Suppression and non-party access

Part II: The how, when and where of non-party access, by Sandy Dawson and Fiona Roughley

Introduction

In the last edition of *Bar News*, Part I of this article detailed the operation of the statutory law in New South Wales (and proposed federal law to similar effect) relating to non-publication and suppression orders.

Since publication of Part I, the *Access to Justice (Federal Jurisdiction) Amendment Act 2012* has been enacted. That Act has had broad-reaching consequences, for example the repeal of s 52 of the *Federal Court of Australia Act 1976*. That and other changes were addressed in Part I of this article.

This second and final instalment addresses the practicalities of how non-parties may get access to documents in court proceedings where no such suppression or non-publication order is in place. It details what kinds of information may be accessed. Finally, it provides some consideration of the benefits and limitations of the various alternative options available to non-parties.

The context for access

Where material disclosed in open court is not subject to disclosure restrictions (be they by way of suppression, non-publication or confidentiality orders), the practical question for non-parties is how and when that material might be accessed. For a person physically present in the body of the court, what is said is known; what is not known is the voluminous documentary bundles accompanying modern-day litigation and encompassing written evidence, submissions, transcripts and other court documents.

The remainder of this article tracks the various options available and the limitations and considerations appertaining to each.

Obtaining information from a party

One potential source of the material is a party to the proceedings. Although parties are subject to a substantive legal obligation (often referred to as the 'implied undertaking') not to use or disclose documents or information obtained during the proceedings for another purpose except with leave of the court,[1] that principle is subject to numerous qualifications.

First, if the material has been received into evidence, absent a suppression, non-publication or confidentiality order (or other obligation of confidence which continues to attach to that party),[2] the party may disclose the material to a non-party.[3] The same applies where any other material is adduced in court proceedings.[4]

Second, even if the material has not been received into evidence (or indeed it is material not in the nature of evidence, for example pleadings), if it has not been 'obtained' from any other person (ie it is the party's own material) and does not otherwise disclose information obtained from another person in the course of proceedings, a party is at liberty to provide that material to third parties for purposes unconnected with the proceedings. Depending on the circumstances, that party would be wise to consider any attendant risk of defamation proceedings, to which there may no defence of fair report.[5]

Third, material provided voluntarily, that is, absent circumstances of constructive or actual compulsion, is generally understood to be outside the scope of the Harman undertaking, though the approach to what may be classified as circumstances of compulsion appears to be expansive.[6]

Fourth, it is always open to a party to approach the court for an order releasing the party from the implied undertaking. 'Special circumstances' are required, but that does not require something extraordinary; it is sufficient that there be 'good reason' for why the material should be used for the advantage of a party in another piece of litigation or for non-litigious purposes.[7] Relevant considerations include the nature of the document or information, the circumstances under which it came into existence and/or into the hands of the applicant, the attitude for the author and any prejudice the author may sustain, whether the document pre-existed litigation or was created for it and hence expected to enter the public domain, and the likely contribution of the material to achieving justice in the proceedings.[8]

In *Sapphire (SA) Pty Limited (t/a River City Grain) v*

Barry Smith Grains Pty Limited (in liq) [2011] NSWSC 1451 an issue arose as to the use, in arbitral and later appellate proceedings, of material disclosed in other unrelated arbitration proceedings involving one of the parties. The material at issue was a defence, a claimant's rebuttal and two statutory declarations. Applicable trade rules had provided for the confidentiality of any documents exchanged and generated for the purposes of the arbitration and that such documents 'should not be used for any other ulterior purpose'.[9] In a comprehensive analysis of the authorities, Ward J clarified that the implied undertaking applies to material that has not entered the public domain and was made or produced in the course of arbitral proceedings under some form of compulsory process.[10] A confidential arbitration is not a public domain.[11] Further, a statutory declaration or affidavit made simply for the purpose of evidence in a hearing without such compulsion will not necessarily attract the undertaking.[12] However, as with all curial proceedings, even where the undertaking applies, a court will either release the undertaking, or refuse to enjoin a third party's use of the material, if special circumstances exist. In the case of *Sapphire*, those special circumstances included the fact that it would be unfair for a party to be able to complain as to the use of the material in circumstances where, at least on one view, it appeared to contradict evidence put by the same witness on behalf of the same party in other arbitral proceedings.[13]

