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THE JUDICIAL FUNCTION AND THE PUBLIC DOMAIN: Proceedings in the Equity Division

by

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(I) INTRODUCTION

1 This paper explores the circumstances in which business of the Supreme Court of New South Wales should be exposed to view in the public domain and, conversely, the circumstances in which the Court's business can be conducted in the absence of the public and kept confidential.

2 An immediate cause for the paper is reflection, not so much on the *Court Suppression and Non-Publication Orders Act* 2010 NSW (the primary focus of the Conference session in which the paper is presented), but on other procedural contexts (including section 71 of the *Civil Procedure Act* 2005 NSW) in which the Court must exercise judgement about what information is or is not placed in the public domain.

3 The starting point for analysis, often associated with the judgment of the House of Lords in *Scott v Scott* [1913] AC 417, is a proposition (variously formulated) that justice should be administered openly unless, and only to the extent that, necessity for the due administration of justice itself dictates otherwise.

4 An assumption underlying all analyses of interaction between the Court and the public in this context is that the Court has, and seeks to maintain, control over its own processes. Even so, there are, or may be, practical limitations on the enforceability, and utility, of court orders (whether prospective or retrospective) designed to prohibit, or restrict, publication of the fact, or details, of court proceedings.

5 Recognition that there are, or may be, such limitations focuses attention on a need: (a) to understand the purpose, or purposes, sought to be served by any form of order, or procedure, designed to prohibit, or restrict, publication of court proceedings; and (b) for the Court to engage the public constructively, as well as purposively, insofar as there may be a departure from the norm of an open administration of justice.

6 Confidentiality orders or court procedures to like effect are not necessarily directed towards keeping "a secret", but they must be directed to service of the due administration of justice.

7 Different types of business require different approaches to the questions of proceedings in "open court" and questions of confidentiality. One size does not fit all.

8 Where full play is given to a working assumption that the business of the Court should be conducted in proceedings open to the public, a departure from that approach must generally be justified on the basis that it is "necessary" for the proper administration of justice. The test of "necessity" is stricter than a requirement simply that it is "convenient" to conduct proceedings otherwise than in public.

9 Nevertheless, courts have long found that the convenient (timely, effective and economic) despatch of business, or the dictates of custom, require that certain types of proceedings (principally those with an administrative flavour) be able to be dealt with otherwise than in open court, or with the benefit of a

confidentiality order of one type or another. The life of the law is not logic, but experience.

10 If Oliver Wendell Holmes Junior never wrote anything more than the following, introductory page of his classic, *The Common Law* (1881) he might nevertheless have attained immortality, so often is it quoted:

> "To [present a general view of the Common Law] other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. **The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.** The law embodies the story of a nation's are development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every age. **The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past** [Emphasis added]".

(II) THE ASPIRATION FOR AN OPEN ADMINISTRATION OF JUSTICE

11 The idea that the administration of justice by a court must be open to the public, and that proceedings in a court can be freely reported to the public, is aspirational rather than universal. It is no less important for that.

12 At a high level of abstraction, in a contemporary setting, three statements of general principle can be taken to command widespread support:

(a) Legal proceedings should be heard in public unless a contrary is clearly required by the dictates of justice: *David Syme & Co. Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.

(b) An order of a court prohibiting the publication of evidence is only "valid" if it is necessary to secure the proper administration of

justice in the proceedings before it: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465.

(c) If proceedings are heard in camera justice may require that an appropriately formulated statement of reasons be published which conveys an adequate account of the litigation, and the reasons underlying the court's orders such as will ensure any confidentiality to which a party may be entitled is protected whilst at the same time ensuring that the public knows what orders are being made by the courts: *David Syme & Co. Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.

13 Important though they are, these statements of principle need to be qualified by an acknowledgement that, in a manner consistent with the dictates of justice, in accordance with established practice, some types of the Court's business can be, and routinely are, conducted in the absence of the public, with information relating to them confidential to the parties.

14 Much of the business of the Equity Division – at least so far as concerns jurisdiction historically associated with the Lord Chancellor or ecclesiastical (probate) courts in England – involves judicial work of an administrative character, not an adversarial contest in the sense ordinarily encountered upon an exercise of common law jurisdiction (historically conditioned by trial by jury) between parties contending for, or against, a claim of right.

15 That type of traditional Equity business typically involves questions about the management of property; the affairs of a person who (by reason of age, incapacity or death) is not capable of managing his or her own affairs; or a need for inquiries, or orders for representation, to be made.

16 The administrative character of this type of Equity jurisdiction carries with it practical implications for the Court's engagement with the public – both in the conduct of business otherwise than in open court *and* in making provision for the public (or absent, interested parties) to be given notice of proceedings.

(III) CURRENT PRACTICE AND AGENTS FOR CHANGE

17 The object of this paper is to describe current practice of the Court, in its engagement with the public in the conduct of proceedings, from the perspective of a judge sitting in the Equity Division with responsibilities for management of cases in the Division's Probate and Protective Lists.

18 It is not an object of this paper to advocate, or to oppose, change to current practice.

19 Nevertheless, a description of current practice might reasonably be thought to require recognition of agents for change which have for some years been abroad, may have influenced the way the Court has conducted business *vis a vis* the public over recent decades, and may influence the Court's conduct of business in the future.

20 Minds might differ in identification of such "agents for change", but the following are offered as candidates for consideration. In substance, they represent a shift away from a process of decision-making based upon primacy afforded to trial by jury towards a process of case management having a greater affinity with a system of administrative decision-making, not necessarily tied to proceedings in public:

(a) The practical abolition of trial by jury in civil litigation which began in the mid-1960s (accompanying, one might think necessarily so, moves towards adoption of a *Judicature Act* system of court administration with the commencement of the *Supreme Court Act* 1970 NSW on 1 July 1972) has meant that judge-alone "trials" have become the norm in civil proceedings.

(b) The adoption of "case management" philosophy in preparation of civil proceedings for trial and in the conduct of trials (in the decades following adoption of a *Judicature Act* system of court administration) has focused increasing attention on directions hearings and reduced the significance of what was once (before

a jury) a once-for-all mode of trial, justifying criticism that the traditional concept of a trial has been displaced by quasi-administrative decision making procedures.

(c) The deployment of compulsory mediation procedures, as routine features of case management of civil proceedings, has further undermined perceptions of case preparation as a process culminating in a “trial”.

