unacceptable consequences with which the exercise of a power to order non-publication or suppression is concerned.

Special leave to appeal to the High Court from the decision in *Rinehart v Welker* was refused. It was said by French CJ and Gummow J that the approach of the Court of Appeal to construing and applying the CSPO Act gives appropriate weight to the principle of open justice.[31]

Fairfax v Ibrahim

During the course of a criminal trial of three accused in the New South Wales District Court, an order was made that:

> Until further order, within the Commonwealth of Australia, there is to be no disclosure, dissemination, or provision of access, to the public, by any means, including by publication in a book, newspaper, magazine or other written publication, or broadcast by radio or television, or public exhibition, or broadcast or publication by means of the Internet of any:
>
> (a) Material containing any reference to any other criminal proceedings in which [the three accused] are or were parties or witnesses; or
>
> (b) Material containing any reference to any other alleged unlawful conduct in which [the three accused] are or were suspected to be complicit or of which they are or were suspected to have knowledge.

Eight news media organisations sought leave to appeal to the Court of Criminal Appeal pursuant to s 14 of the CSPO Act.[32] The court unanimously set aside the order made by the trial judge. Three helpful matters arise from that decision concerning the exercise of the power to make suppression and non-publication orders pursuant to the CSPO Act.

First, that 'necessary' can have shades of meaning and, in its application, will depend significantly upon the particular grounds in s 8 relied upon and the factual circumstances. 'Necessary' should not be given a narrow construction.[33] However whether an order is 'necessary' has regard to its form, jurisdictional application, effectiveness (or futility), and whether it is reasonably adapted to its purpose.[34] Thus:

- An order which, by its form, is not directed to any person, is no more than a general statement of principle in relation to specific material, and which could apply to a whole range of persons and businesses, is not appropriately adapted as to be 'necessary'.
- Jurisdictional overreach will also deny a finding that the order is necessary. Thus, with respect to a trial to take place in the District Court at Sydney, an order preventing residents of Perth, Kununurra or Darwin from having access to material could not conceivably be justified. Further, there is a real question as to whether a judge of the District Court

has power to control the access to information of parties and residents in other states.

- An order which is futile is not necessary. However, the mere fact that an order targets specific material and not others (for example the most prominent or readily accessible information amongst thousands of potential 'hits' produced by a search engine) does not necessarily mean an order will be futile. The guiding principle is whether the order is appropriately adapted to its purpose, in the case of *Fairfax v Ibrahim* being to prevent access by jurors to the prejudicial material.
- An order which is ineffective cannot be said to be 'necessary'. It must be possible to identify all relevant parties bound by the order (whether or not before the court) and, secondly, to enforce the order against such persons in the event of contravention. Impossibility of enforcement against any party not resident in or operating from the jurisdiction would render the order impracticable, if not impossible, and most certainly not necessary.

Second, that it is critical to distinguish between circumstances where a proposed order impacts upon the open justice principle (because it would, for example, prevent publication of material read in open court) as opposed to where it does not prevent or restrict publication of court proceedings. In the latter, the open justice principle which is affirmed in s 6 of the CSPO Act has more limited application and indeed does not constrain the making of an order under s 7.[35] Similarly, the 'common law freedom of speech' provides a lesser obstacle to an order directed to pre-trial publicity and which is designed to prevent prejudice to the proper administration of justice.[36] The reasoning of the Court of Appeal in *Reinhart* is not determinative in this latter type of case. Thus where an order does not impinge upon the principle of open justice, if designed to protect the proper administration of justice and reasonably appropriate and adapted to achieve that purpose, it may well be considered 'necessary'.[37]

Third, that s 7 extends to allow a court to make orders preventing threatened interference with a trial, but it does not have a greater scope than the *sub judice* rule under the general law concerning the powers of a superior court to prevent and punish contempt.[38]

The *sub judice* rule is concerned with the effects of pre-trial publicity on whether the accused will be able to obtain a fair trial. A prominent example was the order made by the Victorian Court of Appeal that a television corporation not publish in Victoria certain episodes of the first season of the series *Underbelly* until after the completion of the trial for murder of one of the persons depicted in the series.[39]

