Striking the balance

Victoria's Open Courts Act 2013

THE *OPEN COURTS ACT* 2013 (VIC), WHICH CAME INTO EFFECT ON 1 DECEMBER 2013, CONTAINS NEW RULES GOVERNING SUPPRESSION ORDERS AND CLOSED COURT ORDERS. THIS ARTICLE CANVASSES THE HISTORY OF THE ACT AND THE CHANGES IT MAKES TO VICTORIA'S SUPPRESSION AND CLOSED COURT ORDERS REGIME, AND RAISES SOME CONSIDERATIONS FOR EVALUATING ITS MERITS.

BY CAMERON CHARNLEY

The *Open Courts Act* 2013 (Vic) (the Act),[1] which came into effect on 1 December 2013, has implications for judicial stakeholders: for litigants and practitioners subject to proceedings in which a suppression order or closed court order may be made; for the Bench wishing to uphold particular values enshrined in the judiciary; and for a general public interested in a transparent system of justice. It has been framed in accordance with model legislation approved by the Standing Committee of Attorneys-General in 2010. This legislation, the *Court Suppression and Non-publication Orders Bill* 2010 (NSW), was drafted pursuant to a report published by the New South Wales Attorney-General's Department in June 2008, seeking to harmonise a number of legislative sources empowering the judiciary to make suppression orders and closed court orders.[2] The Victorian Act largely adopts the wording of the model legislation, but with notable differences as this article will discuss.

KEY PREMISES

After setting out purposive and definitional matters, Part 1 of the Act outlines two key premises on which it is to operate. The first, featured in s4, is a "presumption in favour of disclosure": the Act requires a court or tribunal to adopt this presumption when determining whether to make a suppression order or closed court order. This presumption operates "[t]o strengthen and promote principles of open justice and free communication of information"(s4).

The second premise is found in a group of neighbouring provisions, ss5 and 8, which address the specific impact of the Act on existing laws under common law and statute. In particular:

- Section 5 abrogates the common law basis for making an order to prohibit or limit publication of material in connection with a proceeding, though the Supreme Court's inherent jurisdiction remains on foot (s5(1)); and
- Section 8 lists, non-exhaustively, existing statutes which are not affected by the operation of the Act.

GENERAL PROVISIONS

Part 2 of the Act contains general provisions for granting suppression orders. Section 10 requires an applicant for a suppression order made pursuant to the Act to give three business days notice of its application both to the court or tribunal from which the order is sought and to the parties in the proceeding. Section 10(3) permits a court or tribunal to hear an application for a suppression order notwithstanding the absence of such notice where there is "good reason" for lack of notice, or "in the interests of justice" to do so.

Section 11 requires a court or tribunal, on receiving notice pursuant to s10, to "take reasonable steps" to have "any relevant news media organisation" notified of the suppression order application.

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Section 12 requires that orders (other than interim orders) must have a duration either specified at the time of making the order or referable to a particular future event. The overarching requirement, in s12(4), is that no suppression order must exist for longer than the duration "reasonably necessary to achieve the purpose for which it is made".

The limiting effect of s12(4) is complemented by s13, which seeks to elucidate the scope of information to which the order applies. A court or tribunal, in framing an order, must articulate the purpose for which the order is made and confine the operation of the order to achieving that particular purpose (s13(2)(a)). Section 15 permits a court or tribunal to review a suppression order it has made.

PROCEEDING SUPPRESSION ORDERS

Part 3 contains provisions relating to proceeding suppression orders – that is orders restricting publication or otherwise of a report pertaining to a proceeding or "any information derived from a proceeding" (s17(b)). Section 18(1) provides exhaustively the grounds on which a court or tribunal may make a proceeding suppression order. In making an order the court or tribunal must be satisfied the order is necessary in light of any of the following:

- "to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means";
- "to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security";
- "to protect the safety of any person";
- "to avoid causing undue distress or embarrassment to a complainant or witness in any criminal proceeding involving a sex offence or a family violence offence"; or
- "to avoid causing undue distress or embarrassment to a child who is a witness to a criminal proceeding".

Separate grounds exist for the Coroners Court in s18(2), and further grounds for the Victorian Civil and Administrative Tribunal (VCAT) in s18(1)(f). In the context of VCAT hearing matters involving protected information, the Act does not operate to the extent that ss150C and 150D of the *Private Security Act* 2004 (Vic) take priority (s53). These provisions permit a hearing or decision of VCAT in relation to an application for review to be held in private if the chief commissioner informs VCAT that the review concerns protected information, and VCAT sees fit.