(d) The increasing use of affidavits, written submissions and court books in lieu of oral exposition of a case, and advocacy, may have operated to obscure public understanding of the nature of questions the subject of debate in open court.

(e) Shifts in the law away from general law remedies (based upon common law rights and duties, moderated by the operation of discretionary, equitable principles) towards remedies defined, or regulated, by legislation which routinely requires an exercise of discretion in its application have tended to impose on all judicial decision making an administrative orientation.

(f) That shift has been accompanied by a tendency to move the practical focal point of adjudication of “rights” from courts presided over by judges to tribunals (such as the NSW Civil and Administrative Tribunal, “NCAT”) constituted by decision-makers with a variety of perspectives, not necessarily those of a trained lawyer.

(g) The practical abolition in civil proceedings, by the *Evidence Act* 1995 NSW, of technicalities in decision making which earlier characterised “rules of evidence” may have accentuated moves towards an administrative orientation in judicial decision making.

(h) An increasing resort (by all participants involved in the conduct of court proceedings) to electronic means for the conduct of business (rather than face-to-face encounters of parties, advocates and judicial officers in open court) may have reinforced an administrative orientation in decision making.

(i) A perceived need to protect the Court's processes from intrusion by exploitative use of electronic media (not necessarily by commercial media outlets), coupled with a perceived need on the part of the Court to explain its conduct of business in reasons for decision published on the internet, media releases to explain those reasons, and annual reports may of itself have changed, or change, the way the Court conducts business.

21 While ever administration of the criminal law is grounded in the idea that trial by jury is foundational to the criminal justice system the influence of "agents for change" such as have been identified is likely to differ from their influence (if any) in civil proceedings.

22 With its focus on proceedings in the Court's Equity Division, this paper is directed towards the conduct of civil proceedings, not criminal proceedings.

(IV) THE COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010 NSW

23 The *Court Suppression and Non-Publication Orders Act* 2010 NSW is directed to providing a procedural framework which (if engaged) defines: (a) the nature and extent of particular forms of "confidentiality orders" able to be made; and (b) the classes of persons entitled to be heard in relation to such orders, although strangers to the proceedings in which an order may be made.

24 As made clear in the second reading speech in support of the Bill that became the Act, the *Court Suppression and Non-Publication Orders Act* 2010 was intended to work in conjunction with the *Court Information Act* 2010 NSW, a statute the commencement of which has not been proclaimed. In the

absence of that proclamation the work that might have been done by the *Court Information Act* 2010 continues to be done by the Court's protocol governing access to court files: Practice Note SC Gen 2 – Access to Court files.

25 Points made by the second reading speech on the *Court Suppression and Non-Publication Orders* Bill in 2010 include the following:

(a) Both the Bill and the *Court Information Act* had their origins in the NSW Law Reform Commission's 2003 Review of the Law of Contempt by Publication.

(b) An object of the Bill was to confer on NSW courts power to regulate and restrict persons who are not parties to proceedings in the publication of evidence in and information arising out of criminal proceedings, striking a balance between the interests of open justice, the proper administration of justice and the human rights of all concerned.

(c) According to the terms of the Bill a "suppression order" is a broader term referring to the prohibition of or restriction on access to, or disclosure of something, such as certain documents whereas a "non-publication order" is more specific, prohibiting or restricting publication only, thereby allowing the media and general public to access information but not publish it.

(d) The Bill was predicated upon an understanding that suppression and non-publication orders made by courts are "only one of three ways that publication of material in relation to court proceedings can be prescribed [sic]. The others are under the common law of sub judice and by express statutory authority. [The Bill was] not intended to affect the operation of the common law or these specific legislative protections in any way and the

Government [was] very careful not to dilute any current protections afforded to vulnerable persons in particular".

(e) "The Government's clear policy intention, not only in [the Bill] but also in the *Court Information Act* 2010 [was] to promote access to court information to the public, including the media. [Their intention was] to promote transparency and a greater understanding of the justice system. However, at the same time, [the Government recognised that] we must ensure that the fair conduct of court proceedings, the administration of justice, and the privacy and safety of participants in court proceedings is not unduly compromised".

(f) The power of a court to make suppression and non-publication orders conferred by clause 7 of the Bill (section 7 of the Act) is "the legislative sanction that is required to bind all members of the public, not just those who are present at proceedings".

(g) "Providing for a broader application of suppression and non-publication orders is necessary especially in an age of internet news, where a restriction imposed in one jurisdiction only will not prevent that information from being disseminated *via* a news publication across the world wide web from a source located outside that jurisdiction".

26 The *Court Suppression and Non-Publication Orders Act* does not cover the field of orders that might be made by a court bearing upon questions of confidentiality. Nor does it deal with situations in which, in the ordinary course, the Court may deal with business in the absence of the public without a specific order. Nevertheless, it provides a field upon which battles might be fought about public access to information within the Court's keeping.

27 The Act provides a framework for the making by a court (or a prescribed body), and for review, of a confidentiality order (in the form of a "suppression

order” or a “non-publication order”), in proceedings before the court, on its own initiative, or on the application of a party to the proceedings, or any other person considered by the court to have a sufficient interest in the making of the order: sections 9(1), 13 and 14(3).

28 Critically, the classes of persons (other than a party to the proceedings) entitled to appear and to be heard on an application for the making, or review, of a suppression order or a non-publication order, or on an appeal from a decision about the making or review of such an order, include:

(a) “Government”, State or Commonwealth; and

(b) a “news media organisation”, defined as “a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium”.

29 The terms of the Act are not limited to cases involving “government” or “news media organisations”. Express reference to them is a function of their predisposition to be interested in the conduct and outcome of court proceedings, whether they are or are not involved in the proceedings as a party.

30 Criminal proceedings appear to provide the stage upon which suppression and non-publication orders most commonly play out. In the business of the Equity Division, commercial interests (including government) not uncommonly invoke the Act as a means of protecting what is said to be confidentiality attaching to business secrets. In other areas of the Equity Division’s business, section 71 of the *Civil Procedure Act*, other legislative provisions (eg, *Adoption Act* 2000 NSW, section 119) and customary practice more often govern decision-making about the conduct of judicial business in the public domain.