The court in *Fairfax v Ibrahim* indicated that the power granted by s 7 of the CSPO Act, and indeed the general law powers of a superior court, includes power to make orders preventing public access to existing material until the conclusion of a trial. That extends to preventing access to a publication on a web site.[40] However, the power is not at large. Basten JA, with whom Bathurst CJ and Whealy JA agreed, explained that:

> It does not follow that the trial judge, in exercising powers with respect to the conduct of the trial, can make peremptory orders requiring private individuals or other entities unconnected with the administration of justice to take steps to remove material from potential access by a juror.[41]

The restriction on the power, and the explanation for why some orders requiring material to be removed from the internet will be within power and others will not, appears to be that while the CPSO Act gives power to make such an order, it does not expand the powers of a superior court to prevent sub judice contempt. In other words, if publication of the material in respect of which a suppression or non-publication order is sought would not amount to a sub judice contempt, such an order is beyond power under the CPSO Act.

Finally, by reason of s 109 of the *Constitution* and Schedule 1, cll 90 and 91 of the *Broadcasting Services Act 1992* (Cth), the power under the CSPO Act, even if it did extend beyond the common law principles with respect to *sub judice* contempt, could not validly support an order addressed to the world at large and which might cover material on internet sites of which the hosts were unaware at the time the order was made.[42] Clause 91 specifically provides that a law of a state has no effect to the extent to which it subjects, or would have the effect (whether direct or indirect) of (a) subjecting an internet content host to liability (whether criminal or civil) in respect of hosting particular content in a case where the host was not aware of the nature of the content; or (b) requiring an internet host to monitor, make inquiries about or keep

records of content hosted by the host. Thus the CSPO Act, even if the Court of Criminal Appeal had given it a more expansive operation, could not support an order imposing an obligation on an internet content host to remove, or otherwise restrict access to, content, of the nature of which it was not aware. Similarly, it could not support an order requiring such a host to inquire of or monitor the content hosted on its web sites, of the nature of which it was not otherwise aware.

New South Wales v Plaintiff A

In the District Court of New South Wales Plaintiff A asserted that the State of New South Wales was liable to him for sexual assaults on him by, first, fellow students at Glenfield Park Special School when he was a minor, and second, an inmate at Long Bay Gaol when he was an adult. In the District Court proceedings, non-publication orders were made in respect of the names and identifying details of the plaintiff, his tutor, three solicitors for the state, the solicitor for the plaintiff and four doctors. On appeal to the Court of Appeal, there was no challenge to the making of the non-publication orders below; rather, the state applied for an extension of the non-publication orders to the appellate proceedings, including so as to apply to the state's current solicitors and counsel in the appellate proceedings. Counsel for the plaintiff also sought suppression of the plaintiff's name, submitting it was a 'common practice' where the plaintiff was a minor at the time of the commission of the alleged torts.

The Court of Appeal declined to make the orders sought.

In response to the submissions of the plaintiff's counsel deriving from a so-called 'common practice' of suppression in similar circumstances, the court noted that any such practice 'has not been universally adopted' in civil proceedings, and more importantly, cautioned that 'care must be taken in placing undue weight upon practices which preceded the commencement of the [CSPO] Act'.[43]

As to the balance of the state's application, it was, in the words of Basten JA who delivered the principal judgment, 'unique'.[44] However it was not the unusualness of the application that founded its rejection. Indeed Beazley JA, who substantially concurred with the reasons of Basten JA, expressly rejected the idea that the application was, on its face, unreasonable.[45] The point made by the court was that the insufficiency of evidence was determinative: the material before the court did not establish the 'necessity' of the order.[46]

PRACTICAL CONSIDERATIONS

For parties seeking a non-publication or suppression order, the real advantage of proceeding pursuant to the CSPO Act (or its cognates in other jurisdictions if and when enacted) is certainty as to the scope, source and effect of a non-publication or suppression order. Indeed, the avoidance of complex jurisdictional questions was one of the chief motivations behind the legislation.[47]

For the same reasons, it would appear likely that parties will favour proceeding under the CSPO Act as opposed to (or perhaps in addition to) other repositories of the power. The remaining parts of this section consider the practical considerations that apply to parties – both those seeking and resisting – orders pursuant to the CSPO Act.