Obtaining information from the court

There is no common law right for a non-party (or indeed parties) to access a court document held as part of a court record: the principle of open justice is a 'principle, it is not a freestanding right'.[14]

There are marked differences between jurisdictions as to public access to evidence and other documents produced in proceedings. In 2004, the Australian Law Reform Commission drew attention to the variance then extant in its report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98):

> 7.25 The legislation establishing some Australian courts expressly provides for public access to evidence and other documents produced in relation to proceedings in those courts. However, the legislation and court rules vary from jurisdiction to jurisdiction. Some are more detailed than others in specifying the exact documents to which a non-party may be granted access either with or without the leave of the court. In some cases, there is a presumption that access will be given to documents unless the court otherwise orders; in other cases, the opposite applies. Differences also exist in relation to the release of transcripts to non-parties. In some cases, it is sufficient for a non-party to make an application for the transcript; in others, the non-party has to show good or sufficient reasons for requesting the transcript. [citations omitted]

The ALRC recommended that the Standing Committee of Attorneys-General order a review of federal, state and territory legislation and court and tribunal rules in relation to non-party access to evidence and other documents produced in proceedings with a view to developing and promulgating a clear and consistent national policy.[15] That recommendation was not taken up, but the ALRC revisited the matter again in a subsequent report, *For Your Information: Australian Privacy Law and Practice* (ALRC 108). In the intervening four years, various rules of court and/or practice notes had of course changed, but the extent of the inconsistencies between and within jurisdictions remained. Although noting that the different functions by different courts would make inappropriate one set of access rules for all federal courts, the ALRC again came to the view that there is 'merit in promoting consistency in access rules for courts that deal with similar types of cases'. The recommendation that the SCAG undertake an inquiry with a view to developing clear and consistent national policy was reaffirmed and renewed.[16]

The SCAG has not taken up the recommendations of the ALRC. There remains no nationally consistent policy. Indeed, within jurisdictions, different rules apply to different courts and tribunals. That is a matter that affects not only media interests, but researchers, witnesses and other private persons for whom access to particular court records is of significance.

Despite the lack of national reform, various jurisdictions, and some courts have recently made substantial changes to the standard regime for non-party access to documents. The position in New South Wales and in the Federal Court is outlined below.

New South Wales

The combined work of the New South Wales Law Reform Commission,[17] the Supreme Court of New South Wales,[18] and the Attorney General's Department[19] led to the enactment of legislation, the *Court Information Act 2010* (NSW), which was intended to harmonise and standardise the processes and policy for non-party access across all New South Wales courts and tribunals.[20] As set out in s 3 of that Act, its objects are:

(a) to promote consistency in the provision of access to court information across NSW courts,

(b) to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system,

(c) to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of court proceedings,

(d) to ensure that access to court information does not compromise the fair conduct of court proceedings, the administration of justice, or the privacy or safety of participants in court proceedings, by restricting access to certain court information.

The *Court Information Act 2010* was not only intended to standardise access for non-parties, but to expand the circumstances in which access will be granted. As explained by the Hon Michael Veitch in the second reading speech for the bill,

> Clause 5 of the bill gives any member of the public, including victims of crime and the media, an entitlement to access all court information that is classified as open access information. Courts will no longer be able to refuse access to open access information on the grounds that the person seeking access does not have a sufficient or proper interest in the case.

The recognition of an 'entitlement' to access even certain documents is a direct reversal of the common law position.[21] Under the Act, 'open access information', in both civil and criminal proceedings, includes documentation, which commences proceedings, written submissions made by a party to proceedings, statements and affidavits admitted into evidence (including experts reports), and judgments, directions and orders given or made in the proceedings (including a record of conviction in criminal proceedings). The time at which access is to be granted is also clarified and standardised.

The Courts Information Act was in fact intended as part of a two-stage process to consolidate all statutory provisions relating to access to court information into a single statute. Indeed, the CSPO Act was meant to be the second step. However, although the CSPO Act has commenced, the earlier Court Information Act (which received royal assent on 26 May 2010) is still yet to commence. It appears the cause of the sustained delay are operational difficulties, including a question as to who should be responsible for redacting personal identifying information from court information.[22] The New South Wales experience highlights both the merit of consolidation and its practical difficulty.