31 By express provisions of the *Suppression and Non-publication Orders Act*:

(a) the Act requires that an order made under the Act specify the ground or grounds on which it is made (section 8(2)) and other matters.

(b) the Act does not limit or otherwise affect any inherent jurisdiction or powers that a court has apart from the Act to regulate its proceedings or to deal with a contempt of court: section 4.

(c) the Act does not limit or otherwise affect the operation of a provision made by or under any other Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings: section 5.

32 In deciding whether to make a suppression order or a non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice: section 6.

33 The nature and ambit of orders able to be made under the Act are described, in section 7, in the following terms:

> "A court may, by making a suppression order or non-publication order on grounds permitted by [the] Act, prohibit or restrict the publication or other disclosure of:
>
> a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or
>
> b) information that comprises evidence, or information about evidence, given in proceedings before the court".

34 Section 8 identifies as follows the grounds upon which a suppression order or a non-publication order may be made:

(a) the order is necessary to prevent prejudice to the proper administration of justice: section 8(1)(a).

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security: section 8(1)(b).

(c) the order is necessary to protect the safety of any person: section 8(1)(c).

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (section 8(1)(d)), provided that a court may make a suppression order or non-publication order on the grounds that the order is necessary to avoid causing undue distress or embarrassment to a defendant in criminal proceedings involving an offence of a sexual nature only if there are exceptional circumstances (section 8(3)).

(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice: section 8(1)(e).

35 A key criterion, common to each of these grounds, is that of “necessity” – “necessity” in the service of a defined purpose.

36 An interim order can be made if urgency demands (section 10) but, in deciding the period for which any form of order made under the Act is to operate, the Court is directed to ensure that an order operates for no longer than is reasonably necessary to achieve the purpose for which it is made: section 10 (interim orders) and section 12(2) (orders generally).

37 A suppression order or non-publication order can be specified to operate, beyond New South Wales, anywhere in the Commonwealth. However, an order is not to be made to apply outside New South Wales, unless the court is satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the orders made: section 11.

(V) CONFIDENTIALITY OF COURT BUSINESS IN OTHER CONTEXTS

38 The institutional framework within which any form of "confidentiality order" made by the Supreme Court must operate includes at least three topics which, in practice, do not necessarily encounter a suppression or non-publication order. The first concerns the Court's conduct of business in the absence of the public. The second concerns the power of the Court to order that particular evidence be kept confidential, or to conduct its business in a manner designed to serve that end. The third concerns the terms upon which others than officers of the court can have access to a court file.

39 A departure from an "open court" model of judicial procedure is *not* necessarily driven by a purpose to maintain a "secret" of some kind or another.

40 The conduct of business in a "closed court" setting *may* have such a purpose, but *not* necessarily so. Just as often, closure of the court can be required, and justified, in terms of community expectations and the importance of putting parties at ease so that they can open up, or speak their minds, about subjects most people regard as deeply personal, profoundly private. That is a common experience upon an exercise of the Court's protective jurisdiction.

41 A referral of business to (private) "chambers" *may* have a purpose of maintaining a "secret" or respecting privacy of a party, but *not* necessarily so. Just as often, or indeed more often, a referral of business to chambers is a function simply of a need to work in a timely, effective and economic way, supported by community expectations. In current practice, few judges will have no experience of being bombarded with emails inviting the Court to make orders in chambers which, on a strict application of rules of court, require a notice of motion and a court appearance.

42 Whether court business is conducted in "open court", a "closed court" or "in chambers" the same essential formalities relating to the notation of an application for relief, evidence and procedural fairness are generally required.

(V.A) Business in the Absence of the Public

43 **<u>Section 71 of the *Civil Procedure Act* 2005 NSW</u>** (CPA s71) is in the following terms:

> **"71 Business in the absence of the public**
>
> Subject to any Act, the business of a court in relation to any proceedings may be conducted in the absence of the public in any of the following circumstances:
>
> (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence,
> (b) if the presence of the public would defeat the ends of justice,
> (c) if the business concerns the guardianship, custody or maintenance of a minor,
> (d) if the proceedings are not before a jury and are formal or non-contentious,
>
> (e) if the business does not involve the appearance before the court of any person,
> (f) if, in proceedings in the Equity Division of the Supreme Court, the court thinks fit,
> (g) if the uniform rules so provide."

44 This section substantially reproduces what was section 80 in the *Supreme Court Act* 1970 NSW (SCA s80).

45 In historical perspective, section 80 must be viewed together with sections 11 and 40(1) of the *Supreme Court Act*.

46 Section 11 is in the following terms:

> "**Distinction between Court and Chambers**
>
> 11(1) The distinction between Court and Chambers is abolished.
> 11(2) The business of the Court, whether conducted in court or otherwise, shall be taken to be conducted in court."

47 Section 40(1) provides that all proceedings in any Division of the Court and all business arising out of proceedings in a Division shall be heard and disposed of before a Judge, who shall constitute the Court.

48 The interconnection between these various provisions is not immediately obvious to the modern lawyer.

49 **Legislative History of CPA s71**. Before the commencement of the *Supreme Court Act* 1970 NSW on 1 July 1972, there was an established, but imprecise distinction between business conducted by "the Court" (meaning all judges, sitting together) and business conducted by a single judge "in chambers", either as a delegate of the Court or exercising statutory jurisdiction specifically conferred upon a judge sitting in chambers: *A & V Bence Pty Ltd v Voets Investments Pty Ltd* (1963) 63 SR (NSW) 1016 at 1019-1023; *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 93-97.

50 In those days, the despatch of business by a judge sitting in chambers might involve what, nowadays, would simply be a single judge (exercising the powers of the court) sitting in open court. Sometimes reference might be made to a judge sitting in "open chambers" but, in any event, the idea that business be conducted "in chambers" had technical implications (eg, in relation to an appeal) beyond anything contemplated by current usage of the word "chambers".

51 The first report of the NSW Law Reform Commission on Supreme Court Procedure (LRC 7), which led to an enactment of the *Supreme Court Act* 1970 explained in the following terms (in paragraph 31 on page 15) the provenance of what became section 11 of the Act:

> "[31] *Court and Chambers*
>
> The distinction between the sittings of a Judge in Court and in Chambers is abolished. This distinction is bound up with the ancient concept that the Court always sat as a bench of all Judges of the Court, and certain powers of the Court were delegated to Judges sitting alone, when the whole Court was not sitting. The preservation of the old system leads to needless technicality, and often involves considerable research. The Court, in its various Divisions, is to be presided over by a Judge. The abolition of the distinction will simplify matters by eliminating the various differences that have been held to exist under the present system…"

52 The idea that "the Court, in its various Divisions, is to be presided over by a Judge" finds a legislative expression in the *Supreme Court Act*, section 40(1), the effect of which has already been noted.