Which order?

The model law distinguishes between 'non-publication' orders (orders that prohibit or restrict the publication of information but not otherwise its disclosure), and 'suppression' orders (which prohibit or restrict the disclosure of information by publication or otherwise).[48] Those definitions make plain that suppression orders will have additional ramifications for both parties and non-parties. Even putting aside the 'necessity' threshold required to obtain an order, from a practical perspective, parties seeking to restrain the disclosure of information should closely consider whether the additional complexity and administrative difficulties caused by a suppression order (limiting disclosure generally as opposed to mere publication) are warranted in the circumstances.

Procedure for making an order

A court may make a suppression or non-publication order of its own initiative or on the application of a party or any other person 'considered by the court to have a sufficient interest in the making of the order'.[49] Where an application is made, the court may, without determining the merits of it, make the order as an interim order pending determination of the application.[50] However, if an interim order is made, the

court must determine the application as a matter of urgency.[51]

The distinction noted in *Fairfax v Ibrahim* as to suppression or non-publication orders in respect to, on the one hand, material disclosed in court and, on the other, material already published but said to be prejudicial to the administration of justice, has further significance for the preparation of an application. For constitutional reasons, state law cannot validly support an order addressed to the world at large and which relates to material already published.[52] The court doubted that properly construed the model law would support such an order in any event.[53] For a party seeking an order over material already published, a number of additional antecedent requirements will ordinarily need to have been taken in order to establish that the test of necessity can – at a threshold level – be satisfied. Those are that:

- the specific material said to be prejudicial to the administration of justice must be identified (ie the particular websites, or articles, or otherwise published material);
- the person in possession of that material must be identified (or, in the case of publication on the internet, the particular internet content host identified); and
- the person responsible for access to the content has been contacted and asked to remove, or otherwise restrict access to the content and also given a reasonable period of time in which to do so.

In criminal trials, the usual process will be for the Director of Public Prosecutions to identify web sites containing the material that might tend to prejudice the forthcoming trial.

In framing the orders sought, applicants ought to consider the place where the proposed order is to apply and the duration to be specified. Both are matters which the court will need to address specifically if it decides to grant an order pursuant to the statutory power.[54] Orders may apply anywhere in the Commonwealth, however, if it is proposed than an order operate outside the jurisdiction, it will also need to be established why that is necessary for achieving the purpose for which the order is made.[55] Additionally, it should be kept in mind that pursuant to s 12(2), the court is obligated to ensure that the 'order operates for no longer than is reasonably necessary to achieve the purpose for which it is made'.

The evidence appropriate on an application for a non-publication or suppression order will vary with the exigencies of the case. Where the ground identified in s 8(1)(c) is relied upon ('necessary to protect the safety of any person'), it will usually be the case that evidence demonstrative of imminent threat of danger from publication of the subject material is required.[56] Outside of established categories such as blackmail victims or informers, it may be necessary to support the application by expert evidence, for example in a case where the imminent threat is psychological harm.[57]

Publication of orders made

The advance made by the model law is to give all specified courts statutory power to bind the world at large with a suppression or non-publication order. The advance is more technical than revolutionary: the commission of an offence for contravention of an order, as with the law of contempt, requires knowledge of the order or, at a minimum, recklessness as to whether the conduct constitutes a contravention.[58] (A contravention may be punished as a contempt of court even though it could be punished as an offence. The converse applies, though the same contravention cannot be punished as both an offence and a contempt of court.[59])

The point for parties is that, having obtained an order, its practical effect may depend on the taking of subsequent steps to bring it to the attention of relevant third parties.

The working party of the Standing Committee of Attorneys General which drafted the model law has given consideration to a related proposal for a national register of suppression and non-publication orders.[60] That register has not taken effect. The best option available currently is that the orders (whether made by the Supreme Court or by lower courts) be sent to the Public Information Office of the Supreme Court of New South Wales for dissemination. For reasons of pragmatism and efficiency, it is advisable that a party seeking a suppression order build that consequence into the proposed orders.[61]

Procedure for review of orders

The court that makes a suppression or non-publication order may review the order on its own initiative or on the application of a person entitled to apply for the review. Those entitled to apply for and to appear and be heard by the court on the review are the original applicant for the order, any party to the proceedings, the government of the Commonwealth or of a state or territory, a news media organisation, and any other person who has a sufficient interest in the question. The court may confirm, vary or revoke the order.[62]

The model law provisions governing review of, or appeal from, a decision of a court to make or refuse a suppression or non-publication order are somewhat confusing.

