Facebook vs a fair trial?

Court reporting restrictions and the internet

By Isolde Lueckenhausen

'Despite the judge's decision, the new technological reality is that some Victorians probably did watch *Underbelly* last night. The internet and easy access to illegal DVDs almost guarantee it' – *Herald Sun Editorial*[1]

Every day you can open your paper, click online to your favourite news site or turn on the TV and see reports of court matters. Journalists sit dutifully in court for hours, taking notes of lawyers' submissions, judges' directions and the evidence of witnesses. At the end of the day, we get a short summary of the important bits and whatever images can be found that relate to the story.

With all this reporting on court activity in the media, the principle of 'open justice' may seem to be alive and well; the principle of open justice being that justice is best served when the courts and its processes are open to public scrutiny. The media play an important role in ensuring the activities of court are relayed to the public, who cannot for obvious reasons actually spend their days sitting in court ensuring the wheels of justice turn as they should.

However, a number of mandatory and discretionary reporting restrictions control what information may be published concerning pending and current court proceedings. The nexus between these restrictions and publications on the internet has been the subject of academic consideration for some time. However, the issue has come to public attention more recently with the suppression of Nine's TV drama *Underbelly*[2] (including prohibiting its publication on the internet), the reporting of the Victorian 'terror trial'[3] and the publications on Facebook regarding Brendan Sokaluk, the man charged with arson in relation to the recent Victorian fires.[4] In the Sokaluk case, there were media reports that Facebook and some of its users faced being in contempt of court for publishing his image in breach of suppression orders.[5]

This article examines current reporting restrictions, the rationale behind preventing judges and, in particular, juries from being exposed to certain information, and whether this rationale operates effectively in the age of the internet.

RESTRICTIONS ON REPORTING OF COURT – RELATED MATTERS

Mandatory reporting restrictions

While most state and federal courts generally allow public admission to the actual court proceedings, some information can never be reported, even if presented in 'open court'. For example, legislation prohibits the identification of victims of a sexual assault without their consent, identifying children in Children's Court matters, or identifying parties, associated persons or witnesses in Family Court proceedings.

These legislative reporting restrictions are generally accepted, for various public policy reasons, by the public and media alike. However, there are still instances in which courts find there have been breaches of these laws. For >>

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example, last year the Victorian Court of Appeal upheld the convictions against Channel Seven and the *Sunday Herald Sun* for identifying a child who was the subject of Children's Court proceedings. Channel Seven and the *Sunday Herald Sun* had reported the story of a child having 'divorced' his parents. The Court rejected the argument that it was not a report of the proceedings because it did not 'narrate, describe or retell' what had happened in Court.[6] However, instances of breaches of these mandatory reporting restrictions are relatively uncommon.

Sub judice contempt

Contempt law deals with matters that may have a real tendency to interfere with the administration of justice. A branch of contempt law is the *sub judice* rule, which prevents the publication of matters that may prejudice a judge or jury in pending or existing criminal proceedings – for example, the publication of prior convictions of an accused, or assertions of the guilt or innocence of an accused. Suppression orders are not needed for the *sub judice* rule to apply.

There are some infamous examples of *sub judice* contempt findings by the courts, such as the finding of contempt against Neville Wran in 1986, the premier of NSW at the time. He stated he had a 'deep conviction that Mr Justice Murphy was innocent of any wrongdoing' prior to Mr Murphy's retrial on charges of attempting to pervert the course of justice.[7] A more recent example was the reporting by the *Herald Sun* of a death as a 'gangland killing' during the murder trial relating to that death, where the prosecution had not linked the death to the gangland war and the accused had pleaded self defence.[8] In this case, the *Herald Sun* was fined $10,000.

There is some uncertainty surrounding the practice and adherence to the *sub judice* rule. Journalists, and their lawyers, must decide on a case-by-case basis whether their reports may put them in contempt of court. They will look at various factors in making their decisions, such as the mode of trial, whether it is a criminal or civil matter, the time between the publication and an impending trial, and the nature of the crime itself. For example, if the identification of the accused is a possible issue, they will consider pixilating images of the accused.

As all those involved in the publication of the contempt may be found guilty of a criminal offence, it is a risk that is generally taken seriously by journalists, their supervisors and employers.[9] Accordingly, in order to determine what is acceptable, in addition to the historical case law and factors listed above, they look at the types of contempt matters that are being prosecuted and what information is published and 'allowed to go through to the keeper'.

Suppression orders

The area of greatest controversy in the reporting of matters related to court proceedings is the making of discretionary

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suppression orders by judges. These orders are made using either the express or implied powers of the various federal and state courts. Suppression orders restrict the publication of matters set out in the orders – generally material that identifies a particular individual. They can also suppress such matters as the names of other parties, particular pieces of evidence, or a reference being made to a particular matter. In some circumstances, the fact that a suppression order has been made is also suppressed.

