Reflections on the Concept of "Open Justice"

Chief Justice Debbie Mortimer*

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1 Thank you for the invitation to speak this evening. My thanks to all of you for taking time out of your busy lives to come and listen, you do me an honour.

2 For reasons specific to some claims of native title in our Court, I offer my respects to the people of the Eastern Kulin Nation, to their ancestors and elders. I thank them for their stewardship over this country for many generations before colonisation, and their determination to continue that stewardship despite colonisation.

3 The origins of this lecture in rule of law themes led me to reflect on **how** courts administer justice, and why that might be a good topic to talk about tonight. Specifically, in 2024, what is this creature "open justice", and what are its characteristics? The problem is with the word "open", because it's too absolute; "open justice" can be used to suggest that without immediate and full disclosure of everything in a proceeding, what a court is doing is "secret justice".[1] And that is just not correct.

4 It's a big topic, with much scholarship and history surrounding it and for this address I will gallop through some aspects. My specific focus is on how the Federal Court, in a contemporary Australian landscape, can remain faithful to the values that sit *behind* the phrase "open justice", rather to the somewhat misunderstood phrase itself. Those values do *not* favour disclosure of everything and anything filed with a court or adduced in evidence. Open justice is not open slather.

5 As many cases have emphasised (although it can get lost in the debate), "the chief object of Courts of justice must be to secure that justice is done".[2] That requires a steady focus on what

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1 Lord Neuberger of Abbotsbury, 'Open Justice Unbound?' (2011) 10(3) *Judicial Review* 259 at 272.

2 *Scott v Scott* [1913] AC 417 at 437 (Viscount Haldane LC), quoted in *DPP (Vic) v Smith* [2024] HCA 32 at [63] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), see also [109]–[110] (Edelman J).

justice requires as between the parties to a proceeding, and more widely.

6 It is important that courts seek to ensure that all members of our community can experience, understand, and discuss how courts go about resolving the disputes that are brought to them, and enforcing the laws that regulate behaviour in our community. This involves the behaviour of individuals, corporations or government.

7 In contemporary times, the Federal Court strives to achieve those objectives with a wider range of tools at its disposal than courts of the past. But whatever tools we use, we are still involved in a balancing exercise.

8 It is that balancing exercise that I want to talk about tonight. I am grateful to other thoughtful commentators who've spoken on this issue. The current Chief Justice of Victoria, Anne Ferguson, spoke in 2019 about the need to revisit our idea of open justice.[3] I agree.

9 Across Australia, a myriad of legislation at state and federal level exists to constrain and regulate how courts implement open justice principles. Many of these are jurisdiction dependent: there is no one size to fit all, and generalisations and sweeping statements can be dangerous in this area.[4] Generalisations risk unfair, and uninformed, criticism of courts and their judges who strive to be faithful to the individual cases and the laws they are dealing with. Absolutist criticism about non-disclosure of court documents also risks undermining community confidence in the courts where there is no justification for the community to lack confidence that courts such as the Federal Court are committed to operating in an open manner.

10 In speaking on this issue, I also want to acknowledge the work of the Federal Court's Media Committee, chaired by Justice Wigney. The establishment of this committee occurred early in my time as Chief Justice. With some of my judicial colleagues, we looked at models in other jurisdictions.[5] The Court's Media Committee comprises external media representatives,

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[3] Chief Justice Ferguson, 'The Changing Nature of Open Justice' (Sir Zelman Cowen Address, *Melbourne University Law Review* Annual Dinner, 19 September 2019) at 3–5. See also Chief Justice Bathurst, '"Something More, Something Less": The Contemporary Meaning of Open Justice' (2019) 38(4) *Communications Law Bulletin* 10.

[4] In some discussions, open justice also tends to be merged with demands for greater openness in other arms of government, to decry expansiveness claims of Cabinet secrecy, commercial-in-confidence protection for government, resistance to whistleblower provisions, the substantive anonymising of government decision making and actions. Other commentators such as Bret Walker SC have contended for greater openness in and by government: Bret Walker, 'The Information that Democracy Needs: The 2018 Whitlam Oration' [2018] (47) *Law Society of NSW Journal* 76.

[5] See, eg, Courts of New Zealand, *Judicial Committees* (Web Page) <https://www.courtsofnz.govt.nz/about-the-judiciary/judicial-committees/#EC> (describing the Media and Courts Committee, currently chaired by Walker J of the High Court of New Zealand).

judges, registrars and Court staff involved in media issues. We see it as a consultative mechanism that I am confident is improving the Court's ability to engage constructively in how we do our work.

11 Discussion about open justice must keep a close eye on the subject matter of litigation. The Federal Court does not operate in some jurisdictions where there is the same level of regular and intense scrutiny of personal and private tragedies and circumstances. My colleagues who work in those jurisdictions are best placed to talk about how they must balance competing interests in their work.

12 In the practice areas of the Federal Court, our judges encounter:

(a) cases where private or personal information is involved—such as Fair Work claims and especially sexual harassment and other interpersonal employment conflicts, bankruptcy, discrimination claims and defamation;

(b) cases where commercially sensitive information is involved—such as commercial and corporations cases, intellectual property, insolvency and regulator work; and

(c) cases where claims are settled—this could be across the above practice areas, and notoriously in recent years, class actions.

13 There may be different values at work in terms of the administration of justice in each kind of case, and thus different balancing exercises.

14 Allow me a few minutes to recap what may be familiar to many of you, but helps to understand where I suggest we move from here.

15 The fundamental feature of trials and exercises of judicial power that we have inherited from the United Kingdom is public attendance, and therefore public scrutiny.[6] This feature dates from a time where trials and exercises of judicial power were mostly oral in form, and obviously involved physical presence; a time where power was concentrated in particular classes, and only in men. What mattered then was not necessarily *universal* understanding and scrutiny, but scrutiny from a section of the public.

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[6] For a summary of the history, see *Richmond Newspapers Inc v Virginia* 448 US 555 at 564–73 (1980) (Burger CJ); *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50–52 (Kirby P), citing Peter Wright, 'The Open Court: The Hallmark of Judicial Proceedings (1947) 25 *Canadian Bar Review* 721.

16 Over time the tradition of courts conducting hearings *in public* was elevated to the status of a legal principle,[7] influencing the development of common law.[8] The vice sought to be avoided was secrecy. Scrutiny was believed to build confidence in a system of justice.

17 Conducting trials where the public could attend was believed to encourage witnesses to give truthful evidence, complete the court record and promote the proper exercise of judicial authority.[9] There were of course no systematic research or studies to demonstrate this; rather this belief arose from expressions of opinion by those (men) who were attending court, or studying particular cases. No doubt those conducting, and advocating the conduct of, hearings in public genuinely aspired to these kinds of objectives; whether the objectives were realised or not is from this historical distance difficult to evaluate.[10] At least in the last two centuries, courts conducting their work in public has likely contributed to a better understanding of how the legal system worked, providing tangible demonstrations of judicial independence and—we want to believe—public confidence and trust in the impartiality and independence of the judiciary as a whole.[11] You'll see in a moment that in contemporary Australia, my view is that these critical objectives can be achieved by a much wider range of approaches by courts than what we traditionally conceive of by using the term "open justice".

18 An early adoption in Australia of the precise term "open justice" rather than "open courts" occurred in *Australian Broadcasting Corporation v* ***Parish*** [1980] ATPR ¶40-153. In that case, the ABC's claim related to the arrangement for tours of international cricket teams to Australia.

