Applications for costs and non-publication orders….
Civil applications in the Local Court

Hunter Street Chambers
14 August 2015

Lizzie McLaughlin

NON-PUBLICATION AND SUPPRESSION ORDERS

Introduction

1. Applications for non-publication and/or suppression orders are made pursuant to the *Court Suppression and Non-Publications Orders Act 2010* (NSW) ('the CSNPO Act'). This a simple and straightforward piece of legislation. It is easy to navigate, and it is easy to read. The only problem is – applications for making such orders are hard and, ironically, have the potentially to cause more harm than good.

2. The CSNPO Act has its origins in the New South Wales Law Reform Commission Report 100 (2003) titled "Contempt by Publication". In 2008, the Standing Committee of Attorneys-General ("SCAG") requested that an examination be undertaken of the use of suppression orders, including exploration of possible harmonisation across Australian jurisdictions. In May 2010, SCAG endorsed model provisions in the form of the NSW draft Bill. New South Wales is the first jurisdiction in Australia to adopt the model provisions in the form of the *Court Suppression and Non-publication Orders Act 2010*, which broadly follows the model provisions.

3. In *Rinehart v Welker* [2011] NSWCA 403 reference was made at [5]–[6] to the origins of the Act and it was observed that, although (at that time) no other state or territory had yet adopted the model provisions, the Commonwealth had introduced the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011*, which was referred to the Legal and Constitutional Affairs Legislative Committee for report by 22 March 2012. If enacted, the Commonwealth Bill will have the effect of inserting the model provisions (with some modifications) into the *Judiciary Act 1903* (Cth), the *Federal Court of Australia Act 1976* (Cth), the *Federal Magistrates Act 1999* (Cth) and the *Family Law Act 1975* (Cth).

4. The *Access to Justice (Federal Jurisdiction) Amendment Act 2012 No 186* (Cth) amended the *Judiciary Act 1903* (Cth), the *Family Law Act 1975 (*Cth), the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth) (see Sch 2 of the amending Act, which commenced 12 December 2012) by inserting provisions which implement the model SCAG Bill in terms which are substantially the same as (but not identical with) the CSNPO Act.

There are other options…

5. **Sections 4 and 5** make clear that the CNSPO does not purport to codify the law concerning court suppression and non-publication orders.

6. The CNSPO omits specific provisions from three statutes — ss 292, 302(1)(c), (d) and 302(3) from the *Criminal Procedure Act 1986*, s 72 from the *Civil Procedure Act 2005* and s 62 from the *Criminal Assets Recovery Act 1990*. And in the Agreement in Principle speech (NSW Hansard, Legislative Assembly, 29 October 2010 p 27,195), the Parliamentary Secretary observed that these omitted sections were "considered to be superseded by the provisions of the bill". It was said that the government had:

> "…been particularly careful not to dilute any protections currently afforded by other legislation, particularly as they relate to children, complainants and witnesses in sexual assault proceedings, and some witnesses in broader proceedings."

7. To that end, it is noted that the Act leaves unamended a range of provisions in other statutes concerning suppression and non-publication orders. These include (non-exhaustively) ss 15A–15G of the *Children (Criminal Proceedings) Act 1987*, ss 74–76 of the *Coroners Act 2009*, s 111 of the *Crimes (Appeal and Review) Act 2001*, s 45 of the *Crimes (Domestic and Personal Violence) Act 2007*, s 43 of the *Crimes (Forensic Procedures) Act 2000*, s 51B of the *Crimes (Sentencing Procedure) Act 1999*, ss 126E and 195 of the *Evidence Act 1995*, s 28 of the *Law Enforcement (Controlled Operations) Act 1997*, s 34 of the *Law Enforcement and National Security (Assumed Identities) Act 2010*, s 101A(8) of the *Supreme Court Act 1970*, s 42(5) and (6) of the *Surveillance Devices Act 2007*, ss 26P and 27ZA of the *Terrorism (Police Powers) Act 2002*, ss 23, 26 and 31E of the *Witness Protection Act 1995* and s 65 of the *Young Offenders Act 1997*.

   This means – there are other options that exist for other specific situations within criminal or quasi-criminal proceedings. CSNPO is really for the more general and ordinary context.