53 In a passing reference to what became section 80 of the *Supreme Court Act*, LRC Report 7 (in paragraph 18 on page 13) dealt with the section under the heading "Closed Court" and simply described it as providing a "for the circumstances in which business may be transacted in the absence of the public".

54 As first enacted (with a marginal note, "Business in the absence of the public"), section 80 of the *Supreme Court Act* was in the following terms:

> **"80.** Subject to any Act, the business of the Court may be conducted in the absence of the public –
>
> (a) on the hearing of an interlocutory application, except while a witness is giving oral evidence;
> (b) where the presence of the public will defeat the ends of justice;
> (c) where the business concerns the guardianship, custody or maintenance of an infant;
> (d) where the proceedings are not before a jury and are formal or non-contentious;
> (e) where the business does not involve the appearance before the Court of any person;
> (f) in proceedings in the Equity, Probate or Protective Division where the Court thinks fit; or
> (g) where the rules so provide",

55 Reference in section 80(d) to a jury reflects the *Supreme Court Act's* introduction of a *Judicature Act* system of court administration to the NSW Supreme Court.

56 Reference in section 80(f) to the Probate and Protective Divisions of the Court reflects a Divisional structure of the Court since abandoned. The Probate and Protective "Lists" are now administered within an expanded Equity Division.

57 SCA section 80 came into force on 1 July 1972 without amendment by the *Supreme Court (Amendment) Act* 1972. It was, however, amended by the *Supreme Court (Public Assemblies) Amendment Act* 1979 (which included, as

business able to be conducted in the absence of the public, proceedings under the *Public Assemblies Act* 1979 NSW) and the *Summary Offences Act* 1988 (which amended that same amendment to section 80) before it was repealed by the *Civil Procedure Act* 2005 NSW and replaced with section 71 of that Act.

58 A template for section 80 of the *Supreme Court Act* was section 21 of the *Equity Act* 1901 NSW, which (under the divisional heading "Jurisdiction in Chambers" and against a marginal note that read "Business to be disposed of in Chambers") provided as follows, with emphasis added:

> "**21.** (1) The business to be disposed of by the Judge in chambers shall consist of *such of the following as he thinks would be more conveniently so disposed of*, namely: -
>
> (a) Applications for time;
> (b) Applications for leave to amend;
> (c) Applications for discovery;
> (d) Applications for determining the mode of trial, and settling the questions to be tried;
> (e) Applications relating to the conduct of any suit or matter;
> (f) Applications relating to the guardianship or maintenance of infants;
> (g) Matters connected with the management of property;
> (h) Applications for the investment or alteration of the state of investment of any funds held in Court upon trust in any cause or matter;
> (i) Such other matters as in the opinion of the Judge may advantageously and with propriety be heard in chambers.
>
> (2) The Judge shall fix the times for sitting in chambers, and when so sitting shall have the same powers and jurisdiction as in open court.
>
> (3) The Judge while sitting in open court may adjourn for hearing in chambers, or while sitting in chambers may adjourn for hearing in open court, *any case before him which he may think would better be heard in chambers or in open court as the case may be*".

59 The templates for section 21 of the *Equity Act* 1901 were sections 61-64 of the *Equity Act,* 1880 NSW (44 Vic No. 18) and, in one respect, section 34 of the *Property Law Trustees and Mortgages Act* 1862 NSW (26 Vic No. 12).

60 The 1862 Act provided a template for section 21(1)(h), empowering judges to make general orders as to investment of cash under the control of the Court.

61 Under the heading "Judge Sitting in Chambers", sections 61-64 of the Equity *Act*, 1880 were in the following terms (with marginal notes incorporated in the text), with emphasis added:

> "**61. General power to sit in Chambers.**
>
> After the commencement of this Act, the Judge [that is, the Primary Judge in Equity] shall sit in Chambers *for the despatch of such business in Equity as in his opinion may advantageously and with propriety be heard in Chambers* and such Judge shall fix the times for so sitting and when so sitting shall have the same powers and jurisdiction as in open Court.
>
> **62. Particular business to be heard there.**
>
> The business to be disposed of by the Judge in Chambers shall consist of *such of the following as he shall think would be more conveniently so disposed of*, namely, – Applications for time for leave to amend for production of documents for determining the mode of trial and settling the questions to be tried applications relating to the conduct of any suit or matter the guardianship or maintenance of infants matters connected with the management of property and such other matters as the Judge may from time to time see fit so to dispose of.
>
> **63. Adjournment from Court to Chambers.**
>
> The Judge while sitting in open Court may adjourn for hearing in Chambers or while sitting in Chambers may adjourn for hearing in open Court any case before him *which he may think would better be heard* in Chambers or in open Court as the case may be.
>
> **64. Procedure in Chambers.**
>
> The course of proceeding in the Chambers shall be by summons and as nearly as may be according to the forms of observed by Judges of the Supreme Court sitting in Chambers in proceedings at law."

62 Sections 61-63 of the *Equity Act*, 1880 NSW had their template in the English statute 15 & 16 Vict. c. 80 (by the *Short Titles Act* 1896 UK given the short title, "*The Court of Chancery Act*, 1852"), sections 11, 13, 26 and 37: GP Stuckey and CD Irwin (eds), *Parker's Practice in Equity (New South Wales)* (Law Book Co, Australia, 2nd ed, 1949), page 40. In *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 95 Dixon J described the *Court of Chancery Act*

1852 UK as probably "the foundation of the modern jurisdiction in chambers" on the Chancery side of a Judicature Act court system.

