Open Justice and Closed Courts

From Fairfax to Fair Work

Publicity is the very soul of justice … without publicity, all other checks are fruitless.

— Jeremy Bentham[1]

Open justice lies at the heart of the Australian court system. The principle has been variously described as 'immutable',[2] an 'essential aspect' of judicial character[3] and 'the best security for the pure, impartial and efficient administration of justice'.[4]

Unsurprisingly, the concept has a variety of meanings. At base, it requires that court proceedings and associated documents be physically accessible to the general public. Yet perhaps more importantly, especially as most people rarely, if ever, are inclined to attend court as spectators,[5] open justice entails media access to courtroom hearings so that such reporting can be disseminated to a larger audience.

This principle is not, however, absolute. As with many fundamental legal principles, open justice is often at tension with well-meaning exceptions. Just as the administration of justice normally requires litigation to occur in the open, so may it occasionally necessitate closed hearings in cases of confidential information, child-related matters and where issues of national security arise. While these exceptions are 'strictly defined',[6] common law and statute make allowances for private proceedings or the issuance of various orders to a similar effect.

For example, s 37AG of the *Federal Court of Australia Act 1976* (Cth) provides several grounds for the Court to make non-publication or suppression orders. While it 'must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice',[7] orders can be made when necessary, among other things, to prevent prejudice to the administration of justice, to protect national security related government interests and to protect the safety of any person. Similar powers exist at common law, and the legislation expressly does not affect those powers.[8]

Although the *Federal Court Act* provides little guidance as to determining between these various competing principles, case law offers 'necessity' as a tool. This test prescribes that a departure from open justice will only be permitted if it is 'really necessary to secure the proper administration of justice'.[9] In *Hogan v Australian Crime Commission*, a decision dealing with the previous incarnation of the Federal Court's suppression powers, the High Court added that it must be more than 'convenient, reasonable or sensible, or to serve some notion of the public interest'.[10] As the Victorian bench book bluntly puts it, 'necessity is a high threshold'.[11]

The test does not, however, contemplate some sort of balancing act between the interests of open justice and justifications for the relevant exception. This point was made clear in *Hogan*: if a suppression order is necessary, it will be granted; if it is not necessary, it will not.[12]

Recent litigation amongst the Rinehart family drew out some of these principles. Beginning in late 2011, mining magnate Gina Rinehart launched a barrage of applications for suppression orders in a litigious feud with her children over control of the family trust.[13] Most of these orders were sought under the *Court Suppression and Non-Publication Orders Act 2010* (NSW), legislation almost identical to the relevant sections of the *Federal Court of Australia Act*.

In the initial proceedings and on appeal before a single judge of the NSW Court of Appeal, Rinehart successfully suppressed information about pleadings, evidence, argument and relief claimed. At first instance, Brereton J was satisfied that publication would 'negate the purpose of the confidentiality provisions in the [disputed] Deed', and was further of the belief that 'the public interest in open justice may attract less weight where private issues and interests are concerned'.[14] Tobias AJA upheld this reasoning.[15]

The full bench of the Court of Appeal, however, disagreed, with Bathurst CJ and McColl JA finding that Tobias AJA had erred in several respects.[16] In their view, the lower courts had given too much weight to preserving the effectiveness of the deed. Bearing in mind 'the requirement to treat open justice as "a primary objective"' and that 'the proper conduct of trustees is a matter which warrants close public scrutiny',[17] the full bench held that the test of necessity was not fulfilled. As the judges said, '[i]t is the price of open justice that allegations about individuals are aired in open court.'[18] Special leave to appeal that decision was refused by the High Court.

These setbacks have not deterred Ms Rinehart, though, who continues to seek suppression orders during the course of her spiralling litigation. In November, Jacobson J of the Federal Court revoked an interim suppression order granted to her because, among other things, the application was not distinguishable from that rejected by the Court of Appeal.[19]

In the employment law context, the powers of the Federal Court outlined above are

applicable. Moreover, sections 593(3) and 594 of the *Fair Work Act 2009* (Cth) (the *Act*) allow the Fair Work Commission to make a variety of orders if it is 'satisfied that it is desirable to do so because of the confidential nature of any evidence', or 'for any other reason'.