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7 As Radin observed with respect to the American colonies, "a traditional feature of English trials, more or less accidental, was carried over into [other] systems, and since it was relatively ancient, was treated with the reverence which so many other elements of the common law received, especially from the lawyers of the community": Max Radin, 'The Right to Public Trial' (1932) 6(3) *Temple Law Quarterly* 381 at 388.

8 See *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50.

9 Matthew Hale, *The History and Analysis of the Common Law of England* (Lawbook Exchange, 2000 [1713]) at 256–8; William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press, 1979 [1768]) bk III at 372–4; Jeremy Bentham, *Rationale of Judicial Evidence: Specially Applied to English Practice* (Hunt and Clarke, 1995 [1827]) vol 1, ch X at 522–4.

10 Radin (n 7) further remarked that "we are justified in asking whether [a public trial] did the prisoner any good or was intended to do him [sic] any good", given the limits on an accused person's ability to prepare for trial and call witnesses: at 383–4.

11 *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at 530 [20] (French CJ reasoning that by sitting in public, court proceedings are subjected "to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts"), quoted in *DPP (Vic) v Smith* [2024] HCA 32 at [62] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *Erceg v Erceg [Publication restrictions]* [2017] 1 NZLR 310; [2016] NZSC 135 at [2] ("transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts"); *Canadian Broadcasting Corporation* v *Named Person* [2024] SCC 21 at [1] ("When justice is rendered in secret … respect for the rule of law is jeopardized and public confidence in the administration of justice may be shaken. The open court principle allows a society to guard against such risks, which erode the very foundations of democracy").

In substance, the ABC contended the commercial agreement unlawfully affected its broadcasting opportunities.

19 Justice Brennan, then a member of the Federal Court, was the trial judge. His Honour declined to grant a suppression order over the commercial agreement, saying the Court's role was not a:

> matter of arranging the procedures of the court to suit the wishes or convenience of the parties before it. It is not their rights which are liable to be trespassed upon, but the rights of the public…
>
> Though the loss of confidentiality will be a serious matter for the respondents, it would be a graver matter to shut out the public from an adequate appreciation of the foundations upon which the case is to be decided.[12]

20 Although his Honour accepted the truthfulness of witnesses about the effect of the loss of confidentiality, Brennan J concluded: "adherence to the principle of open justice in the courtroom in the end prevails. I decline to make an order under s 50."[13]

21 Justice Brennan's refusal of a suppression order was overturned by majority on appeal.[14] Which just goes to show you even the best judges are rolled from time to time. Deane J dissented and placed similar emphasis to Brennan J on open justice.[15]

22 As the *Parish* decision illustrates in then s 50 of the ***F**ederal **C**ourt of **A**ustralia **Act** 1976* (Cth), Parliament was aware of the need to balance access and publication of evidence and documents with appropriate protections from disclosure. The kinds of matters that were coming into this Court—trade practices, intellectual property, commercial and corporations law—inevitably meant that parties were applying for orders that precluded some evidence or information being disclosed at various points in a proceeding.

23 By the time the Federal Court was established in the late 1970s, and decisions such as *Parish* were being determined, the practice of judges doing their work in a public environment was well entrenched.[16] Across the country our Court came to be located in modern buildings that

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[12] *Australian Broadcasting Corporation v Parish* [1980] ATPR ¶40-153 at 42,191.

[13] Ibid at 42,192. Justice Brennan acknowledged that he was borrowing the phrase "open justice within the courtroom" from Lord Diplock: see *Attorney-General v Leveller Magazines Ltd* [1979] AC 440.

[14] *Australian Broadcasting Corporation v Parish* (1980) 29 ALR 228 at 235–7 (Bowen CJ), 244–6 (Franki J).

[15] Ibid at 256–7.

[16] See FCA Act s 17(1). The importance of these practices can be observed from the reasons given by judges in different contexts at that time. See *Russell v Russell* (1976) 134 CLR 495; [1976] HCA 23 at 505 (Barwick CJ), 520 (Gibbs J), 532 (Stephen J); *R v Tait* (1979) 46 FLR 386 at 401–7 (Brennan, Deane and Gallop JJ).

emphasise accessibility, light and openness. That was no accident, but part of a vision about the importance of values of accessibility to the modern Australian justice system.[17]

24 In contemporary Australian courts, including the Federal Court, the media is just one conduit to the community we serve, albeit an important one. These days, the community has much greater direct access to the work of the courts, and we must seek to engage directly with the community to help them better understand our work. This should lead us to reflect on the various ways we can make the Court's work more accessible to the community.[18]

25 Perhaps *accessible justice* is a more fitting term than open justice. *Accessible* justice in the Federal Court includes practices such as using concise statements instead of complicated pleadings; creating online files; developing accessible and digestible judgment summaries; livestreaming trials and appeals; using remote hearing technology where appropriate to conduct hearings and permit members of the public to access hearings; engaging on social media to provide easy access to our website, to our remote hearings, to our livestream and to our online files. Accessible justice in a contemporary Court is more easily achieved by digitising court files, which facilitate many of the practices mentioned above. Accessible justice is also enhanced through community engagement by judges and registrars, not only engagement with the legal profession.[19] I suggest that *accessible justice* is the concept that applies to the new modern information landscape.

26 Closed courts are a rare occurrence in the Federal Court. Our judges do their work in public. However, there is ongoing debate about the use of suppression orders and the rules around access to filed court documents by non-parties.[20] I will explain why, first, suppression orders

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[17] Michael Black, 'The Architecture of Law Courts: How Concepts of Justice – Light, Transparency, Access and Equality – Drove the Design of New and Renovated Courthouses for Federal Courts in Australia' in Kirsty Duncanson and Emma Henderson (eds), *Courthouse Architecture, Design and Social Justice* (Routledge, 2022) 31 at 36–49.

[18] Similar views have been expressed by my colleagues on other courts: see, eg, Justice Gleeson, 'Court Education is Not Just for Lawyers' (Kathleen Burrow Research Institute Lecture, University of Sydney, 5 October 2022); Chief Justice Ferguson (n 3) at 3–5; Chief Justice Bell, 'Truth Decay and its Implications for the Judiciary: An Australian Perspective' (Speech, Durham University, 23–26 April 2024) at [69], [75], [81]. See also Kathy Mack, Sharyn Roach Anleu and Jordan Tutton, 'The Judiciary and the Public: Judicial Perceptions' (2018) 39(1) *Adelaide Law Review* 1 at 24–30 (reporting on interviews conducted with Australian judicial officers).

[19] For example, the Federal Court's forthcoming *Annual Report* records that Perry J participated in an *ABC Radio National* interview about court interpreters, Rofe J and O'Sullivan J each participated in interviews for *The Australian* newspaper, and Feutrill J spoke to high school students about professional career paths.

[20] Just this morning, *The Age* reported on an interim suppression order made in bankruptcy proceedings by a Federal Court registrar so an application could be referred to a duty judge: Ben Grubb and Michaela Whitbourn, 'The Tech Billionaire, the "Beauty Addict" and the Suppression Fight', *The Age* (1 October 2024). It was the suppression order, rather than the underlying controversy between the parties, which was the focus of the

are not as major an aspect of our work as commentary might sometimes suggest and second, why public access to court documents is not as straightforward as you might think.

