

## Russell Kennedy Government CPD

### Session 7. Can you keep a secret?

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# Webinar housekeeping

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## Disclaimer

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The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

# Open justice is a good thing, right ?

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## Open justice is super important!

- It is a vital part of a liberal democracy - accountability, transparency and honesty are very important for public faith in the legal process.
- While overall is a desirable aim, in the certain circumstances can have some unexpected side effects.

## Open justice pervades our legal system!

- In Australia, there is a clear commitment to open justice
  - ‘one of the most fundamental aspects of the system of justice in Australia’ - John Fairfax  
*Publications Pty Ltd v District Court (NSW) (2004) 61 NSWLR 344*
  - is ‘deeply entrenched in our law’ - *Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal (2004) 9 VR 275*
  - Is a ‘cornerstone of our judicial system’ - *News Digital Media Pty Ltd v Mokbel (2010) 30 VR 248*

# Open justice



# What does open justice mean?

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- The principle of open justice has two major tenets:

- **Information disclosed in court must be able to be freely communicated;**

*‘A court is ‘open’ when, at the least, members of the public have a right of admission. From this it may be thought ordinarily to follow that the media, in their various forms, are also entitled to communicate ‘to the whole public what that public has a right to hear and see’.*

*per Winneke P, Ormiston and Vincent JJA - Re Applications by Chief Commissioner of Police (Vic) for Leave to Appeal (2004) 9 VR 275*

- **Justice must be administered in public.**

*‘fundamental rule of the common law is that the administration of justice must take place in open court’*

*per McHugh JA - John Fairfax & Sons Ltd v Police Tribunal (NSW) (1986) 5 NSWLR 465*

*‘one of the normal attributes of a Court is publicity, that is, the admission of the public to attend the proceedings.’*

*per Barton ACJ - Dickason v Dickason (1913) 17 CLR*

- **But how open is open ?**

# Why not have Open Justice all the time

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- Protection of vulnerable groups
- Security
- Proper operation of law enforcement
- Investigation of crime
- Witness protection
- To counterbalance other interferences with liberty
- To help justice work more efficiently and fairly – fair trials rather than trial by media.
- To protect the society from threats
- Prejudice/Stigma/societal biases

## Sources of powers to limit access to information

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- Inherent jurisdiction – predates the *Open Courts Act*
- *Open Courts Act* – key focus of today's seminar
- Rules of Court – pseudonym orders

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Focusing on State Laws – not going to the Commonwealth

Not looking at broader public interest immunity cases  
(although some public interest does get some work)

But wait there is more.....



# Many statutory existing restrictions – maybe not so open

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Adoption Act 1984 s 121

Children, Youth and Families Act 2005 s 534

Confiscation Act 1997 ss 17(3)-(5), and  
36L(6)-(8), 37(9)-(10) and 40H(7)-(9)

Crimes (Mental Impairment and Unfitness to  
be Tried) Act 1997 s 75

Criminal Organisations Control Act 2012 ss  
73, 77, 81, and 83-85

Evidence (Miscellaneous Provisions) Act  
1958 s 42BQ and 32F

Family Violence Protection Act 2008 s 166

Major Crime (Investigative Powers) Act 2004 s  
43, 7 and 48

Public Health and Wellbeing Act 2008 s 133

Serious Offenders Act 2018 s 277, 279 and  
278

Sex Offenders Registration Act 2004 s 66ZZB

Terrorism (Community Protection) Act 2003 s  
12

Victims of Crime Assistance Act 1996 s 43

Victorian Civil and Administrative Tribunal Act  
1998 Schedule 1, cl 37

Judicial Proceedings Reports Act 1958 s 4(1A)

Judicial Proceedings Reports Act 1958 s  
3(1)(a)

Witness Protection Act 1991 ss 10-10A and 13

# Types of orders

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## *Open Courts Act orders*

- Proceeding suppression orders
- Broad suppression orders
- Closed court orders.

## *Inherent jurisdiction orders*

- Pseudonym Orders

*“Although the principle of open justice is of great importance ... it is not necessarily the whole weight of that principle which must be placed in the scales. The derogation from the principle ... may be very great; or it may not be great; it may be very small. In placing that principle in the scales, the degree of derogation involved in the proposed order is an important matter to considered.”*

# Open Courts Act - General procedural matters

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- 3 Days Notice required (can be waived) – to Court and Parties
- Notification to relevant news media organisation – Courts makes the notifications
- Order needs to specify the information to which the order applies with sufficient particularity to ensure that:
  - order is limited to achieving the purpose of the order
  - Does not apply to more information that is necessary
  - Readily apparent to the terms of the order
- Orders need to be made on evidence, or sufficiently credible information that the grounds are established.
- Reasons required (unless interim order, variation order, revocation or if reasons would render the suppression order in-effective)

# Proceeding suppression orders

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Proceeding Suppression Order – *prohibits or restricts disclosure by publication or otherwise or a report of the whole or any part of the proceeding, or information derived from a proceeding.*

What is a proceeding ? Criminal or Civil proceeding (Section 3 OCA.)