63 The sections of the 1852 Act identified in *Parker* were in the following terms (with marginal notes incorporated in the text), with emphasis added:

> "**XI. Power to Master of the Rolls and Vice Chancellors to Sit at Chambers for the Despatch of Business, &C.**
>
> From and after the first day of Michaelmas Term 1852 it shall be lawful for the Master of the Rolls and the Vice Chancellors for the time being and they are hereby required to sit at Chambers *for the Despatch of such Part of the Business of the said Court as can, without Detriment to the Public Advantage arising from the Discussion of Questions in open Court, be heard in Chambers*, according to the Directions herein-after in that Behalf specified or referred to; and the Times at and during which they respectively shall so sit shall be from Time to Time fixed by them respectively…
>
> **XII. Judges to have same Power and Jurisdiction as in open Court.**
>
> The Master of the Rolls and every of the Vice Chancellors respectively when sitting in Chambers shall have the same Power and Jurisdiction in respect of the Business to be brought before them, as if they were respectively sitting in open Court….
>
> **XXVI. Business to be disposed of in Chambers by the Judges.**
>
> The Business to be disposed of by the Master of the Rolls and Vice Chancellors respectively while sitting at Chambers shall consist of *such of the following Matters as the Judge shall from Time to Time think may be more conveniently disposed of in Chambers than in open Court*; *videlicet*, Applications for Time, to plead, answer or demur; for Leave to amend Bills or Claims; for enlarging Publication; and also Applications for the Production of Documents; Applications relating to the Conduct of Suits or Matters; Applications as to the Guardianship and Maintenance of Infants; Matters connected with the Management of Property; and *such other Matters as each such Judge may, from Time to Time see fit, or as may from Time to Time be directed by any General Order of the Lord Chancellor*…
>
> **XXXVII. Power to Judges to exercise the Powers given by Section 7, 8 and 9 of this Act, and to dispose of any Cause, &C. in open Court.**
>
> From and after the First Day of Michaelmas Term 1852 the Powers given to the Masters in Ordinary of the said Court, and to the Court, by sections 7, 8 and 9 of this Act, may be exercised by the Master of the Rolls and Vice Chancellors respectively with respect to Causes, Matters, and Things which may be depending before them respectively in Chambers; and if and when any such Judge shall be of opinion that any Cause, Matter, or Thing so depending ought to be finally disposed of, unless the Parties or some of them can show good Cause to the contrary, he shall direct the same to stand in his Paper in open Court, giving such Notice thereof, if any, as he shall deem right, and proceed to dispose thereof accordingly."

64 Sections, 7, 8 and 9 provided powers for summary disposal of proceedings the subject of undue delay.

65 **Contemporary Practice in the Equity Division**. Most of the topics and enumerated as “chambers business“ in antecedents of CPA section 71 and SCA section 80 would now be considered simply under the rubric of “directions“ able to be given by a judge or a registrar and, in recent days, able to be dealt with under an “online court protocol“: Practice Note SC Gen 12 or Practice Note SC Eq 14.

66 Of greater note is consistency in legislative references to proceedings relating to the guardianship or maintenance of infants and, in the context of general rules of court, the probate and protective jurisdictions of the Court, much of the work of which continues to be dealt with “in the absence of the public“ in a judge’s private chambers.

67 Taken as a whole, the various legislative descriptions of the business of the Court able to be conducted in the absence of the public recognise that a judge (in the context of this paper, particularly, an Equity judge) has a discretion about the nature of business to be conducted, “in the absence of the public“ (in modern language) or “in chambers“ (in the old language).

68 SCA section 80 and CPA section 71 use language more spartan than that found in antecedent provisions. However, the language of earlier comparable provisions still reflects the nature of any such discretion that remains to be exercised. That is to say, if a judge determines that business should be disposed of in the absence of the public such a determination should ordinarily be based upon an opinion that the business “would be more conveniently“ disposed of in that way than in open court and that it might be so dealt with “advantageously and with propriety“.

69 In the Equity Division, particular types of business have traditionally been able to be conducted, “in the absence of the public“. They include the conduct of

routine business upon an exercise of adoption, protective, probate or family provision jurisdiction.

70 In *King investment Solutions Pty Ltd v Hussain* (2005) 64 NSWLR 441; [2005] NSWSC 1076 Campbell J made the following observations at [145] and [161]-[162]:

> "[145] A judge of this Court frequently makes orders in Chambers. In the Equity Division the usual practice is to make orders in adoption matters and protective matters in Chambers. Other orders, such as consent orders, where the Court wants to save parties the expense of an additional appearances, are also made in Chambers. In our system of law, the custom and practice of superior courts can itself be a source of law, at least unless it is shown to be contrary to a Statute or a provision of the substantive law….
>
> [161]… Signing a minute of the orders is the way in which orders are frequently made in business conducted in Chambers like adoption and protective matters, and if a judge makes orders in Chambers on an ex parte application.
>
> [162] In deciding whether to adopt a procedure like this, a court would also, of course, take into account the principle that the usual way of conducting the business of the Court in contentious matters is in open Court, and whether the type of case was one where there was a prospect that a party might want to lodge an immediate appeal and have it heard urgently, for which reasons would be needed at the time of the making of the orders".

71 Campbell J's comment (in paragraph 145 of his judgment) that "the custom and practice of superior courts can itself be a source of law" draws support from observations of Dixon J in *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 at 93-95 about the historical origins, and development, of the practice of judges making orders "out of court".

72 Dixon J recorded that, according to long established practice, the origin of which he believed not to have been traced, single judges of the common law courts in England sitting out of court exercised the power of their court in making interlocutory orders and, indeed, a very large part of the powers of the court "in chambers".

73 As he observed, the practice appears to have had its foundations in the need for orders to be made during the intervals between the "law terms" during which English courts traditionally sat. Adopting a passage from *R v Almon*

(1765) Wilm 243 at 263-264; 97 ER 94 at 103, he accounted for development of the practice as being "for the ease and convenience of the suitors of the Court; to accommodate them at a much easier expense, and with less trouble, in a great variety of cases, and especially in vacation time, when they could not have access to the Court; and when there was a great multiplicity of business, the saving of the time of the Court in adjusting trifling matters, which might be so much better employed in momentous ones, [which] was no inconsiderable motive towards establishing [the practice].

74 He then commented: "As time went on, the authority of judges sitting out of court, that is, at or in chambers, has been confirmed and increased by statute and by practice…. It has become a familiar feature of the judicature system".