SUPPRESSION ORDERS AND ACCESS TO COURT RECORDS

27 Let's begin with the fundamentals. Like other courts in this country, the Federal Court operates through an adversarial system. Parties contend for orders and outcomes that accord with the interests they say should prevail in the dispute they bring to the Court. The Court is not conducting a self-initiated inquiry. It is determining a controversy between parties, who have brought it to the Court to decide. The overwhelming majority of suppression orders are made because one party in this adversarial system applies for them to be made.

28 As I have explained, when a judge comes to consider whether or not to make a suppression order as requested, they do not start with a blank slate. They start with whatever framework the Parliament has provided.

29 Today, for the Federal Court that framework is found in ss 17, 37AE, 37AF and 37AG of the FCA Act.[21]

30 Other federal legislation may also confer power to make orders of this kind.[22] For example, s 91X of the *Migration Act 1958* (Cth) is a mandatory provision that requires courts not to publish the names of applicants for protection visas. That is why all proceedings in the Federal Court that concern a person who has applied for a protection visa will have a pseudonym. Outside limited categories such as these, an applicant must apply for name suppression and justify the grounds of the application.[23]

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article. As a post-script, I note the application was listed before the duty judge (Jackman J) at 9.30am on the same day. By 10.10am, Jackman J had delivered ex tempore reasons for making an order suppressing, and prohibiting publication of, portions of two affidavits. That order expires at the end of the first day of the final hearing: *Rogan v White* [2024] FCA 1163.

[21] Section 37AE requires the Court to "take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice." Section 37AF confers the power to "prohibit or restrict the publication or other disclosure" of certain categories of information. Section 37AG(1) provides for four grounds upon which a suppression order may be made. These provisions provide an exception to the general requirement that "the jurisdiction of the Court shall be exercised in open court": s 17(1).

[22] See, eg, *Crimes Act 1914* (Cth) s 15YR (offence to publish identifying information about "vulnerable" people); *Witness Protection Act 1994* (Cth) s 28 (identity of witness protection participant not to be disclosed in court proceedings).

[23] See, eg, *McGinn v Australian Information Commissioner* [2024] FCA 1185 at [54]–[63] (Yates J refusing an application for a pseudonym order); *Youssef v Commissioner of Taxation (De-anonymisation)* [2024] FCA 1033 (Perram J making orders that de-anonymised the proceeding); *Ogawa (formerly Ms PD) v President of the Australian Human Rights Commission (Pseudonym)* (2022) 294 FCR 221; [2022] FCAFC 160 (Rares, Perry and Hespe JJ).

31 Another form of suppression[24] might be said to be evidentiary privileges restricting information that can be adduced in evidence. Examples are legal professional privilege,[25] public interest immunity[26] and journalist privilege.[27] Broadly, these three examples protect core aspects of the lawyer-client relationship; the need for government representatives and officers to be able to communicate candidly and in circumstances where it is appropriate for wider public interest reasons that those communications remain confidential;[28] and the need to protect the identity of people who provide information to journalists under promises of confidence so that the media can fully, accurately and fairly report on matters of public interest. The existence of privileges recognises there may be competing public interests, or competing aspects of the interests of justice, which affect whether information or evidence should be disclosed between parties and from there to the wider public.

32 I mention these privileges only to emphasise the point that community *curiosity*, reflected perhaps in the desire of the media to report on details of a case they consider the community might be interested in or should know about, has never prevailed in any absolute sense. Media and community aspirations to obtain all the juicy details have never operated as some kind of open slather on the disclosure of information in court proceedings.[29] Carefully, methodically, over time, the common law and the parliaments have built up a body of law that seeks to strike a balance between on the one hand being faithful to the general principle of courts doing their work in public, and on the other being faithful to what is fair to litigants, witnesses, and wider third-party interests in the whole context of a particular case, and what facilitates doing justice

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[24] The FCA Act distinguishes between a "non-publication order" and "suppression order": see s 37AA. For convenience, I will refer to both kinds of orders as "suppression orders".

[25] See generally *Daniels Corporation International Pty Ltd v ACCC* (2000) 213 CLR 543; [2002] HCA 49 at 552–3 [9]–[11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (summarising the privilege at common law); *Evidence Act 1995* (Cth) ss 117–126 (providing statutory basis for client legal privilege).

[26] See generally *HT v The Queen* (2019) 269 CLR 403; [2019] HCA 40 at 419–21 [28]–[33] (Kiefel CJ, Bell and Keane JJ), 427–8 [55] (Nettle and Edelman JJ); 431–3 [69]–[74] (Gordon J). See also *Evidence Act 1995* (Cth) s 130.

[27] See generally *Evidence Act 1995* (Cth) s 126K; *Al Muderis v Nine Network Australia Pty Ltd* [2023] FCA 1623 (Bromwich J upholding claim for journalist privilege); *Australian Broadcasting Corporation v Kane (No 2)* (2020) 377 ALR 711; [2020] FCA 133 at [198]–[218] (Abraham J holding that s 126K does not extend to search warrants). For other examples of where the privilege was relied upon, see *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2 at [52], [84], [99] (Besanko J); *Madafferi v Age Co Ltd* (2015) 50 VR 492; [2015] VSC 687 (J Dixon J).

[28] As to the further categories of public interest immunity, and the rationale for them, see generally *DCL22 v Sage* [2022] FCA 1310 at [23]–[34] (Abraham J).

[29] In the context of access to court records, see *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at 667 [41]–[42]; *HT v The Queen* (2019) 269 CLR 403; [2019] HCA 40 at 435 [81] (Gordon J); *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512; [2005] NSWCA 101 at 521 [31] (Spigelman CJ, with whom Mason P and Beazley JA agreed).

between the parties who come to us. Over time, these balances might change as public policy and community expectations change.[30]

33 Rules and principles around disclosure of information filed or adduced in court have always sought to consider what harm might be done by disclosure, and to evaluate how risks of harm ought to be balanced against other interests or values.

34 Most of us who speak or write about the concept of "open justice" are either official participants in the justice system, or observers of it. Thus, it is not *our* story of intimate physical violations, or *our* precarious mental health, or *our* gambling addiction which led to our bankruptcy, nor our own contractual arrangements designed to save *our* business which are at stake. We have no skin in the game. In assessing claims for suppression orders, that kind of objectivity is central. But as in so many areas of the law, before the courts are criticised for suppressing evidence or documents, let us remember that the law operates on the lives of human beings, and in every juicy item where it might be said that this creature "open justice" demands disclosure, there is a human being who may be personally affected by the suppression decisions that courts make.

35 In terms of the Federal Court's statutory provisions about suppression, there has been a lot written about two aspects of these provisions in particular.

36 First, s 37AE refers to "a" primary objective of the administration of justice being to safeguard the public interest in open justice.

37 This is not just a lawyer's point, although, yes, we can be obsessed with single words and the difference between the use of "a" and the use of "the". The use of the indefinite article in s 37AE signals the existence of other objectives of the administration of justice. That is a point made consistently in judicial decisions, but is often overlooked in media commentary.[31]

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[30] See, eg, NSW Law Reform Commission, *Open Justice: Court and Tribunal Information: Access, Disclosure and Publication* (Report No 149, 2022) at 8–11 [1.40]–[1.58], 16 [1.84]–[1.87]; Jemma Holt et al, *Stemming the Unstoppable Tide? An Evaluation of the Role and Operation of 'Suppression Orders' in South Australia* (South Australian Law Reform Institute, 2024) at 33–41, 103–26; Frank Vincent, *Open Court Act Review* (Report, 2017) at [130]–[137]; Chief Justice McLachlin, 'Openness and the Rule of Law' (Annual International Rule of Law Lecture, London, 8 January 2014).