These powers extend to issuing orders:

» that all or part of the hearing is to be held in private;

» about who may be present at the hearing; and

» prohibiting or restricting the publication of evidence, names and addresses of persons appearing, relevant documents, and the whole or any part of its decisions in relation to the matter.

Recent decisions regarding confidentiality orders and de-identification provide interesting insight into the Commission's approach,[20] even though it, as a tribunal rather than court, is not so strictly bound by the common law principles.

In *Corfield*, the Commission held that 'the presumption [in the *Act*] is that a hearing will be conducted in public'.[21] Considering an application to de-identify the parties in its anti-bullying jurisdiction, Commissioner Bissett observed that 'the principle of open justice applies to the Commission just as much [as] to the courts'.[22] Accordingly, the statutory exceptions 'should not be seen to distract from the application of the principle in general'.[23]

In *Hankin*,[24] meanwhile, the employer respondent sought confidentiality orders that the hearing be conducted in private, names and addresses of attendees at the hearing not be published and that the decision be 'anonymised'.

Each case demonstrates that issues of open justice have a particular relevance in the employment context, where parties may desire, for whatever reason, to keep proceedings behind closed doors. Industrial relations conflict can involve 'possible serious embarrassment and unwarranted damage' to reputation,[25] or can interfere 'in what is essentially a private and confidential matter … [in a manner] not conducive to the good governance' of the employer.[26]

Yet in both cases referred to above, such arguments failed to convince the Commission that trampling over open justice was warranted. While the wording of the *Act* may not stress the concept's importance to the same extent as the *Federal Court Act*, neither Commissioner was prepared to ignore that 'the paramount consideration … remains the principle of open justice'.[27]

To this end, both decisions concluded that 'mere embarrassment, distress or damage by publicity is not a sufficient basis to grant such an application'.[28] This conclusion drew from a long line of cases, starting with the 1913 English case of *Scott v Scott*,[29] where the Earl of Halsbury referred to an eighteenth century treatise arguing that hearings must be held 'publicly and in open view'.[30]

Commissioner Bissett then turned to *John Fairfax Group Pty Ltd (Receivers and Managers Appointed) v Local Court of NSW*,[31] where, almost 80 years after *Scott*, Kirby P observed:

> It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of courts, or the issue of suppression orders in their various alternative forms.

Following these authorities, the Commission in both *Corfield* and *Hankin* held that 'embarrassment, distress or damage by publicity will not, of themselves, provide a sufficient basis for making such orders'.[32] This was particularly so because, as noted in the *Hankin*, '[t]he potential embarrassment and damage raised by the Respondents is not unique to the circumstances of this matter or to any of the 37,000 other applications made to the Commission each year'.[33]

In 2006, legal commentator Richard Ackland complained that: [t]he Courts are singularly happy to hand out suppression orders, like lollies to children. While chief justices bemoan the trend, others further down the judicial food chain are not holding back.'[34]

The anti-bullying cases of *Hankin* and *Corfield* suggest that, at least in the Fair Work Commission context, this trend may be slowing. While evidence indicates that it may be continuing at pace elsewhere — 1501 suppression orders were made by Victorian courts over a five-year period[35] — a body not (at least in theory) so beholden to core judicial norms has nevertheless erred on the side of caution when eroding a fundamental principle.

Both cases may seem relatively trivial, and concerned allegations of bullying in relatively small private sector workplaces; hardly the stuff to particularly excite the general public, even in the locality of the workplaces. It is likely that little, if any, community or media umbrage would have followed had either Commissioner decided otherwise and granted the suppression application.