Suppression orders can also be made to prevent the publication of specific material. In the Victorian Court of Appeal decision in the *Underbelly* case in early 2008, the court effectively determined that a fictionalised televised series could prejudice a potential jury, and suppressed its publication, in the context where the book on which the series was based (along with other similar books and online sources) were being published in Victoria.[10] In a subsequent decision relating to the *Underbelly* series, the court determined that five of the first six episodes could be aired at that time, but the sixth episode was suppressed.[11]

While courts may expect journalists and publishers to maintain a higher standard of the knowledge and practice of reporting restriction laws, suppression orders apply to all members of the community, and there is no defence for 'innocent dissemination' in Australia.

THE RATIONALE FOR SUPPRESSION ORDERS AND *SUB JUDICE* CONTEMPT

There is a generally accepted principle that fair, contemporaneous and accurate reports of court proceedings do not constitute contempt, unless a suppression order is in place. This is why – in reports of highly controversial proceedings – journalists will make it clear that the issues were raised in court and they will generally give a pretty straight account of the proceedings.

In most criminal cases, suppression orders are primarily designed to prevent the reporting of information that may prejudice the fair trial of an accused. The possible prejudice is said to arise where the information may influence the jury or judge deciding the matter: that is, they could be exposed to information, public pressure or opinions that may affect their ability to make a fair decision based only on the facts and issues that are at issue at trial.

This precautionary approach is balanced in a line of judicial authorities that acknowledges the ability of jurors to critically assess information before them at court and make decisions based on evidence.[12] Our criminal justice system relies upon the ability of judges and juries to be able to perform the difficult task of separating information they may know from other sources, from the information on which they are entitled to base their decision.

Juries are expected to follow directions from the judge as to what information they are entitled to rely upon when making their decision, and what it is they are being asked to determine. This can include directions not to make their own investigations of an issue, although it has also been argued that such directions serve the counter purpose of encouraging jurors to try to find out the information that the court is attempting to prevent them from accessing.[13] In some states, there is a legislative prohibition on jurors conducting enquiries about the defendant[14] and any juror misconduct in this regard can be grounds for a re-trial.[15]

However, suppression orders are arguably required when the possibility of prejudice is unlikely to be overcome by directions to a jury. For example, in the recent so-called 'gangland murders' in Victoria, the courts ordered a string of suppression orders relating to various persons involved in a series of interlinked criminal events. In the case of gangland leader, Carl Williams, the guilty verdict against him in one murder trial was suppressed until other trials and matters relating to him in other proceedings had been finalised.

SUPPRESSION ORDERS IN THE AGE OF INTERNET

In some states, the main media outlets and their lawyers receive suppression orders on an almost daily basis. Victoria is now leading the country in the number of suppression orders made by the courts – with 280 made in 2007.[16] As a consequence, a substantial amount of court activity is never reported (at least not contemporaneously) in the media.

The Right to Know coalition (made up of 12 major media organisations) released a report reviewing suppression orders made in Australia, and the media's right to access court documents in November 2008.[17] The report noted various practical problems with suppression orders, such as discrepancies between what is ordered in court and the >>

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terms of the suppression order that is published, and the absence of a clear duration for the orders (which are often revoked only when a further order is made). However, it is the increasing use on suppression orders, in place of relying on the general rule of *sub judice* contempt, which concerns many advocates of free speech and contemporaneous media reporting of court matters.

Further, there is debate as to whether recent suppression orders, such as those made in relation to *Underbelly*, are effective or reflect the reality of the context in which juries and judges made their determinations.[18] Some have argued that judges want to 'wrap the jury in cotton wool',[19] while others see the decision as a necessary curb on the principle of free speech.

There is a real question as to whether the balancing act of preventing the possible prejudice to criminal proceedings is being properly weighed against the public interest of contemporaneously discussing and scrutinising court cases on some major issues issue of public importance – such as terrorism and organised crime. For example, in the Victorian terror trial, where a number of the accused men were found not guilty, it is arguable that few people have any real comprehension of the manner or duration of the legal process they endured.

Suppression orders do not stop discussion or prevent determined people from getting information from internet sites. However, they do stop the gradual discussion and analysis of issues that occur with contemporaneous reporting. Although most suppression orders are ultimately lifted, a summarised retrospective of various events is no substitute for contemporaneous reporting. While justice should not be prejudiced by the format of mainstream media, it is a fiction to suggest that people will digest, respond to or engage with issues presented in this matter.