Fundamental Principle – Open Justice

8. **Section 6** of the CNSPO is one of its most critical provisions. It is simple. It provides that in deciding whether to make a suppression order or 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.

9. Section 6 is based upon the fundamental rule of the common law that the administration of justice should take place in open court: *John Fairfax & Sons Ltd v Police Tribunal (NSW*) (1986) 5 NSWLR 465 at 476; *Attorney-General (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342 at 345–50. The open justice principle was considered, in the context of statutory suppression orders, in *Hogan v Hinch* (2011) 275 ALR 408 at [20]–[27].

10. In *Rinehart v Welker* [2011] NSWCA 403 it was said at [26] that the principle of legality favours a construction of legislation such as this which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle and common law freedom of speech and, where constructional choices are open, so as to minimise its intrusion upon that principle.

11. In *Rinehart v Welker*, it was observed at [32] that open justice ensures public confidence in the administration of justice, and (at [39]) that the concept of administration of justice is multi-faceted.

What does a CNSPO order cover and who does it bind?

12. **Section 7** empowers a court expressly to make a suppression order or non-publication order, which operates to prohibit or restrict the publication or disclosure of specified *information*. The Agreement in Principle speech (NSW Hansard, Legislative Assembly, 29 October 2010 p 27,195) observed that the s 7 power is:

> "…the legislative sanction that is required to bind all members of the public, not just those who are present at proceedings…"

13. At common law, conflicting views had been expressed as to whether or not a non-publication order made in open court extended to the world at large and bound persons not present in the courtroom: *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; 50 ACSR 380 at [89]; *Commissioner of Police (NSW) v Nationwide News Pty Ltd* (2008) 70 NSWLR 643 at [43]–[44]; *Hogan v Hinch* (2011) 275 ALR 408 at [23].

14. However, the Court in *Fairfax Digital v Ibrahim* per Basten JA at [92] – [102] found that, provided that the orders sought do not purport to bind the 'world at large' and that certain conditions are met, orders can be made which are binding on third parties. See below for a discussion in relation to material on the internet.

Grounds for making an order

15. **Section 8** sets out the grounds for making an order. Each of the grounds requires the court to consider whether the order is "necessary" for a stated purpose. Section 8 provides:

> **(***1)* *A court may make a suppression order or non-publication order on one or more of the following grounds:*
> *(a) the order is necessary to prevent prejudice to the proper administration of justice,*
> *(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,*
> *(c) the order is necessary to protect the safety of any person,*
> *(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 (including an act of indecency),*
> *(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.*
>
> *(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.*

16. The test of necessity is well known at common law in this area: *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465 at 476–477; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512; 220 ALR 248; [2005] NSWCA 101 at [39]–[48]; *Burrell v R* [2008] NSWCCA 276 at [17]; *Nagi v DPP (NSW)* [2009] NSWCCA 197 at [30]–[31].

17. The meaning of "necessary" in s 8 was considered in *Rinehart v Welker* [2011] NSWCA 403 at [27]–[31], where it was said that "necessary" is a strong word and that orders under the CNSPO should only be made in exceptional circumstances, and that "necessary" did not mean convenient, reasonable or sensible. It requires something more.

18. The word "necessary" should not be given a narrow construction, and what is necessary will depend on the particular grounds in s 8 relied upon and the factual circumstances said to give rise to the order: See *Fairfax Digital v Ibrahim* at [8] and [46].

19. In *Ashton v Pratt* [2011] NSWSC 1092 at [11], Brereton J found that that the tests of 'necessity' set out in section 8 require a high degree of 'certainty'. In practice – what this means is that the evidence needs to establish with a 'high degree of certainty' that the relevant ground is to occur.

20. It is difficult to know how section 6 interacts with section 8. The reality is that section 6 is often seems to be treated as a form of 'proviso' - a motherhood statement which is dragged out to undercut what would seem to be an otherwise strong application. To that end, it is noted that section 6 requires that the principle be taken into account. It does not say to what degree. It is clearly leaving that to the discretion of the judicial officer and the particular facts of the matter.

21. The CCA found that the requirement imposed by s 6 should not impede a court from making an order when it is of the opinion that one of the grounds in s 8 is made out, and its importance will vary depending on the extent that any such order would interfere with that principle: *Fairfax Digital v Ibrahim* at [9].