However, death to open justice may come from a thousand cuts. Last June, former Victorian Supreme Court judge Phillip Cummins delivered a paper entitled 'Open Courts: Who Guards the Guardians?' to the Rule of Law Institute.[36] Quoting *Scott* he argued that, '[t]here is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves…we need to be astute to this inherent tendency of judicial method'.[37]

In the meantime, wealthy litigants will likely persist in seeking suppression orders, and courts will grapple with challenging normative dilemmas. Although it did not appear disposed to reconsidering these issues in the face of Ms Rinehart's special leave application, legislative changes since *Hogan* incline the High Court to consider the issue in due course.

John Wilson, Managing Legal Director,
& Kieran Pender, Law Clerk,
Bradley Allen Love

Endnotes

1 Jeremy Bentham, *The Works of Jeremy Bentham* (William Tait, 1843) vol 4, 316–7.

2 Enid Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2013) 251.

3 *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

4 *Scott v Scott* [1913] AC 417, 463 (Lord Atkinson).

5 Miiko Kumar, 'Keeping Mum: Suppression and Stays in the Rinehart Family Dispute' (2012) 10 *Macquarie Law Journal* 23, 24.

6 *R v Tait* [1979] 24 ALR 473, 487.

7 *Federal Court of Australia Act 1976* (Cth) s 37AE.

8 Ibid s 37AB.

9 *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465, 477 (McHugh JA).

10 [2010] 240 CLR 651, 664 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*Hogan*').

11 Judicial College of Victoria, *Necessity is a High Threshold* (1 December 2013) Open Courts Bench Book.

12 See Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671, 675–6.

13 Kumar, above n 5, 29–37.

14 *Welker v Rinehart* [2011] NSWSC 1094 (13 September 2011) [16], [17].

15 *Rinehart v Welker* [2011] NSWCA 345 (31 October 2011).

16 *Rinehart v Welker* [2011] NSWCA 403 (19 September 2011) [48], [56].

17 Ibid [52], [55].

18 Ibid [55].

19 *Bianca Hope Rinehart v Georgina Hope Rinehart* [2014] FCA 1241 (19 November 2014) [94].

20 *Justin Corfield* [2014] FWC 4887 (21 July 2014) ('*Corfield*'); *Peter Hankin v Plumbers Supplies Co-Operative Ltd* [2014] FWC 8402 (1 December 2014) ('*Hankin*').

21 [2014] FWC 4887 (21 July 2014) [20].

22 Ibid [21].

23 Ibid [21].

24 [2014] FWC 8402 (1 December 2014).

25 Ibid [24].

26 *Corfield* [2014] FWC 4887 (21 July 2014) [4].

27 Ibid [25], quoting *Day v Smidmore (No 2)* (2005) 149 IR 80.

28 *Corfield* [2014] FWC 4887 (21 July 2014) [32]; *Hankin* [2014] FWC 8402 (1 December 2014) [25].

29 *Scott v Scott* [1913] AC 417 ('*Scott*'); *Corfield* [2014] FWC 4887 (21 July 2014) [24].

30 [1913] AC 417, 441.

31 [1991] 26 NSWLR 131, 142.

32 *Corfield* [2014] FWC 4887 (21 July 2014) [26], quoting *Day v Smidmore (No 2)* (2005) 149 IR 80.

33 *Hankin* [2014] FWC 8402 (1 December 2014) [24].

34 Richard Ackland, 'You Wouldn't Read About It — Not That You Can', *The Sydney Morning Herald* (online), 27 January 2006, quoted in Andrew Kenyon, 'Justice Seen to be Done: Suppression Orders in Law and Practice' (Paper presented at Judicial Conference of Australia, Canberra, 6 October 2006) 2.

35 Bosland and Bagnall, above n 12, 679.

36 Phillip Cummins, 'Open Courts: Who Guards the Guardians?' (Justice Open and Shut Seminar, Rule of Law Institute, Sydney, 4 June 2014).

37 *Scott v Scott* [1913] AC 417, 477–8 (Lord Shaw); ibid 2.