There has been some judicial consideration of the connection between information that may prejudice jurors (or potential jurors) and the internet in Australia. The issue was considered by the Supreme Court of NSW, Court of Appeal in 2004, in which his Honour Spigelman CJ noted (and Handley JA and Campbell AJA agreed):

> 'I have not overlooked the fact that the ability of a stay or adjournment to ensure a fair trial has been substantially attenuated by the immediate accessibility of information of the internet with an efficiency that overrides the practical obscurity of the past. This accessibility poses significant challenges for the administration of justice.'[20]

His Honour went on to suggest it may be desirable to request that Australian-based websites remove references to an accused for the period of a trial and that it may be necessary to return to the past practice of sequestering the jury. His Honour has noted in extra-judicial writings, that the heart of the issue is the 'conflict between two principles: the principle of open justice and the principle of a fair trial'.[21]

However, it may be that judges feel they are torn between key principles of our legal system when, in fact, open justice does not so readily threaten the ability to conduct a fair trial as the courts may anticipate. Jurors must digest and analyse the persuasive arguments of both the prosecution and defence counsel in a trial, and so must necessarily have the ability to process and prioritise information.

Courts also need to recognise that the information context for jurors has changed in the age of the internet and that juries may be exposed to more information about an issue than they were in the past. In order for trials to be fair, we need to be able to rely on the ability of juries to follow directions and make decisions on the evidence at trial. The format and content of instructions and directions to a jury needs to be developed across the jurisdictions, rather than continue to make orders which have limited effect.

While courts are reluctant to make orders that are impractical and ineffective, it is arguable that they have been doing just that, with the effect of suppressing some portions of public discussion in the mainstream media, while not effectively suppressing publications on the internet. Accordingly, quality discussion and scrutiny of our legal processes is compromised, while the suppressed information is still available on the internet.[22] ■

Notes: **1** *Herald Sun*, Editorial , 'The right to a fair trial' (14 February 2008). **2** *General Television Corp Pty Ltd v Director of Public Prosecutions (Underbelly Case)* (2008) 19 VR 68. **3** *R v Benbrika* [2009] VSC 21 (and the related rulings). **4** Various group sites on Facebook including ones entitled 'Freedom of speech – Violated – Facebook gone softcock....', 'Against fools that may ..get a mistrial', 'Against cyber lynch mobs' – still online as at 7 April 2009. **5** A Moses, '"Arsonist" online threats taken down', *The Age*, 17 February 2009; AAP 'Police move to ban blogs on accused firebug Brendan Sokaluk', *Herald Sun*, 17 February 2009; N Ross 'Brendan Sokaluk's lawyer concerned by online threats of violence' *Herald Sun*, 17 February 2009. **6** *Howe & Ors v Harvey; DPP v Tinkler & Ors* [2008] VSCA 181 (23 September 2008). **7** *DPP v Wran* (1986) 7 NSWLR 616. **8** *R v The Herald and Weekly Times Pty Ltd & Anor* [2008] VSC 251 (17 July 2008). **9** *Attorney General v John Fairfax & Sons Ltd & Bacon* (1985) 6 NSWLR 695. **10** *General Television Corporation Pty Ltd v Director of Public Prosecutions* [2008] VSCA 49. **11** *X v General Television Corporation Pty Ltd & Ors* [2008] VSC 344. **12** *Hinch and Macquarie Broadcasting Board Holdings Limited v Attorney-General for the state of Victoria* (1987) 164 CLR 15; *Yuill v R* (1993) 69 A Crim R 450; *Gilbert v R* (2000) 201 CLR 414; *R v Glennon* (1992) 173 CLR 592. **13** *R v K* [2003] NSWCCA 406. **14** Section 69A of the *Jury Act 1995* (QLD), s68C of the *Jury Act 1977* (NSW), s78A of the *Juries Act (Vic) 2000*. **15** *R v K* [2003] NSWCCA 406. **16** Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information, Chaired by Prue Innes, 13 November 2008. **17** *Ibid.* **18** *Herald Sun*, Editorial, 'The right to a fair trial' (14 February 2008); 'The judge is right. Justice is more important than TV ratings', *The Age*, (14 February 2008); M Day, 'Law's sensitive underbelly a poke in the eye for jurors', *The Australian* (14 February 2008); R Ackland, 'Blindfolding jurors an idea whose time has gone', *The Sydney Morning Herald* (15 February 2008). **19** R Ackland, see note 18 above. **20** *John Fairfax Publications Pty Ltd v District Court of NSW and Ors* [2004] NSWCA 324. **21** Hon Chief Justice Spigelman AC, 'The internet and the right to a fair trial', *Judicial Review* (4) 2006. **22** D Vaile and A Maurashat, 'The [digital] Document that Will Not Die: Attempted Suppression and Secrecy in the Internet Age', Cyberspace Law and Policy Centre, UNSW Law Faculty, 2008.

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