> 14 Appeals
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> (1) With leave of the appellate court, an appeal lies against:
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> (a) a decision of a court (the original court) to make or not to make a suppression order or non-publication order, or
>
> (b) a decision by the original court on the review of, or a decision by the original court not to review, a suppression order or non-publication order made by the court.
>
> (2) The appellate court for an appeal under this section is the court to which appeals lie against final judgments or orders of the original court or, if there is no such court, the Supreme Court.
>
> …
>
> (6) If judgments or orders of the original court are subject to review by another court (rather than appeal to another court), this section provides for a review of the original court's decisions instead of an appeal and in such a case references in this section to an appeal are to be read as references to a review.

The Court of Appeal in *Fairfax v Ibrahim* identified the awkwardness of any construction of s 14, specifically that it is difficult to give meaning to s 14 without making s 14(6) otiose.[63] The court determined that the word 'review' in s 14(6) refers to an alternative to a statutory appeal and not to the exercise by the Supreme Court of its supervisory jurisdiction. The upshot for practical purposes is that, accepting that suppression and non-publication orders are interlocutory in nature, in most courts or tribunals in which the model law will apply, the appropriate appellate court is that to which an appeal would lie against a final judgment of the original court.[64]

Notably, an appeal pursuant to s 14 is by way of rehearing and, pursuant to s 14(5) fresh evidence or evidence in addition to, or in substitution for, the evidence given on the original application may be given on the appeal. From a case-load perspective, and given the urgency usually associated with these kinds of matters, the prospect of an appeal with volumes of new evidence poses particular challenges to appellate courts. The court in *Fairfax v Ibrahim* identified the answer to these 'very real practical issues' as being found in s 14(1): an appeal lies only with *leave* and the court has power to grant that leave conditionally, including with respect of the evidence which may be led on the appeal.[65]

Costs

In criminal proceedings, costs against the parties to the proceedings in which an application for a non-publication or suppression order is made, are not appropriate, including on an appeal from the determination of the application below.[66]

In civil proceedings, costs may be awarded on determination of the application in accordance with the general discretion to award costs. However, it is important to note that confidentiality regimes generally, and non-publication and suppression orders more specifically, are interlocutory in nature[67] and that this may have consequences for the time at which any adverse costs order is payable absent specific provision by the court.

For example, in New South Wales, r 42.7(2) of the *Uniform Civil Procedure rules 2005* provides that the costs of any application in proceedings are not payable until the conclusion of the proceedings unless the court otherwise orders. Where an application relates to a discrete and separately identifiable aspect of proceedings an order may be made, on application by the relevant party, that costs be payable forthwith.[68] Successful parties would be well advised to seek such an order.

Future revocations and the need for forensic decisions

From a tactical perspective, the stakes can be high. As noted above, confidentiality regimes generally, and non-publication and suppression orders more specifically, are interlocutory in nature. They may be set aside on appeal or review, but they also may be revoked or altered when circumstances change or the continuation of the regime or order is otherwise no longer considered to be appropriate. Whether to place material in evidence, even on the faith of what for the time being may be a restriction imposed on its further disclosure, is a forensic decision.[69]

The result in *Hogan v Australian Crime Commission* is instructive: an exhibit to an affidavit which was adduced and admitted into evidence during the currency of a confidentiality regime, was, after the revocation of that regime, subject to access and inspection by non parties pursuant to access properly granted under the then Federal Court Rules. There is always the risk that the price of the decision to have otherwise confidential material admitted into evidence may be its subsequent disclosure.

CONCLUSION

Part I of this article has focussed on the current law of suppression and non-publication orders in New South Wales, a position likely to be replicated at the federal level if the *Access to Justice Bill 2011* passes the Senate. Although no person has yet been prosecuted under the CSPO Act, the increasing frequency with which it is being invoked by parties and non-parties is indicative of both the extent to which it has altered the landscape of this aspect of practice, and of its importance.