Unsurprisingly, most applications for access or inspection are made by media organisations for the purpose of reporting the proceedings in question. This is a strong starting point for an application: as Spigelman CJ said in *John Fairfax Publications Pty Ltd v District Court of NSW*[23] '[t]he entitlement of the media to report on court proceedings is a corollary of the right of access to the court by members of the public. Nothing should be done to discourage fair and accurate reporting of proceedings'.

However, in the absence of the Court Information Act commencing, practice and procedure in New South Wales remains governed by various court-specific procedures. For example, in all divisions of the Supreme Court, in the Court of Appeal and in the Court of Criminal Appeal, access to court files by non-parties is currently informed by Practice Note SC Gen 2 'Access to Court Files'. In civil proceedings in the District Court the relevant practice note is Practice Note DC (Civil) 11, 'Access to Court Files by Non-Parties'. In criminal proceedings in the District Court, s 314 of the *Criminal Procedure Act 1986* (NSW) provides that a media representative is 'entitled' to inspect certain documents once proceedings commence 'for the purpose of compiling a fair report of the proceedings for publication'.[24]

In contrast to the provisions of the Court Information Act, the Supreme Court and District Court practice notes provide for a general position that access to material in any proceedings is restricted to parties

except with the leave of the court.[25] Both contain the same guidance that:

> Access will normally be granted to non-parties in respect of:
>
> - pleadings and judgments in proceedings that have been concluded, except in so far as an order has been made that they or portions of them be kept confidential;
> - documents that record what was said or done in open court;
> - material that was admitted into evidence; and
> - information that would have been heard or seen by any person present in open court,
>
> unless the judge or registrar dealing with the application considers that the material or portions of it should be kept confidential. Access to other material will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist.[26]

Information that, although not actually set out in open court by reason of efficient procedure or the application of particular rules of practice, has been taken as read or otherwise influences the action of the judicial officer, is included in the material available to non-parties with the leave of the court.[27] The reference to 'proceedings that have been concluded' in the first bullet point has been taken to refer to proceedings for which the hearing has concluded even if judgment remains reserved.[28] The absence of any reference to concluded proceedings in the remaining three bullet points prima facie permits a grant of access to that material at any time, although in practice a number of considerations will guide whether access is granted. Relevantly, however, in *Hogan v Australian Crime Commission* the High Court indicated, in respect of the former O 46 r 6(3) of the Federal Court Rules, that where file material has been admitted into evidence the interests of open justice are engaged. Where a party can adduce no evidence of apprehended particular or specific harm or damage by disclosure of the material to a non-party seeking access, leave is properly granted to that non-party to inspect documents in the proceedings.[29] Although there are substantial differences between the access regime set out in Order 46, r 6 of the former Federal Court Rules and those that prevail in New South Wales, those differences are not material on this point. In essence, Hogan identifies the nub of the inquiry: What is the unacceptable harm that prejudices the administration of justice if the principle of open justice is followed?

In the Court of Appeal, Supreme Court, and the District Court, the practical means by which a non-party applies for access to material held by the court is by application to the appropriate registrar and using the template attached to the relevant practice note.[30] In practice, applications are often made to the trial judge with varying degrees of success. For example, different approaches are taken not only to whether access ought to be given, but also as to the type of access: although the practice notes contemplate that a grant of access to material will generally permit copies of it to be made,[31] s 314 of the Criminal Procedure Act refers only to an entitlement to 'inspect'. Whealy J's decision in *R (Cth) v Mohamed Ali Elomar (No 3)*,[32] in which media representatives were permitted to film and photograph weaponry which had been admitted into evidence, is a useful guide to a clear and principled approach to the legal and practical issues which arise on such applications, especially in criminal proceedings.

Federal Court

The *Federal Court Rules 2011* made some changes to the access regime that applies to non-parties in that court. Unlike the practice of the New South Wales courts, both the previous rules and their replacement provides an entitlement to access for certain documents (so long as there is no extant confidentiality or non-publication or suppression order) and requires that leave be obtained to inspect others. With the adoption of the *Federal Court Rules 2011*, a non-party is no longer entitled to inspect written submissions,[33] but a party, upon payment of the requisite fee and in the absence of a confidentiality order, is entitled to obtain a copy of the transcript of a proceedings from the court's transcript provider.[34]

As was made clear in *Hogan v Australian Crime Commission*, access to material admitted into evidence, although not expressly dealt with in Rule 2.32, is generally permitted,[35] but where the application by a non-party is not founded upon the principle of open justice, access may be limited.[36]