75 Palmer J, in his seminal judgment on court-authorized ("statutory") wills in *Re Fenwick; Application of JR Fenwick; re "Charles"* (2009) 76 NSWLR 22; [2009] NSWSC 530 at [262]-[265], Palmer J made the following observations to like effect:

> "[262] The applications in *Re Fenwick* and *Re Charles* have been straightforward and unopposed. The evidence has been so clear and convincing as to all matter upon which the Court must be satisfied under s 19 and s 22 of the *Succession Act* that there was no need for the Court to see and hear any witness. Counsel for the applicants provided precise and well directed written submissions. There are likely to be many such applications in the future and it is desirable that they should be dealt with by the Court as expeditiously as possible and with as little expense to the parties as possible.
>
> [263] There is no need for straightforward, unopposed cases such as *Re Fenwick* and *Re Charles* to be heard in open Court and for Counsel to appear to make submissions. Such applications can be dealt with on the papers by a Judge in Chambers, pursuant to s 71(d) or s 71(f) *Civil Procedure Act*. Many applications for orders under the *Protected Estates Act* 1983 (NSW) – now the NSW *Trustee and Guardian Act* 2009 NSW - and the *Adoption Act* 2000 (NSW) are dealt with in this way.
>
> [264] If an application is, or may be, opposed it should be listed and heard in open Court in the usual way. Likewise, if a Judge dealing with the matter in Chambers has reservations about the quality of the evidence adduced, the matter can be listed in Court so that the Judge can see and hear the witnesses whose affidavit evidence is unsatisfactory. However, if the Judge merely has a query about a particular aspect of the information provided, the query may be addressed by a requisition from the Registrar.

[265] As with decisions made in Chambers in uncontested applications under the *Protected Estates Act* and the *Adoption Act*, there is no need for publication of reasons for a decision made in Chambers in straightforward, unopposed applications for a statutory will. Many of such applications will involve minors or mental health issues or matters of concern only to the immediate family members. There is no public interest in publishing reasons for judgment in such cases. Further, the dispensation of the requirement to give reasons in such applications will permit them to be dealt with far more quickly than otherwise. Of course, when an application is contested and heard in open Court, reasons for the decision will be required in the normal way".

76 In *Kelly v Kelly* [2019] NSWSC 994 at [77]-[80] Hallen J recently made similar observations about the conduct of business in the Family Provision List:

"[77] Arguably, by virtue of [CPA] s 11(1), a reference to a matter being dealt with "in chambers" is now an anachronism. In any event, dealing with a matter "in chambers" does not mean that the proceedings are dealt with in secret. It means no more than a less formal procedure may be adopted by the Court in matters where there is no opposition to the Court making the orders sought: *Le Grand v Criminal Justice Commission* [2001] QCA 432, per White J (with whom Davies and Williams JJA agreed), at [19]. (Of course, that case was determined by reference to the *Supreme Court Act 1995* (Qld). Nonetheless, the principle to which I have referred remains applicable.) Otherwise, the business of the Court is conducted in court.

[78] In the Family Provision List, the Court, frequently, makes orders in chambers. In compliance with s 56 of the *Civil Procedure Act*, which requires the Court to give effect to the overriding purpose of the Act and of rules of court, in their application to civil proceedings, to facilitate the just, quick and cheap resolution of the real issues in the proceedings, and also in cases where the Court wishes to save parties the expense of an additional appearance by their legal representatives, orders, such as orders finally resolving the proceedings, or other procedural orders, are regularly made in chambers.

[79] Dealing with the matter in chambers still requires the documents in the Court file, where relevant, to be read, and the formal notation of the documents that have been read in the Court's record of proceedings. The settlement checklist, which the legal representatives are now required to consider, complete, and sign, in family provision matters that are compromised where an order under the [Succession] Act is to be made, assists in the task of identifying the documents to be read and considered together with other relevant matters (such as whether the consent of the beneficiary who is bearing the burden of provision made in favour of the Plaintiff has been obtained).

[80] Of course, as in this case, the Court may, if thought appropriate, deal with the matter in Court, and then, if necessary, refer it to chambers, to enable the orders to be made".

77 My personal experience of the Adoption, Probate, Protective and Family Provision Lists in the Equity Division (and work in the Division generally) accords with these observations of Campbell, Palmer and Hallen JJ.

78 Probate Proceedings. The probate proceedings most commonly referred to (private) chambers on a List Day (held most Mondays) are applications for a grant of probate in solemn form, on settlement of contested proceedings, passing over a will alleged to have been invalid for a want of testamentary capacity.

79 In accordance with established practice, following a grant of probate the proceedings are generally referred to the "Probate Registrar" for completion of the grant in accordance with the *Probate Rules*. This mode of procedure enables an application, and supporting evidence, to be scrutinised with greater attention than practicable in a busy List.

80 Protective List Proceedings. The protective proceedings most commonly dealt with in (private) chambers are applications referred to the Protective List Judge in chambers, by a registrar sitting in open court, for orders for the making, or revocation, of protected estate management orders under sections 41 and 86 of the *NSW Trustee and Guardian Act* 2009 NSW, respectively.

81 An application for the appointment of a manager commonly follows a payment into court of money paid in satisfaction of a judgment for damages for personal injuries in proceedings in the Common Law Division of the Court or in the District Court of NSW. Applications for the revocation of protected estate management orders are commonly made when, after an incapable person's mental health has stabilised or his or her personal circumstances have changed, grounds exist for believing that the protected person is capable of managing his or her own affairs without the constraints of a management regime.

82 Routine applications, for a manager or for revocation orders, are generally dealt with in chambers. If any doubt attends the making of the orders sought,

proceedings are listed in court (*prima facie*, a “closed court“) for hearing, or directions, as the nature of the case requires.

83 The practice of the Court upon an exercise of protective jurisdiction has long been to hold at least some of the Court’s proceedings in closed court and to withhold the identity of at least persons the jurisdiction is intended to protect: *B v Medical Superintendent of Macquarie Hospital* (1987) 10 NSWLR 440 at 459D (notwithstanding Kirby P’s advocacy, at 456C, against traditional practice).

84 A cultural aspect of the Court’s engagement with the public domain, and confidentiality, is evident in routine applications to the Court for the appointment of a protected estate manager, upon an exercise of protective jurisdiction, as a preliminary step towards an order that money paid into court in satisfaction of a judgment for damages, as compensation for personal injuries, in Common Law proceedings be paid out of court.