The factors to be considered by a court or tribunal in making a proceeding suppression order replace those in s19 of the *Supreme Court Act* 1986 (Vic) (SCA), s80AA of the *County Court Act* 1958 (Vic) (CCA), s126 of the *Magistrates Court Act* 1989 (Vic) (MCA), and s101 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCATA). The grounds for making a suppression order in these statutes were framed in terms more general than in the Act, and the Act requires stronger justification for the granting of suppression orders (exemplified, for example, by the addition of the "real and substantial risk" threshold in s18(1)(a), a formulation of the judiciary).[3] Moreover, the Act does not contemplate offence to "public decency or morality" as a factor for consideration in the making of a suppression or closed court order, as existed in each of the SCA, CCA and VCATA.

In further contrast to the court-based statutes, two additional grounds that a court or tribunal must consider in determining whether to make a proceeding suppression order are found in ss18(1)(d) and (e) of the Act. The latter stipulates the need "to avoid causing undue distress or embarrassment to a child who is a witness to a criminal proceeding". The former expands the existing grounds regarding prevention of undue distress or embarrassment in sexual offence proceedings to now cover "family violence offence" proceedings, and modifies the persons to whom the undue distress or embarrassment might occur.[4] Neither of these grounds was contemplated in the New South Wales model legislation, nor do Parliament's explanatory documents address their inclusion.

Unlike the New South Wales model legislation, the Act does not cite "public interest" in open justice as an overarching consideration or as a specific factor for a court or tribunal to consider in making a suppression order.[5] Parliament considers public interest a "poorly defined" expression in this context.[6] Arguably, the articulation of "public interest" does not permit a court "to act upon its whim",[7] and it should not be confused with the public's curiosity.[8] By excluding it as a consideration, the Act may reduce the likelihood of the judiciary, in the course of determining whether to make an order, making the potentially difficult inquiry into what might constitute the relevant public interest.

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INTERIM SUPPRESSION ORDERS

Section 20 contains rules in relation to the making of an interim suppression order. Sections 20(3) and (4) serve to limit the duration of an interim order, with s20(4) requiring a court or tribunal to address, "as a matter of urgency", the substantive application for a proceeding suppression order at hand.

BROAD SUPPRESSION ORDERS

Part 4 of the Act contains provisions relating to broad suppression orders. Although not defined in the Act, s24 provides that a broad suppression order is not to apply to any information otherwise capable of being subject to a proceeding suppression order.

In relation to the County Court, s25 vests in the Court "the same jurisdiction . . . as the Supreme Court has and may exercise in respect of a criminal proceeding" insofar as it may grant an injunction "to ensure the fair and proper conduct of the proceeding" (s25(1)) and can be exercised "on such terms and conditions as the [County] Court thinks just" (s25(2)). This provision effectively maintains the operation of ss36A(3)-(5) of the CCA, provisions repealed pursuant to the Act.

Section 26 grants the Magistrates' Court a broad power to make orders for the prohibition of material relevant to a proceeding where necessary to prevent "prejudice [to] the administration of justice" (s26(1)(a)) or where any person might otherwise be endangered.

Section 21(2) permits both proceeding and interim suppression orders to apply outside the jurisdiction in which they are made, though only to the extent necessary (s21(3)). Similar provisions operate in the context of broad suppression orders made by the Magistrates' Court (ss26(3) and (4)). This clarification as to the territorial operation of orders prevents the kind of situation that has arisen, for example, in the context of s126 of the MCA, where the Supreme Court has held that Parliament did not intend for orders made pursuant to that provision to extend to conduct outside Victoria.[9]

CLOSED COURT ORDERS

The making of closed court orders is governed by Part 5 of the Act. Similar to the "presumption in favour of disclosure" in s4, s28 states that "[t]o strengthen and promote the principle of open justice, there is a presumption in favour of hearing a proceeding in open court". Section 30 sets out the powers of a court or tribunal to order that a proceeding be heard partly or entirely in closed court or tribunal. Mirroring the grounds under s18(2) to which a court or tribunal is to have consideration when making a suppression order, s30(2) provides substantially the same grounds in the context of a court or tribunal making a closed court order.

POTENTIAL IMPACT OF THE ACT

The vitality of open justice

Because the Act concerns the restriction by courts and tribunals of the publication of information, it is natural to scrutinise the Act in light of the principle of open justice. Parliament has stated that the Act seeks to bolster "the primacy of open justice and the free communication of information in relation to proceedings".[10] This "primacy" is edified in the Act's key presumption, discussed above. In framing principles for the interpretation of legislation contemplating the open-court principle, French CJ in *Hogan v Hinch* stated that ". . . a statute which affects the open-court principle, even on a discretionary basis, should generally be construed . . . so as to minimise its intrusion on that principle".[11] The views of both Parliament and the judiciary suggest that the Act and its interpretation support the principle of open justice.