- Criminal proceeding now involves everything from charge onwards
- Extends beyond the resolution of the proceeding to ‘information derived from a proceeding.’ (Section 17(b) OCA)

## Broad suppression order

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Broad Suppression Orders are orders *restricting, prohibiting or restraining the disclosure of specified material by publication or otherwise.*

- Aimed at specific material – (compared with Proceeding Suppression Order – which is the reports of the proceeding and pseudonym orders which go to identity)
- A broad suppression order must not be made in respect of information which could be the subject of a proceeding suppression order (*Open Courts Act s 24*).
- For Supreme Court (can also extend to already published information) – i.e. take down order. It is likely that this also extends to the Magistrates Court and County Court

# Closed Court order

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Closed Court orders are orders that require the whole or any part of a proceeding to be heard in closed court or closed tribunal; or limit those persons or classes of persons who may be present during the whole or any part of a proceeding

- The common law power to close court remain unaffected by the passing of the OCA (OCA 29).
- Legislation and judgment suggest that this should be the option of last resort.
- A closed court order must be necessary to prevent a real and substantial risk of prejudice to the administration of justice ‘that cannot be prevented by other reasonably available means’, such as ‘making a proceeding suppression order’. The implication is that proceeding suppression orders impinge less significantly on the open justice principle. (OCA s 30(2)(a))

# Pseudonym orders

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- A ‘pseudonym order’ is an order which obscures the identity of a person in court documents and/or hearings.
- Preserved under the OCA
- Provides a minimal interference with the open justice principle

*“When one has an order for trial in camera, all the public and all the press are evicted at one fell swoop and the entire supervision by the public is gone. Where one has a hearing which is open, but where the names of the witnesses are withheld, virtually all the desirable features of having the public present are to be seen.”*

*Socialist Working Printers & Publishers Ltd (1957) 1 QB 637*

- normal rule of our courts is that justice is administered in a court open to the public where the names of parties are openly revealed. Names are important

# Interim order

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Interim orders can be made without determining the merits of the application but will only have effect until the substantive application is determined or the interim order is revoked by a court or tribunal (s 20(2)-(3)).

- An interim orders may be made where an application is made for a proceeding suppression order (*Open Courts Act* s 20(1)).
- If an interim order is made, the court or tribunal must determine the substantive application urgently (*Open Courts Act* s 20(4)).



# Grounds

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- A court or tribunal cannot make a suppression order **unless** it is satisfied that a ground – being a condition or set of conditions – is made out.
- The *Open Courts Act* sets out grounds that courts and tribunals **may** rely on to make suppression and closed court orders, including five major statutory grounds and several court or tribunal-specific grounds (OCA ss 18(1), 30(2))
- For Broad Suppression orders common law grounds still operate. OCA grounds provided a good guide

## Grounds (summary)

	<b>Proceedings Suppression Order</b>	<b>Broad Suppression Order</b>	<b>Closed Court Order</b>
<b>Supreme Court</b>	5 major statutory grounds: <i>Open Courts Act s 18(1)</i>	Common law administration of justice ground	5 major statutory grounds: <i>Open Courts Act s 30(2)</i>
<b>County Court</b>	5 major statutory grounds: <i>Open Courts Act s 18(1)</i>	Common law administration of justice ground	5 major statutory grounds: <i>Open Courts Act s 30(2)</i>
<b>Magistrates' Court</b>	5 major statutory grounds: <i>Open Courts Act s 18(1)</i>	2 Magistrates' Court-specific grounds: <i>Open Courts Act s 26</i>	5 major statutory grounds: <i>Open Courts Act s 30(2)</i>
<b>VCAT</b>	5 major statutory grounds + 2 VCAT-specific grounds: <i>Open Courts Act ss 18(1)(f) and 30(2)(f)</i>	No grounds	5 major statutory grounds + 2 VCAT-specific grounds: <i>Open Courts Act ss 18(1)(f) and 30(2)(f)</i>
<b>Coroners Court</b>	2 Coroners Court-specific grounds: <i>Open Courts Act s 18(2)</i>	No grounds	1 Coroners Court-specific ground: <i>Open Courts Act s 30(3)</i>
<b>Children's Court</b>	Same as Magistrates' Court pursuant to <i>Children, Youth and Families Act 2005 s 528(1)</i>		

# Grounds – requirement of necessity

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All statutory grounds reflect the common-law position that the order must be **necessary** to achieve the particular objective.

- Necessity is a high threshold.
- Necessary does not mean ‘necessary or essential for the proceedings to continue’
- What is necessary will depend on the ground relied upon.
- What is necessary does not involve balancing competing interests.
- Necessity must be reasonable demonstrated on the available evidence.
- Mere embarrassment, shame and humiliation do not amount to necessity
- Court should not make futile or unenforceable orders
- Order must do no more than necessary

# Grounds – Statutory and common law

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1. 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;
2. Orders necessary to prevent prejudice to the interests of the Commonwealth, State or Territory in relation to national or international security.
3. Order is necessary to protect the safety of any person;
4. 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.

## **VCAT**

- Avoid publication of orders made under Section 53 or 54 of the VCAT Act (cabinet documents or Crown privilege); or
- For any other reasons in the interests of justice

## **Coroners Court**

- Likely to prejudice fair trial; or
- contrary to public interest.

# Key hints and practical takeaways

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- Plan ahead
- Redaction may render proceeding suppression orders unnecessary
- Consider how necessary the information is – can it be excluded by other means, earlier stages.
- Public interest immunity claims are hard – the broader, the harder – aim carefully
- Aim for the minimum restriction you feasibly can – narrow focus increases chance of success
- Often the Court will assist if you engage with them intelligently
- Engaging with your opponents (or other parties) can often result in an easier application.
- Focus on establishing the necessity of the order – usually the rest will follow.
- Be practical – think of the justice and its needs

# Q&A – Your Russell Kennedy Contacts

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