85 Throughout the pendency of the common law proceedings, an incapable person sues (by his or her tutor) as a publicly named plaintiff, and those proceedings are generally heard in open court. The parties to such proceedings generally agree that a settlement of them is on the basis that the terms of their settlement are not to be disclosed.

86 At the next stage of proceedings, in the Protective List of the Equity Division, proceedings are generally treated as confidential to the parties. However, when the incapable person is declared to be incapable of managing his or her affairs (so that his or her estate is managed as a protected estate, subject to supervision by the Court and the NSW Trustee) a manager of the estate is free to do openly what is necessary to be done in dealing with third parties in management of the estate. This is largely an incident of a need to manage “property”, a concept that generally involves, or potentially involves, the public against whom “property rights” operate.

87 The course of personal injury litigation by or on behalf of an incapable person, from the commencement of common law proceedings *via* a tutor to an order that compensation money paid into court be paid out to a protected estate manager of the incapable person, is an illustration of Oliver Wendell Holmes' aphorism that the life of the law is not logic, but experience.

88 Problems which likewise expose the limits of logic in administration of the law can arise where a protected person acts, or purports to act, independently of the manager of his or her protected estate, generally in disregard of the fact that (by virtue of section 71 of the *NSW Trustee and Guardian Act* 2009 NSW) his or her power to deal with his or her estate is suspended in respect of so much of that estate as is the subject of management under that Act. In *M v Mental Health Review Tribunal and Ors (No. 2)* [2016] NSWSC 572 (disposing of proceedings in which a protected person conducted proceedings as a litigant in person, concealing his activities from manager of his estate, the NSW Trustee), I drew attention to the fact that there is no central register of subsisting management orders outside the office of the NSW Trustee and, under current confidentiality regimes, access to information available to the NSW Trustee is restricted. Whether a correct balance has been struck between competing imperatives (maintaining confidentiality of a protected person's affairs in his or her best interests, and protecting those who deal with such a person) is open to debate.

89 By long established practice recognised by rules of court (*Uniform Civil Procedure Rules* 2005 NSW, rule 57.2(2); BE Porter and MB Robinson, *Protected Persons and Their Property in NSW* (Law Book Co, Sydney, 1987), page 59), the Protective List Judge makes orders in chambers responsive to a "report and proposal to court" filed by the NSW Trustee, the statutory successor to the Protective Commissioner, who enjoyed the status of a Master of the Court. That procedure enables protective business to be conducted quickly and cheaply in circumstances in which the costs of fully blown court proceedings might be prohibitive for a small protected estate or undue inconvenience might attend management of an estate by a requirement that separate proceedings be instituted. In most cases, the

Court's orders take the form of an endorsement of a proposal specified, and elaborated, in the NSW Trustee's report. In some cases, reasons for judgment are published on the Caselaw website in disposition of a report's proposal.

90 When a party applies for a "private manager for reward" (other than a licensed trustee company) to be appointed as a protected estate manager, in circumstances such as described in *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245 and *Re Managed Estates Remuneration Orders* [2014] NSWSC 383, the established practice is that the Court's consideration of the application is deferred pending presentation to the Court by the NSW Trustee of a report as to the suitability of the proposed manager. In routine cases orders are made in chambers with the benefit of that report. In non-routine cases, the proceedings are listed in (*prima facie,* closed) court for further consideration, or directions, as the nature of the case requires.

91 The distinguishing feature of a "private manager for reward" is that the manager is, by an order of the Court, authorised to charge remuneration for services which a fiduciary is generally required to perform gratuitously. Each year, the Protective List Judge publishes on the Caselaw website a Report styled "Re Managed Estates Remuneration Report" which, in redacted form, reproduces a Report from the NSW Trustee as to the remuneration allowed to such managers. This provides a basis for comparison of their fees with those of licensed trustee companies, the fees of which are published in accordance with provisions of the *Corporations Act* 2001 Cth.

92 When reasons for judgment are published in disposition of business in the protective jurisdiction (or upon the determination of an application for a statutory will for a person lacking testamentary capacity), the Court's reasons are, according to custom, anonymised by the use of pseudonyms. This is generally done without a suppression or non-publication order, or any other form of confidentiality order.

93 In the determination of an appeal from the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT), the Mental Health Review Tribunal or the Children's Court of NSW (or upon any exercise of *parens patriae* jurisdiction relating to proceedings pending in those tribunals) a non-publication order is generally made in parity with "confidentiality" provisions in the legislation (namely, the *Guardianship Act* 1987 NSW, section 101; the *Civil and Administrative Tribunal Act* 2003 NSW, section 65; the *Mental Health Act* 2007 NSW, section 162; and the *Children and Young Persons (Care and Protection) Act* 1998 NSW, section 105) governing proceedings in those tribunals.

94 Summary. The practical reality is that: (a) the nature of some business conducted by the Equity Division lends itself to being dealt with "in the absence of the public", not merely in "closed court" but, literally, "in chambers"; (b) parties are generally anxious to have it dealt with in that manner so as to secure an expeditious conduct of their business and so as to avoid the costs of attendance before the Court; and (c) if business of that character could not be dealt with informally, additional judicial resources would inevitably be required.

(V.B) "Confidentiality" Orders and Procedures in aid of a Hearing

95 In, or in connection with, the conduct of a hearing of proceedings in "open court", the Court may endeavour to maintain (or cause to be maintained) the confidentiality of particular evidence, submissions or other information by (for example):

(a) sitting in a "closed" court: *Russell v Russell* (1976) 134 CLR 495 at 520.

(b) regulating access to subpoenaed or other documents within the custody of the Court: *Waind v Hill & National Employers' Mutual General Association Ltd* [1978] 1 NSWLR 372 at 385-386.

(c) making information available to parties or their legal representatives on the basis (enforceable by an undertaking or order) that it is not available for publication: *R v Perez-Vargas* (1986) 8 NSWLR 559 at 561-562.

(d) making an order that documents be placed in a sealed envelope marked "Not to be opened without the leave of a Judge": *R v Cartwright* (1989) 17 NSWLR 243 at 245B, 254F and 257B; *R v Foster* (1992) 25 NSWLR 732 at 736D-E, 741B and 743B.

(e) returning "confidential exhibits" to the solicitor for the party who tendered them, upon an undertaking or subject to an order for their return to the Court if, within a particular time frame, required by the Court.