In Part II of this article, to be published in the next edition of *Bar News*, we will consider the converse situation to non-publication and suppression regimes: the means by which non-parties can access information relevant to court proceedings.

Endnotes

1. See *New South Wales v Plaintiff A (by his tutor 'Salin')* [2012] NSWCA 248 at [94] (Basten JA, Beazley and Hoeben JJA agreeing).
2. For discussion of the source and scope of the power at common law, see: *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 477 (McHugh JA); *John Fairfax Group Pty Ltd v Local Court of NSW* (1992) 26 NSWLR 131 at 160; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345 (Mahoney JA); *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [24]–[37]; *DJL v The Central Authority* (2000) 201 CLR 226 at 240-241; *Central Equity Ltd v Chua* [1999] FCA 1067. For detail of the difficulties consequent upon the reliance on the common law power, see: *Cameron v Cole* (1944) 68 CLR 571 at 590; *Re Macks; Ex p Saint* (2000) 204 CLR 158 at [20]–[23]; *United Telecasters Sydney Ltd v Hardy (1991) 23 NSWLR 323 at 332–333.*
3. For example, *Federal Court of Australia Act 1976* (Cth), s 50; *Federal Magistrates Act 1999* (Cth), ss 15, 61; *Family Law Act 1975* (Cth), s 34; *Civil Procedure Act 2005* (NSW), s 72 (now repealed); *Criminal Procedure Act 1986* (NSW), ss 292, 302(1)(c), (d) and (3) (now repealed); *Supreme Court Act 1986* (Vic) s 18(1)(c); *County Court Act 1958* (Vic), s 80.
4. See, for example: *Hogan v Hinch* (2011) 243 CLR 506 at [23]-[27], [46] (French CJ); *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465.
5. For a summary, see: *Court Suppression and Non-Publication Orders Act 2010* (NSW), Second Reading Speech by the Hon. Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, *Hansard*, 23 November 2010.
6. CSPO Act, s 3 ('court').
7. Section 4.
8. Court Suppression and Non-publication Orders Bill 2010, drafting note 2.2 (at 2).
9. For example s 121 of the *Family Law Act 1975* (Cth).
10. *Federal Court Act 1976* (Cth), s 50; *Federal Magistrates Act 1999* (Cth), s 61.
11. For example: *Federal Court Act 1976* (Cth), s 23; *Family Law Act 1975* (Cth), s 34; *Federal Magistrates Act 1999* (Cth), s 15.
12. Access to Justice (Federal Jurisdiction) Amendment Bill 2011, Schedule 2, item 1, s 102PB (in respect of the *Family Law Act 1975* (Cth); Schedule 2, item 4, s 37AC (in respect of the *Federal Court Act 1976* (Cth); Schedule 2, item 7, s 88C (in respect of the *Federal Magistrates Act 1999* (Cth)), Schedule 2, item 8, s 77RC (in respect of the *Judiciary Act 1903 (Cth)*.
13. Access to Justice (Federal Jurisdiction) Amendment Bill 2011, explanatory memorandum at p 9.
14. *Owners of 'Shin Kobe Maru' v Empire Shipping Company Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).
15. *Rinehart v Welker* [2011] NSWCA 403 at [7]-[9] (Bathurst CJ and McColl JA).
16. *Welker & Ors v Rinehart* [2011] NSWSC 1094; *Welker & Ors v Rinehart & Anor (No 2)* [2011] NSWSC 1238.
17. *Rinehart v Welker and Ors* [2011] NSWCA 345.
18. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [78].
19. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [15]; *Rinehart v Welker and Ors* [2011] NSWCA 345 at [25]-[26] (Tobias AJA).
20. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [51] (Bathurst CJ and McColl JA); [119] (Young JA). The Court of Appeal subsequently held, that, in any event, Brereton J had correctly refused to grant a stay of the primary proceedings: *Rinehart v Welker* [2012] NSWCA 95 (Bathurst CJ, McColl and Young JJA).
21. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [26].
22. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [32]-[33] (Bathurst CJ and McColl JA) and [79] (Young JA).
23. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [32] (Bathurst CJ and McColl JA).
24. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [33] (Bathurst CJ and McColl JA), quoting *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 at [20].

25. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [87] (Young JA).
26. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [34]-[37] (Bathurst CJ and McColl JA); [85]-[89] (Young JA).
27. *Rinehart v Welker and Ors* [2011] NSWCA 403 at [27] (Bathurst CJ and McColl JA).
28. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [31].
29. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [38] and [43]; *Rinehart v Welker and Ors* [2011] NSWCA 403 at [31] (Bathurst CJ and McColl JA).
30. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [42].
31. *Rinehart v Welker* [2012] HCATrans 57.
32. Proceedings were originally commenced in the Court of Appeal, not the Court of Criminal Appeal. The chief justice constituted the same bench as the Court of Criminal Appeal under s 3 of the *Criminal Appeal Act 1912* (NSW) against the possibility that the latter was the appropriate court, and the former had no jurisdiction. It was conceded at the hearing that the Court of Criminal Appeal was the appropriate appellate court, and the decision of the Court of Criminal Appeal confirms the correctness of this position: *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [15] – [17].
33. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [8] (Bathurst CJ); [47]-[48] (Basten JA).
34. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [72] – [79].
35. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [49], [51].
36. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [49].
37. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [51].
38. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [63].
39. *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68; [2008] VSCA 49 (Warren CJ, Vincent and Kellam JJA). The decision varied more expansive orders made by the trial judge that prohibited transmission, publication, broadcasting or exhibiting of the production in the State of Victoria until after the trial and directed that the series not be published on the internet in Victoria and the specified website until after the trial: *R v A* [2008] VSC 73 (King J).
40. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [61].
41. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [63].
42. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [95]-[96].
43. *State of New South Wales v Plaintif A (by his tutor 'Salin')* [2012] NSWCA 248 at [94].
44. *State of New South Wales v Plaintif A (by his tutor 'Salin')* [2012] NSWCA 248 at [101].
45. *State of New South Wales v Plaintif A (by his tutor 'Salin')* [2012] NSWCA 248 at [4].
46. *State of New South Wales v Plaintif A (by his tutor 'Salin')* [2012] NSWCA 248 at [4] (Beazley JA), [96], [99], [107] (Basten JA).
47. *Court Suppression and Non-Publication Orders Act 2010* (NSW), Second Reading Speech by the Hon. Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, *Hansard*, 23 November 2010.
48. Section 3, ('non-publication order'; 'suppression order').
49. Section 9.
50. Section 10.
51. Section 10(2).
52. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [95].
53. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [95].
54. Sections 11, 12.
55. Section 11(3).
56. *X v Sydney Children's Hospitals Specialty Network & Anor* [2011] NSWSC 1272 (Adamson J); *State of New South Wales v Plaintif A (by his tutor 'Salin')* [2012] NSWCA 248; *Welker & Ors v Rinehart & Anor (No 6)* [2012] NSWSC 160 at [55]-[56].
57. *X v Sydney Children's Hospitals Specialty Network & Anor* [2011] NSWSC 1272 (Adamson J).
58. Section 16. The maximum penalty for an individual is $100,000 ($110,000 under the CSPO Act) or 12 months' imprisonment or both. For a body corporate, the maximum penalty is $500,000 ($550,000 under the CSPO Act).
59. Section 16(2)-(4).
60. See: *Court Suppression and Non-Publication Orders Act 2010* (NSW), Second Reading Speech by the Hon. Michael Veitch (Parliamentary Secretary) on behalf of the Hon. John Hatzistergos, New South Wales Legislative Council, *Hansard*, 23 November 2010.
61. Although the orders were set aside on appeal, the orders made by the trial judge in the *Ibrahim* proceedings are an example (extracted in the judgment of the Court of Appeal at [11]): 'Orders are to be sent to the Public Information Office at the Supreme Court of New South Wales for dissemination'.
62. Section 13.
63. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [18] – [20].
64. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [17].
65. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [24].
66. See *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [104].
67. *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125 at [17].
68. See *Rinehart v Welker (No 3)* [2012] NSWCA 228 at [21] and the cases there cited (Bathurst CJ, Beazley and McColl JJA).
69. *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [43].