22. In the Agreement in Principle speech (NSW Hansard, Legislative Assembly, 29 October 2010 p 27,195), it was said that the security ground (s 8(1)(b)) "is common in relevant Commonwealth legislation". The express reference to interests "in relation to national and international security" in s 8(1)(b) enacts a statutory ground of this type in NSW law. The relationship at common law between national security and the administration of justice, in the context of a screening order to protect a witness in a criminal trial for a state offence, was considered in *BUSB v R* [2011] NSWCCA 39.

23. In the Agreement in Principle speech, it was also said that the public interest ground in s 8(1)(e) was "intended to cover those situations that do not fit easily" within other specified grounds, and that it was "intended that these other reasons should only outweigh the public interest in open justice where it does so 'significantly'".

The Internet

24. The question of whether an order may be made under the Act requiring removal of material from the internet (in the context of a criminal jury trial) was examined in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125; 19(7) Crim LN [3087], where consideration was also given to the decisions in *R v Perish* [2011] NSWSC 1102 and *R v Debs* [2011] NSWSC 1248, where orders to that effect had been made. In *Fairfax,* the relevant principles on that issue as distilled from the judgment of Basten JA are as follows:
    a. Relevant service providers must first be identified and given the opportunity to remove relevant material before the order is sought;
    b. The fact that an internet search engine reveals many thousands of hits for the prejudicial material is not of itself determinative of whether a suppression order is necessary;
    c. The issue is how accessible those items are on the internet – are they stored in archives, have they been cached?
    d. The test for determining if a jury would be so influence by the prejudicial material such that a direction from the judge to ignore the material would be ineffective, does not change because the material is available on the Internet;
    e. The capacity to enforce a suppression order is relevant. Factors such as where the websites hosting the material are located, where the search engines are located, and whether or not sites have the material in cached form is also important; and,
    f. Relevant service providers must first be identified and given the opportunity to remove relevant material before the order is sought;

Procedure for making orders

25. **Section 9** provides a procedure for making the order. In short the order can be made at any time during proceedings or even after proceedings have concluded (s.9(3)). A court may make a suppression order or non-publication order on its own initiative or on the application of a number of other persons or organisations including state or territory governments and news media organisations.

26. A suppression order or non-publication order may be made subject to such exceptions and conditions as the court thinks fit and specifies in the order (s.9(4)). A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made (s.9(5)).

Interim Orders

27. **Section 10** provides for interim orders. It provides that if an application is made, the court may, *without determining the merits of the application*, make the order as an interim order to have effect, subject to revocation by the court, until the application is determined.

Time and place

28. **Section 11** provides that the order must specify the place where the order provides. It also provides for orders under the CNSPO to operate anywhere in the Commonwealth if the court is satisfied that having the order apply outside NSW is *necessary* for achieving the purpose for which the order is made.

29. In the Agreement in Principle speech (NSW Hansard, Legislative Assembly, 29 October 2010 p 27,195), it was said that:

> "…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 worldwide web from a source located outside that jurisdiction."

30. **Section 12** provides for the duration of an order to be identified by time or the occurrence of a specified future event. Further the court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.

Review and Appeal

31. **Section 13** provides for a broad review function by the court that made the order, either on its own initiative or on application by a person entitled to apply for review. On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court may otherwise make under the CNSPO. The review can be initiated by the court or by:
    a. the applicant for the order;
    b. a party to the proceedings in connection with which the order was made,
    c. the Government (or an agency of the Government) of the Commonwealth or of a State or Territory,
    d. a news media organisation,
    e. any other person who, in the court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should have been made or should continue to operate.

32. **Section 14** provides for appeal, with leave of the appellate court, against a decision to make or not to make an order under the Act or a decision on review, or a decision not to review, an order under the Act. An appeal is by way of rehearing and fresh evidence may be given (s 14(5)) with the powers of the appellate court specified in s 14(4).

33. If the District Court makes an interlocutory order under the Act in criminal proceedings on indictment, an appeal lies to the Court of Criminal Appeal: *Fairfax Digital v Ibrahim* at [17].