(f) making orders for proceedings, or particular questions, to be the subject of "alternative dispute resolution" procedures (arbitration, mediation or referral for a referee's report), all procedures involving decision making otherwise than in an open court rather than, or as a preliminary to, a fully contested hearing in open court.

(g) publication of reasons for judgment to parties affected by the Court's judgment or orders without publication of the reasons on the internet site, "Caselaw", or with a redacted form of publication on Caselaw.

96 A common example of the "sealed envelope" procedure in the context of Equity proceedings occurs when (upon an application for judicial advice (under section 63 of the *Trustee Act* 1925 NSW or otherwise) an order is made that the opinion of counsel, or other documents confidential to the applicant trustee, be placed in a sealed envelope (marked "Not to be opened without the leave of a Judge") and be retained on the court file in that form. An application for judicial advice thus bears a hybrid character. Advice given

to a trustee is characterised as “private” because its function is to give personal protection to a trustee rather than to determine a dispute between competing litigants: *Macedonian Orthodox Community Church St Petka Incorporated v Petar* (2008) 237 CLR 66 at [64]. That said, an application for judicial advice is generally heard and determined in public, subject to procedural safeguards designed to protect confidential material.

(V.C) Access to Court Files

97 Practice Note SC Gen 2 (Access to Court Files) prescribes a procedure for the provision of access to court files: paragraph 4.

98 The Practice Note embodies a foundational prohibition on outside access to court files, qualified by exceptions (conditioned on a grant of leave by the Court) distinguishing between access allowed to a party to proceedings and access available to a non-party.

99 Essentially, the Practice Note provides that:

(a) a person may not search in a registry for or inspect any document or thing in any proceedings except with the leave of the Court: paragraph 5.

(b) access to material in any proceedings is restricted to parties, except with the leave of the Court: paragraphs 6 and 7.

(c) provided that a non-party who applies for access to a court file demonstrates that access should be granted in respect of particular documents for a stated reason (paragraph 17), access will normally be granted to a non-party, after the conclusion of proceedings (paragraph 15), in respect of:

(i) pleadings and judgments in proceedings that have been concluded, except insofar as an order has been made that they or portions of them be kept confidential;

(ii) documents that record what was said or done in open court;

(iii) material that was admitted into evidence; and

(iv) information that would have been heard or seen by any person present in open court, unless the judge or registrar dealing with the application considers that the material or portions of it should be kept confidential: paragraph 7.

(d) access to other material by a non-party will not be allowed unless a registrar or judge is satisfied that exceptional circumstances exist: paragraph 7.

100 Other provisions elaborate these essential features of the Practice Note. For example:

(a) paragraph 10 precludes a party from inspecting privileged material, expert's reports or witness statements without the leave of the Court.

(b) Paragraphs 14-16 provide guidelines directed towards ensuring that documents made available to a non-party are documents which have been deployed in open court.

101 Paragraph 17 of the Practice Note prescribes a form of application by a non-party for access to material held by the Court.

102 Before dealing with an application by a non-party for access to a court file the registrar or judge dealing with the application *may* notify interested parties before dealing with the application: paragraph 17.

103 In overview, the Practice Note confirms that:

(a) the court maintains control over all documents held by it; and

(b) it is within the power, and routine practice, of a judge to order that material held by the court be kept confidential.

(VI) COURT PROCEDURES DEPENDENT UPON PUBLIC ENGAGEMENT

104 Discussion of the importance of court proceedings being conducted "publicly and in open view" is generally directed towards an explanation of why it is proceedings should be conducted in public.

105 In *Russell v Russell* (1976) 134 CLR 495 at 520 Gibbs J followed that pattern when he wrote the following:

> "It is the ordinary rule of the Supreme Court [of Victoria], as of the other courts of the nation, that their proceedings shall be conducted 'publicly and in open view' (*Scott v Scott* [1913] AC 417 at 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hall-mark of judicial as distinct from administrative procedure' (*McPherson v McPherson* [1936] AC 177 at 200)".

106 Less attention is given to the fact that the effective exercise of some types of the Court's jurisdiction depends, not only on proceedings being conducted "publicly and in open view", but upon steps being taken actively to draw proceedings to the attention of persons who may be affected by their determination.

107 A common denominator in those types of case is often a need for the Court to make a determination about entitlements to property and to do so in a manner that binds all persons who have, or may have, an interest in that property.

108 In those types of case the Court commonly encounters a need for the publication, or service, of a formal notice about business to be conducted by the Court.

109 Thus, notice of an intention to apply for a grant of probate or administration is routinely required, and notice of proceedings must be served in probate proceedings in preparation for a grant of probate in solemn form (the nature of which is explained in *Estate Kouvakis; Lucas v Konakas* [2014] NSWSC 786 at [249]), taking into account that (as explained in *Osborne v Smith* (1960) 105 CLR 153 at 158-159) a person given notice of proceedings and a reasonable opportunity to intervene is bound by the outcome of the proceedings even if not named as a party in them.

110 In family provision proceedings, Practice Note SC Eq 7 provides for notice of the proceedings to be given, *inter alia*, to all persons eligible to apply for family provision relief and all persons beneficially entitled to the distributable estate subject to an application for relief.

111 In proceedings under the *Corporations Act* 2001 Cth, all manner of applications concerning the status or administration of a corporation must be the subject of public advertisements, or the service of notice, so as to accommodate the interests of creditors as well as those of members and directors.

(VII) CONCLUSION

112 A key feature of the Court's performance of its functions, and its engagement with the community it serves, is the Court's need, in service of the due administration of justice, to remain, so far as may be reasonably practical, in control of its own processes and the extent to which business of the Court is conducted in public.

113 The *Court Suppression and Non-Publication Orders Act* provides authority for the Court to make "suppression orders" and "non-publication orders" ("confidentiality orders" of a kind) affecting persons who are not joined in proceedings as a party. It does not deal generally with the occasions upon which, or means by which, proceedings can be made the subject of some other form of "confidentiality" order or procedure.

114 In a modern context questions about what, if any, business of the court should not be conducted in public view or be freely reported ultimately involve considerations of "case management".

115 Chief amongst those considerations are the policy issues, classically identified in *Scott v Scott* [1913] AC 417, about the importance of the business of the court being conducted in public so far as the due administration of justice allows.

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GCL

22/8/2019