[31] See *Porter v Australian Broadcasting Corporation* [2021] FCA 863 at [83] (Jagot J). For endorsement of Jagot J's remarks regarding the difference between "a" and "the" see, eg, *Lee v Deputy Commissioner of Taxation* (2023) 296 FCR 272; [2023] FCAFC 22 at 291 [83] (Thawley, Stewart and Abraham JJ); *Chan v Commonwealth of Australia as represented by the NDIS Quality and Safeguards Commission (No 2)* [2023] FCA 1538 at [84] (Shariff J); *Deputy Commissioner of Taxation v Wu* [2024] FCA 250 at [35] (Thawley J); *Patterson v Westpac Banking Corporation (No 2)* [2024] FCA 818 at [29] (Raper J).

38 Second, the Court must be persuaded that a suppression order is *necessary* to prevent damage to one of four kinds of interests set out in s 37AG—to remind you, those four interests are prejudice to the administration of justice, national or international security, safety of a person and undue distress or embarrassment of a person in a criminal proceeding involving sexual offences. I will not rehearse all the judicial discussion about what kind of threshold the word "necessary" imposes. There is a general consensus that the burden on a party seeking a suppression order is a "very heavy one".[32]

39 It may be easier to explain what "necessary" *doesn't* mean than what it does. It doesn't mean an order is "convenient, reasonable or sensible" or that serves "some notion of the public interest".[33]

40 The word "necessary" has a sense of unavoidability about it. It might convey a sense of urgency or acuteness. On evaluating the evidence, the Court must be persuaded there is an imperative to suppress filed information or evidence, and be persuaded about how long the filed information or evidence should be suppressed. The length of time for suppression is another overlooked aspect of courts' consideration. The length of time that any suppression order should operate for is another area where the word "necessary" has a lot of work to do. Some suppression orders operate for a very short time.

41 Finally, another critical hallmark of open justice—the giving of reasons for orders made—allows public scrutiny of **why** judges make the choices they do about whether or not to grant a suppression order.

Preliminary research

42 In advance of this lecture, I asked for preliminary research to be undertaken about suppression orders made in the Federal Court in the last financial year.[34] Generally, reasons are given for

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[32] *Computer Interchange Pty Ltd v Microsoft Corporation* (1998) 88 FCR 438 at 442 [16] (Madgwick J), quoted in *Giddings v Australian Information Commissioner* [2017] FCAFC 225 at [25] (Collier, Flick and Charlesworth JJ).

[33] *Hogan v Australian Crime Commission* (2010) 240 CLR 651; [2010] HCA 21 at 664 [30]–[31]; see also *Country Care Group Pty Ltd v DPP (Cth) (No 2)* (2020) 275 FCR 377; [2020] FCAFC 44 at 379 [8]–[9] (Allsop CJ, Wigney and Abraham JJ).

[34] Again, my gratitude to Jordan Tutton for his work on this. Some of the underlying judgment data comes from the thorough work of the Court's National Registrars David Priddle and Stephanie Sanders.

the making of a suppression order,[35] so published judgments provide a reasonable source for a preliminary inquiry.

43 This research may not have captured all orders made, such as where reasons were given ex tempore on transcript only, interim orders were made in Chambers or existing orders were varied in Chambers. On the other side of the ledger, the figures were increased by some double counting: several judgments related to a single proceeding,[36] and some orders modified existing orders.[37] The research also included orders that were very limited in scope,[38] as well as orders that were only in effect for a short time.

44 Thus, readers and listeners should not assume that every one of these orders was wide and of unlimited duration—the opposite is generally the case. As with all statistics, there is a need to take care and not take them too literally. However, I feel confident in being able to give you a general picture about the amount of suppression orders made in the Federal Court, and under what circumstances.

45 The main messages are that the Federal Court does not make many suppression orders, and where it does, many are time limited. The views of third parties wishing to oppose the making of an order are heard, and it can be the case that more limited suppression orders are made than those sought, or orders are made for a more limited time. However, the other main message is that there is no formula applied by our judges and each case very much turns on its own facts. That is how justice works; judges look at the facts and evidence in the case before them.

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[35] See *Hogan v Hinch* (2011) 243 CLR 506; [2011] HCA 4 at 540 [42] (French CJ); see also *R v Tait* (1979) 46 FLR 386 at 407 (Brennan, Deane and Gallop JJ).

[36] See, eg, *Connelly as Receiver and Manager of "Digital Currency Assets" v NGS Crypto Pty Ltd* [2024] FCA 618 (Collier ACJ); *Connelly as Receiver and Manager of "Digital Currency Assets" v NGS Crypto Pty Ltd (No 2)* [2024] FCA 697 (Meagher J).

[37] See, eg, *Vehicle Monitoring Systems Pty Ltd v SARB Management Group Pty Ltd (No 10)* [2023] FCA 1214 at [23] (Besanko J); *DIZ18 (by her litigation representative DJA18) (No 3) v Minister for Home Affairs* [2023] FCA 1350 (Murphy J).

[38] See, eg, *Gulliver v Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane (No 2)* [2023] FCA 1039 at [2]–[3] (Logan J limiting access to the names of children who were not parties); *ASIC v Ferratum Australia Pty Ltd (in liq)* [2023] FCA 1043 at [57]–[67] (Kennett J ordering non-publication of personal information of non-parties).

How many orders were made?

46 In a nutshell, in the more than 1,830 Federal Court judgments published online in the last financial year (2023–24), a suppression order was recorded as being made in 91 judgments (which is about 5% of all judgments).[39]

In what kinds of proceedings were orders made?

47 Of the judgments where a suppression order was made, more than half related to proceedings in the Court's *Commercial and Corporations* practice area.[40] To an extent, this reflects the proportion of work undertaken by this Court in that area of law.[41]

48 Just over 10% (or 10) of judgments with suppression orders related to class action proceedings.[42] The remaining 30% (or 27) of judgments with suppression orders were spread across the practice areas of *Administrative and Constitutional Law & Human Rights*, *Intellectual Property*, *Migration*, *Taxation*, *Employment and Industrial Relations*, *Federal Crime* and *Other Federal Jurisdiction* (ie negligence and defamation).

Why were suppression orders made?

49 In 84 of the 91 judgments, orders were made solely on the ground that an order was "necessary to prevent prejudice to the proper administration of justice". The judgments show that prejudice to the proper administration of justice might arise in a diversity of ways; some common examples follow.

50 About two-fifths (more than 30) of the judgments concerned applications by administrators, liquidators, or receivers or managers for orders to facilitate the winding up (or external administration) of the company. In seeking these orders, applicants would often rely upon evidence that, if disclosed to a wider audience, may undermine the purpose of the winding up or administration. One common category of this kind of case arises where business assets are

[39] For wider context, judges finalised 2,381 matters across the year. Proceedings might be finalised without a published judgment – for example, where they are settled.

[40] The *Commercial and Corporations* practice area encompasses six "sub-areas". The *Corporations and Corporate Insolvency* sub-area on its own accounted for 43% of all judgments involving suppression orders.

[41] In 2023–24, more than 40% of judgments were published in the *Commercial and Corporations* practice area.

