Restriction of publication orders

Ross Duncan considers some recent cases on the media's right to be heard

In Western Australia the media has standing to challenge directly a Magistrate's order restricting publication of proceedings; in New South Wales the media has no such right. That is the anomalous situation following recent decisions of the Full Court of Western Australia and the New South Wales Court of Appeal.

Western Australia

In *Re Bromfield: ex parte West Australian Newspapers Limited* (June 1991) the *West Australian* sought to quash a Magistrate's non-publication order and ruling that the newspaper had no right to be heard in the Court of Petty Sessions to oppose the order.

While not deciding the merits of the non-publication order itself, the majority held that the Magistrate's failure to hear the newspaper was a denial of natural justice.

Malcolm CJ considered that the now well-recognised standing of the media to challenge such non-publication orders in the Supreme Court, was suggestive of a right to be heard at first instance to seek revocation or variation of the order; denial of that right amounted to a denial of natural justice. It was not necessary for the order to be directly binding upon the media organisation; it was sufficient if the order had the effect of prohibiting or restricting publication of a fair and accurate report of proceedings.

This did not mean that a court could not make an order that the proceedings be conducted in camera or an order prohibiting or restricting publication without first hearing any representative of the media or member of the public present in court. However, he considered that an opportunity to be heard should be extended to any party having a sufficient interest at the earliest convenient time.

Nicholson J. considered the issue to be not so much one of the standing of the newspaper but whether the Magistrate had a duty in accordance with the rules of natural justice to hear the newspaper when it sought to be heard. He held that the newspaper's right to publish reports of proceedings and its general activities in relation to reporting the courts (including its record of opposing suppression orders) was sufficient evidence of it having the necessary interest and legitimate expectation which was subject to deprivation by the Magistrate's order. Accordingly, the Magistrate had a duty to hear the newspaper.

Rowland J, however, found it unnecessary to resolve the question, but considered that while a newspaper had a legitimate interest in protecting its right to publish evidence it had no such interest in publishing evidence that is not heard in public.

New South Wales

In *John Fairfax Group Pty Limited and Australian Broadcasting Corporation v Central Local Court & Downing Centre Local Court & Ors*, (December, 1991) Fairfax and the ABC challenged rulings by a Local Court Magistrate that:

(a) the names of the alleged victims of an alleged extortion attempt be referred to by pseudonyms; and

(b) neither Fairfax nor the ABC had standing in the Local Court to oppose or seek revocation of that order.

On appeal from a decision of Carruthers J in the Supreme Court, which upheld both rulings, it was argued that if Magistrates had a power at common law to make a pseudonym order as an exception to the principle of open justice the order was not justified in this case. Further, as that order effectively prevented publication of the names of the alleged victims, the appellants had a sufficient interest and right to be heard to oppose the order in accordance with the rules of natural justice.

Kirby P (dissenting) was of the view not only that the Magistrate erred in denying standing to Fairfax and the ABC but that he had no power to make the pseudonym order. While acknowledging the legitimacy of such orders to protect police informers, blackmail victims and national security he said it would be necessary, if the order made in this case were to be upheld, to create a new category for extortion. Extortion could not be equated with blackmail; there was no apparent difficulty in getting the alleged victims to come forward and while the corporate victims would obviously wish to avoid publicity, this was not sufficient to justify another inhibitor to the open administration of justice.

In relation to standing of the media organisations in the Local Court Kirby P, like Malcolm CJ in *Re Bromfield* considered that it would produce a curious result if they were to enjoy standing to approach the Supreme Court but lacked it before the court dealing with the very matter.

Kirby P dismissed as exaggerated the "floodgates" fears expressed by Carruthers J at first instance — the view that to give the media standing in the Local Court would result in harassment of Magistrates and an intolerable interference with the business of the courts.

However, the majority held that the pseudonym order was a valid exercise of the common law power to make such orders where necessary for the administration of justice. Mahoney JA (with whom Hope JA agreed), considered that the power to make such an order existed in circumstances where, if it were not made, unacceptable consequences would flow. "Unacceptable consequences" included hardship on an informer, a security officer or a blackmail victim and difficulties in obtaining evidence from such persons necessary to bring offenders before the court and deal with them. Extortion was analogous to blackmail, he said, in that revealing the identity of the victims could lead to "copycat crimes" and victims would not approach or co-operate with the authorities. (Note that Kirby P considered that in order to avoid copycat offences much more than the names of the victims would need to be suppressed).

As to standing, Mahoney JA distinguished between an order directly restricting publication and an order which only indirectly affects the media. In effect he held that since the pseudonym order did not operate directly to prohibit publication of the names of the alleged victims but merely regulated the conduct of the proceedings (although publication of the names by Fairfax or the ABC would have created a potential liability in contempt) the media had no right to be heard on the making of it.

A joint application by Fairfax and the ABC for special leave to appeal to the High court was refused.

Ross Duncan is a solicitor in the Legal and Copyright Department at the ABC.