The second reading speech for the *Open Courts Bill* 2013 (Vic) states that open justice helps to hold those in contravention of the law accountable to the judiciary and to the community at large.[12] It also arguably facilitates a healthy discourse between the judiciary and the public insofar as the public may be able to better understand the law and be given the opportunity to critique it.[13] In the public's absence, the media has an important function in informing the public of the nature and substance of court proceedings.[14]

A balancing act

Notwithstanding its importance, open justice is not unfettered or absolute.[15] According to the High Court, the degree to which the open-court principle is to be given precedence depends on the facts and circumstances of the case at hand, as "[t]he character of the proceedings and the nature of the function conferred upon the court may . . . qualify the application of the open-court principle".[16]

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The public interest must be balanced against other competing interests[17] such as those of parties to proceedings and those of the media. In extreme cases, extensive publicity may frustrate the right to a fair trial.[18] The Act's requirement that the media be notified of an application for an order provides an opportunity for the media to challenge an application,[19] thereby espousing open justice by sustaining the role of the media as both the ear and voice of the public.

Effectiveness and necessity

Notwithstanding the response the Act has made to issues raised by the judiciary, such as clarifying rules as to extraterritoriality, it is unclear to what extent the Act accommodates broader issues. It may be, for example, that in an age of digitally prolific information a new standard of "fairness" is required for proceedings where widespread access to that information can be difficult to control.[20]

Broader criticism of the Act has called into question its ability to change judicial behaviour with respect to the granting of suppression and closed court orders,[21] particularly where the provisions might be seen to merely codify "existing practice".[22] Codification is apparent, for example, in the inclusion of the judiciary's "real and substantial risk" threshold for identifying any potential prejudice to the administration of justice when determining whether to grant a suppression order (s18(1)(a)). Codification may be appropriate, however, as greater transparency with respect to the grounds on which a court or tribunal may grant suppression or closed court orders complements the broader transparency that the Act seeks to promote.

CONCLUSION

Any legislative instrument governing suppression orders or closed court orders inevitably finds itself at the junction of open justice and the right to a fair trial. This Act is no exception. Although the Act clarifies the grounds on which the judiciary may grant such orders, and creates a greater push for courts and tribunals to justify such orders, uncertainties remain as to the extent the Act will be instrumental in facilitating a judicial system that is balanced and ultimately fair with respect to its stakeholders. The Act stands for a commitment by Parliament and the judiciary to support a transparent and balanced suppression and closed court orders regime, and time will reveal its impact on the number and efficacy of suppression and closed court orders in Victoria. ●

CAMERON CHARNLEY is an associate to a judge at the County Court of Victoria. The author would like to thank two anonymous referees for their suggestions.

1. All references to sections in the body of the article refer to the *Open Courts Act* 2013 (Vic) unless otherwise specified.
2. Legislation Review Committee, Parliament of New South Wales, *Legislation Review Digest*, No 15 of 2010, 8 November 2010, 15 [14].
3. *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 473 at 474; see also Explanatory Memorandum, *Open Courts Bill* 2013 (Vic) 7.
4. The term "party" has been replaced with "complainant", to clarify that an accused may not seek a suppression order on grounds of undue distress or embarrassment: see Victoria, *Parliamentary Debates*, Legislative Council, 5 September 2013, 2792-5 (Gordon Rich-Phillips, Assistant Treasurer), 2793.
5. Cf *Court Suppression and Non-publication Orders Bill* 2010 (NSW) ss6 and 8(1)(e).
6. Victoria, *Parliamentary Debates*, Legislative Assembly, 27 June 2013, 12-16 (Robert Clark, Attorney-General), 14.
7. *Hogan v Hinch* (2011) 243 CLR 506 at 540.
8. Bruce Baer Arnold, "Seen to Be Done: Opening Access to Justice in Victoria" (2013), https://theconversation.com/seen-to-be-done-opening-access-to-justice-in-victoria-15620.
9. *R v Nationwide News Pty Ltd* (2008) 22 VR 116.
10. Note 6 above at 13.
11. Note 7 above at 535.
12. Note 6 above at 14.
13. R D Nicholson, "The Courts, the Media and the Community" (1995) 5 *Journal of Judicial Administration* 5, 19.
14. See, eg, Miiko Kumar, "Keeping Mum: Suppression and Stays in the Rinehart Family Dispute" (2013) 10 *Macquarie Law Journal* 23, 24.
15. Note 14 above at 26; see also Andrew T Kenyon, "Not Seeing Justice Done: Suppression Orders in Australian Law and Practice" (2007) 27 *Adelaide Law Review* 279, 283.
16. Note 7 above at 532; see also *News Digital Media Pty Ltd v Fairfax Digital Ltd* [2010] VSCA 51 at [36].
17. Note 7 above at 537.
18. Roxanne Burd, "Is There a Case for Suppression Orders in an Online World?" (2012) 17 *Media and Arts Law Review* 107, 107.
19. Note 6 above at 15; see also Explanatory Memorandum, *Open Courts Bill* 2013 (Vic) 4.
20. Note 18 above at 114.
21. Victoria, *Parliamentary Debates*, Legislative Council, 4 September 2013, 2948 (Martin Pakula).
22. Note 21 above at 2951 (Jane Garrett).