[42] Although "class actions" do not have their own practice area, they were counted separately from other practice areas because of their distinctive features compared to other proceedings.

to be sold or shares are to be transferred.[43] In court proceedings, a party may rely on evidence that discloses information such as purchaser identities, any "floor" price, the number of offers received and the size of those offers. Sometimes disclosing that information may prejudice creditors' interests by undermining active negotiations or, if future negotiations occur, disadvantaging the applicant. Other examples arise where liquidators have sought "shelf orders" to extend the time within which they may seek orders voiding certain transactions by the company, or have sought orders regarding funding agreements. Sometimes evidence regarding a liquidator's funding arrangements or active investigations might, if known to others, disadvantage the liquidator when prosecuting future claims.[44] Often the suppression orders in these cases will expire upon the finalisation of the liquidation or administration of the company.

51 Different judges may take different approaches, and approaches may vary between courts.[45] Some judges may require applicants to do a lot of work upfront to redact documents and only suppress the redacted text; some judges might accept suppression of whole documents is appropriate but only for a limited period of time. Some may order suppression subject to any third-party application to inspect documents; that is, the Court will wait and see if third-party access is sought and only then require precise redactions to be considered. That may be because ordering specific redactions can result in a costly and time-consuming exercise. The message? Balancing, balancing, between competing demands and finite resources.

52 In a second group of cases, proceedings were brought to protect intellectual property or confidential information, or a party sought urgent relief such as freezing orders.[46] In these cases, the Court was persuaded that its processes—and confidence in their efficacy—could be undermined by the disclosure of filed documents. For example, one of the Court's Western

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[43] See, eg, *Re Halo Food Co Ltd (admin apptd) (rec and mgr apptd)* [2023] FCA 1135 at [19] (Yates J); *Re PGP Group (Aust) Pty Ltd* [2023] FCA 1554 at [25] (Goodman J); *Re Quintis Leasing Pty Ltd (admin apptd) (No 3)* [2024] FCA 85 at [22] (Banks-Smith J); *Re Redback Technologies Holdings Pty Ltd (admin apptd)* [2024] FCA 418 at [29]–[30] (Meagher J); *Re Bonza Aviation Pty Ltd (admin apptd)* [2024] FCA 575 at [23] (Jackman J).

[44] See, eg, *Re McCorkell & Associates Pty Ltd (in liq)* [2023] FCA 863 at [52]–[54] (Lee J); *Re Union Standard International Group Pty Ltd (No 8)* [2023] FCA 1054 at [28]–[32] (Cheeseman J); *Re i-Prosperity Pty Ltd (in liq)* [2023] FCA 1446 at [13]–[14] (Button J); *Re City Steel Pty Ltd (in liq)* [2024] FCA 481 at [16]–[18] (Cheeseman J); *Re Australian Vocational Learning Institute Pty Ltd (in liq) (No 3)* [2024] FCA 708 at [22]–[24] (Goodman J).

[45] See Justice Banks-Smith, 'Courts, Confidences and Change in Challenging Circumstances' (Quayside Chambers Oration, Perth Concert Hall, 4 March 2021) at [57]–[62].

[46] See, eg, *Transportable Shade Sheds Australia Pty Ltd v Aussie Shade Sheds Pty Ltd* [2024] FCA 584 (Collier J issuing interim injunction); *ASIC v NGS Crypto Pty Ltd* [2024] FCA 373 (Meagher J, making orders relating to the appointment of receivers, preserving assets and restricting travel).

Australian judges made search and seizure orders under the *Corporations Act 2001* (Cth) in respect of company books and motor vehicles believed to be in the possession of a director of a company that had been placed in liquidation, where the director was not cooperating with the liquidators.[47] The suppression orders were made so that the director did not get any advance warning of the proposed seizure, the Court being satisfied that he might move or conceal the books and property which were the subject of the orders.[48] These suppression orders expired after the seizure had occurred.

53 A third group of cases involves circumstances where the Court refused to make a suppression order, but a party indicated it would appeal (or considering appealing that decision). The Court granted a suppression order to allow for that to occur.[49] Clearly such orders may be necessary to make an access to appeal effective. Similarly, orders were sometimes made so as not to undermine the confidentiality regimes existing in other court proceedings.[50]

54 A fourth group of cases involves applications to the Court to approve settlements. In class actions where parties wish to settle the proceeding before trial, the Court must approve the settlement.[51] In seeking the Court's approval, counsel will usually produce an opinion about whether and why the settlement is in the best interests of the group members. Generally, this document must be kept confidential in case the settlement is not approved, but also to encourage counsel to be frank in the advice they give, so the Court can properly scrutinise the

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47 *Re Advanced Traffic Management (WA) Pty Ltd (in liq)* [2024] FCA 260 at [24]–[27] (Banks-Smith J).

48 Ibid [30]–[31].

49 See, eg, *BQC23 v BQS23 (Publication of Reasons)* [2023] FCA 890 at [8] (Rares J); *Commissioner of Taxation v [Respondent]* [2023] FCA 1176 at [33]–[35] (Kennett J); *Hendry v Western Australia* [2023] FCA 1670 at [24] (Jackson J); *[Redacted] v Commissioner of Taxation* [2024] FCA 185 at [95]–[96] (Anderson J).

50 See, eg, *Warren v Chief Executive Officer, Services Australia* [2023] FCA 1337 at [61], [68] (McElwaine J); *ASIC v Noumi Ltd* [2024] FCA 349 at [10], [253] (Shariff J).

51 FCA Act s 33V(1).

proposed settlement.[52] For similar reasons, legal opinions have been suppressed where the Court is asked to approve the settlement of a proceeding brought by a litigation representative.[53]

55 That said, court approvals of settlements in class actions is one of the areas where several judges of this Court have been critical of the approaches taken by legal representatives and parties to seeking wide suppression orders.[54] The take-away point here is that it is the Court which has been critical, and it is the Court which has on many occasions refused to make the wide suppression orders sought. As one judge said, there is a difference between the understandable desires of parties to keep information private and a situation that justifies a suppression order.[55]

56 There have been attempts to secure orders suppressing the settlement sum in class actions. An example from outside the 2023–24 financial year is *Jenkings v Northern Territory (No 4)* [2021] FCA 839, the Don Dale class action where the Northern Territory government applied to suppress the settlement sum. I gave a decision on that application and refused to make suppression orders. I observed that the proceedings were "*about* the exercise of public powers in respect of minors held in juvenile detention in the Northern Territory", and "[i]t is difficult to conceive of a piece of litigation which is more centrally concerned with the administration of justice than this one."[56] I commented on the spending on public funds to defend the proceeding and settle it, as well as funding the Court to approve the settlement. In all the circumstances, I remarked that: "In a civil society governed by the rule of law, [there] are

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[52] See ***Ewok*** *Pty Ltd as trustee for the E & E Magee Superannuation Fund v Wellard Ltd* [2024] FCA 296 at [103] (Button J):

> In settlement approval proceedings, the Court is much assisted by the responsible counsel and solicitors expressing their views on the proceeding in frank and candid terms. It would be inimical to the interests of the administration of justice for counsel and solicitors providing those opinions to be reticent in what they say, lest their opinions be disseminated to the world at large. In addition, orders in respect of the confidential opinions are warranted on the basis that they disclose information that is the subject of legal professional privilege claims. I do not consider that any time limit needs to be imposed on orders in respect of these two categories of information in order to ensure that the orders only go as far as is necessary to prevent prejudice to the proper administration of justice.

For further examples of orders made on this basis see, eg, *Haswell v Commonwealth (No 3)* [2023] FCA 1093 at [7]–[8] (Lee J); *Fordham v Commonwealth Bank of Australia* [2023] FCA 1106 at [106] (O'Bryan J).