34. The hearing of an appeal under s 14 is a hearing de novo. Problems which could arise from this construction can be controlled by the imposition of conditions on leave to appeal. Although the question of leave will depend upon each particular case, it is likely that in cases involving a reconsideration of an order on fresh or different evidence, leave will commonly be refused and the applicant left to exercise his or her right of review under s 13: *Fairfax Digital v Ibrahim*, above, at [6]–[7] and [21]–[24].

35. The construction and operation of ss 13 and 14 were considered in *Fairfax Digital v Ibrahim* at [5]–[7] and [15]–[27].

Quick Summary - What must an order under the CNSPO specify?

- The ground or grounds on which the order is made: s 8(2)
- The information to which the order applies, with sufficient particularity to ensure that it is limited to achieving the purpose for which it was made: s 9(5).
- Any exceptions or conditions to which the order is subject: s 9(4).
- The place to which the order applies — whether New South Wales only or elsewhere in the Commonwealth as well: s 11, and,
- The duration of the order, by reference to time or the occurrence of a specified future event: s 12.

Some useful or interesting cases…

- *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125
- *Rinehart v Welker* [2011] NSWCA 403
- *Bissett v Deputy State Coroner* [2011] NSWSC 1182
- *DPP v QPX* [2014] VSC 211
- *D1 v P1* [2012] NSWCA 314
- *In the Application of S for a Suppression or Non-Publication Order* [2013] NSWLC 1

TEN QUESTIONS TO GUIDE YOUR APPLICATION FOR ORDERS UNDER THE CSNPO ACT

1. What will happen if your application fails? Consider the risks.

2. What is the order that you are seeking? Be specific …
    a. Information (internet, facebook,
    b. Duration
    c. Reach

3. Why is the order sought? What ground/s are you relying upon...
    a. Prevent prejudice to proper administration of justice
    b. National/international security
    c. Protect safety of any person
    d. Undue distress or embarrassment involving offence of sexual nature
    e. Otherwise in the public interest

4. Evidence!
    a. Do you need it?
    b. Have you got it? Interim order?

5. Is the proposed order convenient, sensible and reasonable?

6. Is the proposed order necessary?

7. Have you taken any necessary preventative steps? Internet – letter to provider – steps taken by solicitor – affidavit….common sense….

8. What is the causative or persuasive link between the harm concerned and the order?

9. What about section 6? What arguments do you have to persuade the Court that open justice is

10. What will happen if your application fails? Consider the risks.

APPLICATIONS FOR COSTS

Some fundamental principles

1. Courts can only award costs when there is a statutory provision allowing them to do so. They do not have any inherent jurisdiction to award costs. Before making or considering making any application, you need to work out which statute you are relying. In criminal matters, the choice is generally straightforward:
    a. *Criminal Procedure Act 1986* (NSW) ('the CPA'); or
    b. *Costs in Criminal Cases Act 1967* (NSW) ('the CCCA').

2. The purpose of a costs order is not to punish one party but to indemnify or reimburse the other. Although the submissions and legal principle that underpins whether or not costs should be awarded in any particular case will necessarily involve some comment on the conduct of the prosecution or the litigation, a costs order is not punitive. In *Latoudis v Casey* (1990) 170 CLR 534 at 542 - 543 Mason CJ said:

> "It will be seen from what I have already said that, in exercising its discretion to award or refuse costs, a court should look at the matter primarily from the perspective of the defendant. To do so conforms to fundamental principle. If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings: *Cilli v. Abbott*, at p 111. Most of the arguments which seek to counter an award of costs against an informant fail to recognize this principle and treat an order for costs against an informant as if it amounted to the imposition of a penalty or punishment. But these arguments only have force if costs are awarded by reason of misconduct or default on the part of the prosecutor. Once the principle is established that costs are generally awarded by way of indemnity to a successful defendant, the making of an order for costs against a prosecutor is no more a mark of disapproval of the prosecution than the dismissal of the proceedings."

3. Furthermore, in *Latoudis v Casey* [supra] Toohey J stated:

> "What has emerged from a number of decisions is recognition that costs are awarded by way of indemnity to the successful party and, expressly or impliedly they are not by way of punishment of the unsuccessful party".