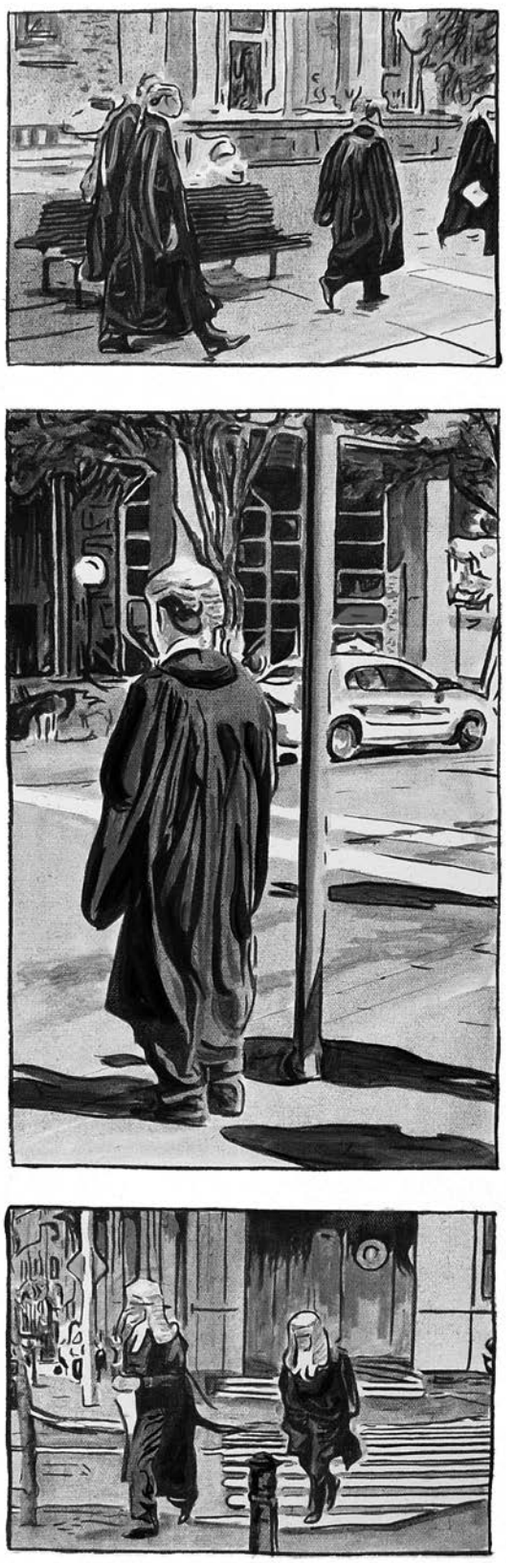
Conclusion

This two-part article has considered the practical means by which parties may apply for information in proceedings to be suppressed or subject to non-publication orders (Part I), and the means by which non-parties may seek access to information relevant to court proceedings (Part II). As is evident from the topics covered, the issues are ones that have been paid a not insignificant amount of legislative and judicial attention over the past few years. Despite the concerted effort for simplification and codification, the law and practice remains something of a rabbit warren for both parties and non-parties.