[53] See, eg, *McElligott v Commonwealth* [2023] FCA 1638 at [23] (Meagher J); *DIZ18 (by her litigation representative DJA18) (No 3) v Minister for Home Affairs* [2023] FCA 1350 at [53], [65] (Murphy J).

[54] See *Ewok* [2024] FCA 296 at [96]–[98] (Button J).

[55] *Ewok* [2024] FCA 296 at [97] (Button J).

[56] *Jenkings v Northern Territory (No 4)* [2021] FCA 839 at [91]–[92] (emphasis in original).

additional reasons for a high level of transparency about how such a proceeding is proposed to be resolved."[57]

Observations

57 This short review shows how complex it is to produce an accurate picture of how many suppression orders are made, for what periods of time and for what purposes. It might be easy to grab one particular case and highlight that, but doing so says nothing about the overall approach being taken in the Federal Court. A purely quantitative inquiry contributes limited insight into these issues.[58] Orders are made in, and tailored to, a myriad of situations across the Court's wide jurisdiction, the particular type of information that is suppressed, the precise risks that would arise from publication or disclosure in the evidence before a particular judge, and can be made at different stages of a proceeding. Finally, like the order reported in *The Age* this morning, interim orders to preserve a party's right to apply to a judge for a suppression order may not always be captured. Refusal of suppression orders may also not be captured.

58 Even if the number of suppression orders granted in the Federal Court is proportionately small, that does not mean that the Court always has the benefit of the most fulsome perspectives about whether the criteria in s 37AG are engaged or not. Other commentators have observed that there may be no real contradictor on a suppression order application.[59] That is especially so where parties have settled cases. Media representatives may brief counsel to fulfill that role. To do so, the media need to know an interlocutory application is being made, and may be an element of chance or luck in that, unless a proceeding is so high profile that it is being constantly and closely followed, such as the *Roberts-Smith* proceeding.

59 Together with the Court's records management and IT teams, I am keen to look at more comprehensive data capture, and to share the results of that internally and externally. Internally, accurate data can assist in judicial education about suppression and non-disclosure orders. Externally, it is clearly part of operating an accessible court.

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[57] Ibid at [93].

[58] Compare then Chief Justice James Allsop, 'Courts as (Living) Institutions and Workplaces' (2019) 93(5) *Australian Law Journal* 375. As to the methodological challenges of "counting" suppression orders, and difficulties drawing inferences from such data, see Jason Bosland, 'Debunking the Myth: Why Victoria is Not the Suppression Order "Capital" of Australia' (2020) 24(1) *Media and Arts Law Review* 11; Holt et al (n 30) 215–8; Vincent (n 30) [328]–[330], [332]–[333], [371], [379]–[381], [429]–[431].

[59] See, eg, Vincent (n 30) at [301]–[306], [531]–[538]; Jason Bosland, 'Two Years of Suppression under the *Open Courts Act 2013* (Vic)' (2017) 39(1) *Sydney Law Review* 25 at 55–6; Holt et al (n 30) at 96–8, 143.

60 I am also keen to explore with my judicial colleagues and registrars whether there are other reforms the Court could evaluate, in terms of notification of suppression order applications and ensuring there is a proper contradictor to such applications.[60]

ACCESS TO COURT RECORDS BY NON-PARTIES

61 Another issue that has gathered some attention recently, and which concerns an important element of operating an accessible court, is access to court records by non-parties. Non-parties might be members of the media. Or curious members of the community. Or people who might think they have a similar claim. Or members of the academy who want to see filed documents for the purposes of research or commentary. Sometimes they are other lawyers checking up on how a claim has been pleaded, or what evidence is being relied upon, for their own purposes. But whatever the reason, the Court's processes must work fairly and effectively for all the different categories of non-parties who may want to access court files.

62 Let me start by emphasising that how individual courts deal with non-party access varies considerably around the country.[61] In this section, I am principally addressing how the Federal Court treats a non-party access request for documents by which a civil proceeding is commenced—an originating application, any statement of claim and any supporting affidavits.

63 Prior to early 2023, the ***F**ederal **C**ourt **Rules** 2011* (Cth) had one of the most permissive non-party access regimes of any court. Rule 2.32(2) listed "unrestricted" documents which non-parties could access as of right, provided they paid the prescribed fee.[62]

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[60] As to the notification system under s 11(1) of the *Open Courts Act 2013* (Vic), see Vincent (n 30) at [288]–[294]. As to the notification system under s 69A(10)(c) of the *Evidence Act 1929* (SA), see Holt et al (n 30) at 193–4. Cf NSW Law Reform Commission (n 30) at [7.119]–[7.122].

[61] Some of the State and Territory Courts require non-parties to seek leave to inspect these documents: *Access to Court Files* (Practice Note SC Gen 2, 4 October 2019) at [6ff]; *Supreme Court Rules 1987* (NT) r 28.05; Supreme Court of the Northern Territory of Australia, *Access to the Court Building, Judgments, Exhibits and Files* (Practice Direction No 2 of 2010) at [23]–[30]. In other State Supreme Courts and the High Court, the originating process and/or statement of claim are accessible but leave is required for supporting affidavits, unless they have been admitted into evidence: *High Court of Australia Rules 2004* (Cth) r 4.07.4; *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 28.05; *Supreme Court Act 1935* (SA) s 131; *Rules of the Supreme Court 1971* (WA) order 67B, rr 6(3), 8; *Court Procedures Rules 2006* (ACT) r 2903; *Supreme Court Rules 2000* (Tas) r 33(4); Supreme Court of Tasmania, *Media Guidelines* (2019) at 6. In the Supreme Court of Queensland, generally a non-party cannot access an originating process or any supporting affidavits until the document is relied upon in open court or the defendant has filed an appearance: *Uniform Civil Procedure Rules 1999* (Qld) r 975H.

[62] Unrestricted documents included originating applications, statement of claims, defences and interlocutory applications, as well as less substantive documents as well (such as notices of address for service).

64 In cases that came to the Federal Court from the Australian Human Rights Commission, there was a question whether a person's complaint to the Commission, which was required to be attached to their application in the Court, formed part of the originating application. Those complaints are often very detailed, often contain a lot of personal information, and may include allegations that were not drafted by a lawyer because the Commission has relatively informal processes. In *Oldham v Capgemini Australia Pty Ltd* (2015) 241 FCR 397; [2015] FCA 1149 I held that the complaint did not form part of the originating application so it was not available for unrestricted inspection by non-parties, even though at that time the statement of claim and originating application were available.[63]

65 In early 2023, the Court changed its approach. The change was to make "unrestricted" documents **not** available for inspection as of right by non-parties until after the first directions hearing or a hearing, whichever is the earlier. The amendments preserved the ability to apply for leave to inspect these documents at any point—for example, shortly after a new proceeding had been filed. But an *application process* was imposed, whereas before there was an *entitlement* to access.

66 Judgments and orders were also included in this change, but the Court's judgments are publicly available through its website so this change did not in substance affect access to judgments.

67 The change came about after the Court's decision in ***Porter** v Australian Broadcasting Corporation* [2021] FCA 863. In that decision, a single judge dealt with an agreed proposal by the parties, who had settled Mr Christian Porter's defamation claim against the ABC, to remove the ABC's Defence from the Court file. Mr Porter had applied to strike out that Defence on the basis it was scandalous (amongst other grounds), in part because of the allegations it contained. The parties settled the whole proceeding before that strike out application was heard. Part of their agreement was that the Defence would be removed from the file, which the Court accepted was tantamount to a suppression order.[64] That approach was opposed by the media parties and the matter was dealt with in open court.

68 In the course of determining the parties' joint application, the Court made some observations about what was seen to be the unfairness in the Federal Court's existing rules about document

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[63] *Oldham v Capgemini Australia Pty Ltd* (2015) 241 FCR 397; [2015] FCA 1149 at [28]–[38]; see also *Oldham v Capgemini Australia Pty Ltd (No 2)* [2016] FCA 1101 at [14]. Similar views were expressed in *McLaughlin v Glenn* [2020] FCA 679 at [12] (Abraham J); *Clarke v Health Care Complaints Commission* [2024] FCA 753 at [39]–[40] (Nicholas J).

[64] *Porter* [2021] FCA 863 at [88]–[90].

inspection. The Court noted the well-established proposition that while it is fundamental that justice must be seen to be done, the principle is not absolute,[65] and observed a number of inconsistencies and anomalies in the way the FC Rules worked. The observations I focus on tonight are what was said about the entitlement to inspect originating processes and statements of claim. At [97], the Court stated:

> It can be expected that an applicant will take care to protect their own confidential and personally sensitive information in an originating application and statement of claim. However, an applicant will not necessarily have the same incentive (or knowledge) to protect confidential and personally sensitive information about the other parties or third parties in their originating application or statement of claim. While inclusion of such information in a document filed in a court for some collateral purpose would involve an abuse of process, the more likely prospect is that the information is relevant but the applicant has not known or appreciated (or, perhaps, cared sufficiently) that the other parties or third parties might have a legitimate basis to apply for suppression and non-publication orders over that information. The anomaly is one of timing. If a member of the public becomes aware that an originating application and statement of claim has been filed they may be able to exercise their right of inspection under r 2.32(2) before the other parties to the proceeding and the third parties who may be mentioned in the filed documents are aware of the existence of the proceeding. As a result, the right of those parties to seek suppression and non-publication orders would be undermined. This potential for injustice could be ameliorated by amending r 2.32(2) to permit inspection as of right only after the first return date of the proceeding; applications to inspect before the first return date in the proceeding would require leave.

69 Ultimately the Court decided that it was appropriate to remove the ABC Defence from the file, emphasising the parties' entitlement to agree on comprises to all or part of their litigation, and that the Court should be cautious about refusing to make orders to give effect to that bargain. But, the Court in *Porter* emphasised it will always be a matter for the Court independently to decide if the orders sought are really necessary for the administration of justice.[66]

70 After the publication of these reasons, as it would with any other rule change, the Court commenced an internal process of considering whether its non-party access rules ought to be amended. The judges of the Court determined to amend the rule, and Allsop CJ published a new Practice Note explaining the changes.[67] The Practice Note re-iterated the importance of

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[65] Ibid at [86].

[66] *Porter* [2021] FCA 863 at [106], [115].

[67] *Federal Court Legislation Amendment Rules 2022* (Cth); *Access to Documents and Transcripts* (Practice Note GPN-ACCS, 10 February 2023). The amendments were then examined by the Parliamentary Joint Committee

open justice but made it clear that principle was not absolute. As we have seen, that is correct. The Practice Note stated:

> it is contrary to the administration of justice for respondents to learn of the case made against them, whether through the media or other publication, before they are served or before they have a reasonable opportunity to protect their legitimate interests by seeking properly founded suppression or non-publication orders. However, the Court does expect parties to lodge any application seeking suppression or non-publication orders promptly.
>
> Recognising the importance of accurate reporting of court proceedings, r 2.32(2) does not expand the processes or basis of suppression or non-publication, or merely enable a party to avoid embarrassment. It is about ensuring that the rules of the Court are not used, knowingly or innocently, as an instrument of injustice.[68]

71 Nonetheless, it is fair to say that from the perspective of the media, the change has introduced complexities and delays in obtaining leave to inspect documents prior to the first directions hearing, as the amended rule and Practice Note require. A first directions hearing may occur relatively promptly, or in fact it may be deferred for some time because the parties agree on case management orders that are then made in Chambers.[69] An actual hearing may therefore be a long time away. That means the leave provisions have a lot of work to do. It is certainly a change from the relatively unconstrained regime that used to be in place.

72 Through the Media Committee, the Federal Court has been given specific examples to back up the concerns of the media. From the Court's perspective, there have been considerable additional administrative burdens arising from the new rule, especially around how the leave process should operate and whether leave requests always need to be escalated to judges or not. Frustration on both sides one might say.

73 Nonetheless, the changes are not a substantive or substantial constraint on accessible justice. Remaining faithful as a Court to the conduct of our work in public, judges expose themselves

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on Human Rights. The Joint Committee requested further information about the amendments, noting "that restricting access to certain court documents prior to a hearing, including access to journalists, engages and limits the right to freedom of expression": Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Scrutiny Report* (No 2 of 2023, 8 March 2023) at 47–8 [1.91]. After receiving a detailed response from Allsop CJ, the Committee confirmed the "measure is compatible with the right to freedom of expression" and that "its concerns have been addressed": Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Scrutiny Report* (No 4 of 2023, 29 March 2023) at 72 [2.61]–[2.63].

68 Ibid at [4.11]–[4.12].

69 Answer to Question on Notice No 157, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *2022–23 Supplementary Budget Estimates* (LCC-SBE23-157, 3 April 2023) (reporting that "[t]he average time between lodgement of a matter and the first directions hearing is currently 2.9 months").

to scrutiny through their work in court and their reasons for judgments. Explaining in our reasons why we make the decisions we do is fundamental to our task. None of these values are substantially affected by the *time* at which non-parties are able to inspect court documents, especially in the very early stages of a proceeding.

74 The imperatives for immediate or early inspection, especially by the media, may have less to do with assisting the community to understand proceedings filed in the Court and more to do with the race to file news copy. While we can be sympathetic to that need, that race is not and must never become the business of the courts.

75 Filed document access comes to non-parties in what is, in the world of court proceedings, a relatively short period of time. It now generally comes at a time after a respondent or defendant has appeared on the record or has been given a reasonable chance to do so, and the Court is actively managing a case. That is the appropriate time for the Court to be concerned that the community is able to follow how a proceeding is being managed and dealt with, and follow what the issues are. This is where there is a time for concise statements, for online files, for livestreaming, and for other accessibility initiatives I discuss in a moment.

76 Nevertheless, the media concerns have promoted the Media Committee to discuss how the situation can be improved, perhaps with further rule changes that could alleviate delays and complexities but remain faithful to the reason for the rule change at the start of 2023, as set out in the Practice Note and in the observations in *Porter*.

77 As Chief Justice, I am sympathetic to those objectives. There are proposals under active consideration by the Court's Rules Committee at the moment. Any forthcoming proposals will then be discussed by the judges of the Court as a whole.

78 The Court is focusing on ensuring a more predictable, accountable and streamlined leave process for non-party access requests. There is currently no proposal to wind the rules back to the wholly permissive and somewhat one-sided position of the past. The Court proposes to continue to be faithful to the consideration of the positions of respondents or defendants to proceedings, and ensure that their entitlement to attempt to persuade the Court why there should be some limits on disclosure of originating process is preserved and remains an effective entitlement. That is just as important to the proper administration of justice as allowing non-party access.

79 But as to how the Court's leave processes work—I accept there is room for improvement in that area and that is what the Court is committed to doing.