Endnotes

1. That is, the Harman undertaking: *Home Office v Harman* [1983] 1 AC 280, which is 'now better understood as a substantive obligation of law': *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [3] (Gleeson CJ) and at [96],[105]–[108] (Hayne, Heydon and Crennan JJ); *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; [1995] HCA 19 at 32-33 (Mason J, with whom Dawson and McHugh JJ agreed).
2. See, for example, *Missingham v Shamin* [2012] NSWSC 288 (Ward J) at [55]–[68], [69] (Ward J) concerning the continuing obligations imposed by a Deed of Settlement notwithstanding that the court had reproduced sections of the Deed in an ex tempore judgment. See also *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [172]–[202] concerning the role of continuing obligations of confidence in relation to material disclosed in a confidential arbitration.
3. *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 at [96] (Hayne, Heydon and Crennan JJ).
4. *Home Office v Harman* [1983] 1 AC 280 at 306, 307–308, 319–326; *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10; [1995] HCA 19 at 32–33 (Mason J, with whom Dawson and McHugh JJ agreed); *Moage Ltd v Jagelman and Others* [2002] NSWSC 953 at [12] (Gzell J).
5. See, for example, s 29 of the *Defamation Act 2005* (NSW).
6. Groves M, 'The implied undertaking restricting the use of material obtained during legal proceedings' (2003) 23 *Australian Bar Review* 314.
7. *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283; [2005] FCAFC 3 at [31] (Branson, Sundberg and Allsop JJ).
8. *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283; [2005] FCAFC 3 at [31] (Branson, Sundberg and Allsop JJ), citing *Springfield Nominees Pty Ltd v Bridge Lands Securities Limited* (1992) 38 FCR 217 at 225 (Wilcox J).
9. The arbitration was conducted pursuant to the *Commercial Arbitration Act 1984* (NSW), now repealed, which did not provide for the confidentiality of arbitral proceedings. *The Commercial Arbitration Act 2010* (NSW) makes comprehensive provision for the confidentiality of arbitral proceedings.
10. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [188].
11. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [195].
12. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [188].
13. *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (Ward J) at [197].
14. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29] (Spigelman CJ, Mason P and Beazley JA agreeing).
15. ALRC, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (ALRC 98), 24 June 2004, Recommendation 7-1.
16. ALRC, *For Your Information: Australian Privacy Law and Practice* (ALRC 108), 12 August 2008 at [35.126]–[35.127].
17. New South Wales Law Reform Commission, *Contempt by Publication*, Report 100 (2003), Ch 11.
18. Supreme Court of New South Wales, *Non-Party Access to Court Records—Consultation Paper and Draft Policy* (2004). That consultation process resulted in the court adopting Practice Note SC Gen 2 (17 August 2005) to replace the former Practice Note No. 97 which had previously provided guidance on the court's exercise of the discretion to grant non-party access to court records pursuant to Part 65, r 7 of the then *Supreme Court Rules 1970* (NSW). The current version of Practice Note SC Gen 2 was issued and commenced on 1 March 2006.
19. New South Wales Government Attorney General's Department, *Review of the Policy on Access to Court Information*, Discussion Paper, 2006.
20. *Court Information Bill 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, 18 May 2010.
21. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [29] (Spigelman CJ, Mason P and Beazley JA agreeing).
22. Susannah Moran, 'Court information act verges on farce as horse chases the cart', *The Australian*, 4 November 2011, http://www.theaustralian.com.au/business/legal-affairs/court-information-act-verges-on-farce-as-horse-chases-the-cart/story-e6frg97x-1226185125998 viewed 22 August 2012.
23. (2004) 61 NSWLR 344 at [20] (Handley JA and M W Campbell A-JA agreeing).
24. Those documents are set out in subsection (2): the indictment, court attendance notice or other document commencing the proceedings, witnesses' statements tendered as evidence, brief of evidence, police fact sheet (in the case of a guilty plea), transcripts of evidence and any record of a conviction or an order, and pursuant to subsection (1) may be inspected at any time from 'when the proceedings commence until the expiry of two working days after they are finally disposed of'.

25. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [5]–[6]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [1].
26. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [7]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [2].
27. *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 at [66] (Spigelman CJ, Mason P and Beazley JA agreeing); *Hammond v Scheinberg* (2001) 52 NSWLR 49 at [8].
28. This was the approach taken by the Court of Appeal on an application brought by third-party media interests seeking access to certain appeal books in *Rinehart v Welker* [2012] NSWCA 95 prior to the delivery of reserved judgment: unreported reasons of Registrar Riznyczok, 9 March 2012.
29. (2010) 240 CLR 651 at [41].
30. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [17]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [6].
31. Supreme Court of New South Wales, Practice Note SC Gen 2 (3 January 2006) at [18]; District Court of New South Wales, Practice Note DC (Civil) 11, (9 August 2005) at [7].
32. [2008] NSWSC 1443.
33. *Federal Court Rules 2011,* r 2.32(2); cf Federal Court Rules, O 46, r 6(2)(g).
34. *Federal Court Rules 2011*, r 2.32(5), note 2; cf Federal Court Rules, O 46, r 6(5).
35. See also *Seven Network Ltd v News Ltd* (No 9) (2005) FCA 1934 at [27] (Sackville J); *Australian Competition and Consumer Commission v ABB Transmission & Distribution Ltd (No 3)* [2002] FCA 609 at [7] (Finkelstein J).
36. *Re Universal Music (Australia) Pty Ltd v Sharman Licence Holdings Ltd; Ex parte Merlin BV* [2008] FCA 783 (Jacobson J).



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