ACCESSIBLE JUSTICE IN THE 21ST CENTURY

80 If we talk about "accessible justice" rather than "open justice", it may enable us to move away from that adjective "open", which can promote the one-sided misconceptions I have described.

81 Our approach to accessible and open justice in the Federal Court is built around a whole range of processes and practices, which have been introduced over many years, and some which remain works in progress. Our approach encompasses the Court's leading innovations in digital case management and electronic filing which has been in place now for over ten years. Judges, registrars and chambers staff are increasingly working with digital instead of hard copy files, and with digital authorities and court books. There has been a corresponding increase in trials and appeals being run entirely in digital form. This focus on a digital platform for all court users, greatly increases the Court's efficiency, has obvious environmental benefits and improves our ability to disseminate information.

82 Digitisation enables the Court to produce publicly available online files. Online files are an important component of the Federal Court's work. These are established where the Court expects there to be considerable community interest in a proceeding. Online files enable direct and immediate access by non-parties to filed court documents such as pleadings, affidavits and expert reports, with no inspection processes required and no intermediaries. Documents may be uploaded progressively; for example, affidavits are unlikely to be available until after they have been read in open court and any objections to parts of affidavits have been ruled upon.

83 For example, at the moment, O'Callaghan J is running the defamation trial in Melbourne brought by Mrs Moira Deeming against Mr John Pesutto. On the landing page of the Federal Court website, you can see a notification that the online file has been updated. You can click through a wealth of evidence, orders, submissions and the pleadings. People who are interested can read the evidence directly for themselves, and see for themselves how the parties are making their arguments.

84 This trial is also being livestreamed. When I checked in on Tuesday 1 October 2024, there were 1,300 people watching the livestream. More about livestreaming in a moment.

85 Online files make the media's reporting job a lot easier and quicker. They encourage accuracy and fairness by providing source documents and enable members of the community to read parts of the evidence for themselves. Where non-disclosure or suppression orders have been made, documents can be redacted and then uploaded, which still enhances accessibility.

86 Online files will, I hope, become an increasingly used tool in accessible justice. I encourage all practitioners and parties in our Court to embrace their use, and work with our judges to establish and maintain them.

87 Accessibility has been considerably enhanced by livestreaming proceedings via the Court's YouTube channel. There are prohibitions on recording livestreamed proceedings, which may provide a challenge in terms of enforcement, and in terms of what constitutes a recording. However, it is these prohibitions, and other policy reasons, which mean livestreamed proceedings are generally not stored or available after the date they are streamed. Livestreaming with recording prohibition is intended to duplicate the experience of sitting in a courtroom and watching a proceeding. The Court's livestreaming facility is intended to allow the viewer to observe and experience the moments of a proceeding as they occur. It is not designed to enable a viewer to go back over anything that has been recorded.

88 Recently, I have asked that the Court's YouTube channel be updated to ensure that all welcomes and farewells of judges remain available. That has occurred. These are important ceremonial events in the life of the Court, but also provide easily accessible information about the judges. A wide variety of seminars, speeches and "In Conversation" events are also broadcast this way, enabling a much wider public reach, acknowledging it is not easy for people to get into the CBD to attend events in person. In this way, people with caring responsibilities, people with disabilities, people living in rural areas all have the opportunity to listen and learn about the work of the Court. That includes, for professional events, legal practitioners who may be living and working in regional and remote Australia.

89 This is a national Court and we must take care to conduct our work in a way which appropriately reflects this feature and the physical geography of our country.

90 In 2023–24, 89 listings were livestreamed, including high-profile public interest cases such as the *Roberts-Smith* and *Lehrmann* proceedings, and *eSafety Commissioner v X Corp*. Livestreaming is often used in class action proceedings, including at case management level, to enable access by all group members to what is occurring in the proceeding. Native title case

management is another area where live streaming or Microsoft Teams technology can be used to ensure that First Nations communities, whose native title claims are being dealt with by the Court, can stay in touch with the proceedings, no matter where they are. This technology, and improving the availability of internet across Australia, should not be understated as a means of keeping remote and often very disadvantaged communities in closer touch with a part of the justice system that profoundly affects their culture and traditions, and which can be transformational for communities who secure recognition of native title.[70]

91 Accessible justice also means using contemporary forms of communication. Aside from our YouTube channel, the Court also has accounts with X (formerly Twitter) and LinkedIn. We actively use these accounts to notify the profession, litigants and the public about legislation and rule changes; latest developments affecting our Court; significant proceedings and decisions; selected job vacancies; online service outages; and registry closures.

92 At the commencement of proceedings in our Court, we encourage the use of concise statements and concise responses, rather than pleadings. The ACCC, a frequent litigator in our Court, has been exemplary at engaging with the use of concise statements. Other frequent users include ASIC and other federal agencies. Individuals, liquidators, corporations, associations and NGOs also use them. The Court's *Central Practice Note* encourages the use of these documents, which are to be no more than five pages and must focus on the real issues in dispute between the parties.

93 At the other end of a proceeding, judgment summaries are becoming a regular tool employed by the Court to explain, in a summary way, what a case was about, what decision was made, and why.[71] The complexity of the Court's jurisdiction, both in terms of fact and law, and its dense statutory base, mean that the entire judgment in a proceeding may not easily be described as "accessible", despite the fact that my judicial colleagues and I are very conscious of writing

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[70] In making this comment, I acknowledge that people living in remote communities may not have the same access to the internet as those living nearer to the capital cities: see Julian Thomas et al, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index: 2023* (ARC Centre of Excellence for Automated Decision-Making and Society, 2023) at 9–10.

[71] See, eg, the summaries prepared in respect of *Tickle v Giggle for Girls (No 2)* [2024] FCA 960; *Ford Motor Company of Australia Pty Ltd v Capic* [2023] FCAFC 179; *Save the Children Australia v Minister for Home Affairs* [2023] FCA 1343; *Karpik v Carnival plc (The Ruby Princess) (Initial Trial)* [2023] FCA 1280; *Kaplan v Victoria (No 8)* [2023] FCA 1092; *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020; *Commissioner of Taxation v Rawson Finances Pty Ltd* [2023] FCA 617; *Nona on behalf of the Badulgal, Mualgal and Kaurareg Peoples (Warral & Ului) v Queensland (No 5)* [2023] FCA 135; *Qantas Airways Ltd v Transport Workers' Union of Australia* [2022] FCAFC 71; *Minister for the Environment v Sharma* [2022] FCAFC 35.

less, not more. Judgment summaries are increasingly helpful in building community understanding of our decisions and assist the media in fair, accurate and balanced reporting.

94 There is always more to do and there is certainly more planned to ensure we remain faithful to the proposition that justice must be accessible so that our work can be better understood in a contemporary Australian society. Judges on the Court are actively and enthusiastically engaged in contributing to innovative projects that will contribute further to these objectives. Technology and modern communications are key in this process.

CONCLUDING REMARKS

95 I am proud to lead a court of intellectually committed and experienced judges and registrars who care about the work we do. They well understand the challenges and balancing required to operate in a transparent and accessible way within an adversarial system that exists impartially to resolve disputes between parties, and—just as importantly—to assist them to resolve their own disputes. No one on our Court advocates secret justice. But we do believe in fair justice, and in a judicial system that recognises the tensions and challenges at a case-by-case level and a justice system level in ensuring fairness and avoiding harm. Accessibility to our work will come in our contemporary Court from a wide range of sources, and the legal profession and the community should be confident of our Court's commitment to these values.