4. Similarly, McHugh J in *Latoudis v Casey* [supra] stated that:

> "An order for costs indemnifies the successful party in litigious proceedings in respect of liability for professional fees and out-of-pocket expenses reasonably incurred in connexion with the litigation: *Kelly v. Noumenon Pty Ltd* (1988) 47 SASR 182, at p 184. The rationale of the order is that it is just and reasonable that the party who has caused the other party to incur the costs of litigation should reimburse that party for the liability incurred. The order is not made to punish the unsuccessful party. Its function is compensatory."

***Criminal Procedure Act 1986* (NSW)**

5. An application for costs under the CPA can be made at the conclusion of summary proceedings in the Local Court (s 213), at the conclusion of committal proceedings in the Local Court (s 116) or in the Supreme Court when exercising it's summary jurisdiction (s 257C). In each situation, there are four basic criteria – which are replicated in relevant sections of the CPA. For the purposes of this paper, all references are to the section 214(1) provisions.

s.214(1)(a) – Investigation was unreasonable or improper

6. This does not require the Court to conclude that the investigation by police "*fell grossly below optimum standards*" (JD v DPP and Ord [2000] NSWSC 1092 (30 November 2000).

s.214(1)(b) – That the proceedings were initiated reasonable cause or in bather father or were conducted in an improper manner

7. This is probably one of the most common provisions relied upon for costs applications. Accordingly, Wood CJ and CL concluded in *R v Maley* [2000] NSWCCA 196 (26 May 2000) that given the wide variety of cases in which applications pursuant to section 214(1)(b) and the like are made, there is no one exhaustive definition of what amounts to a decision to prosecute '**without reasonable cause'**, however, he made the following observations (at pars 12-14):
    a. The fact that a prima facie case exists does not mean it is necessarily reasonable to launch a prosecution;
    b. There may be some circumstances where, when a prima facie case exists, it is reasonable to expect a prosecutor to make some evaluation of that evidence; and
    c. What is required is an 'objective analysis of the whole of the relevant evidence'.

8. A proceeding is initiated "without reasonable cause "if it has no real prospects of success, or was doomed to failure" (see *Port Macquarie-Hastings Council v Lawlor Services Pty LTd; Port Macquarie-Hastings Council v Petrol* (No 7) 4 [2008] NSWLEC 275 (21 February 2008) per Pain J at 61-63.

9. There is no 'exceptional circumstances' requirement. What is needed is an examination of the quality of the evidence that the Police gathered, including those enquiries that that should have made (*DJ v DPP*).

10. Consider the (persuasive but non-binding) New Zealand case of *R v Boyd* (1984) 2 DCR 372. It concerned a prosecution against a police officer. In that case, although the Court found that the prosecution was initially brought in good faith, it concluded that it was not *continued* in good faith as the prosecution had continued with the proceedings so that the court and not the police would make the decision on the charges. The reason that the prosecution had taken this course was because the accused was a police officer.

11. The discussion later in this paper of the issue of credibility applies here also.

s.214(1)(c) – Unreasonable failure to investigate any relevant matter etc

12. *DPP (Cth) v Neamatis* [2007] NSWSC 746 dealt with with this subsection – but it's useful in that it makes it clear that any application requires there to be a evidence in

support of the application, that the applicant's submissions must clearly outline the basis of the application with direct reference to the relevant caselaw.

s.214(1)(d) – exceptional circumstances + just and reasonable

13. This is the 'catch-all' provision that allows for an argument to be fashioned for costs when it would otherwise not fall neatly within the other subsections of s 214.

Adjournments

14. Don't forget about adjournments. Sections 118, 216 and 257F of the CPA all allow for costs to made on an adjournment. The test is whether or not the other party has incurred additional costs because of the unreasonable conduct or delay on the part of the prosecutor. Examples:
    a. Return of subpoena non-compliance by Police;
    b. Adjournment of a hearing because of non-service of the brief.

15. Such applications do not require there to be any assessment of the overall merits of the case. It is not necessary to follow the usual 'costs in the cause' approach of civil costs applications that are made before the proceedings are finalized. The application is contained to the particular need for an adjournment on the particular date.

Costs in Criminal Cases Act 1967 **(NSW)**

16. In the alternative to the application for costs pursuant to the CPA, an application may be made pursuant to section 2 of the CCCA for a certificate to be issued permitting compensation from the Director General for the expenses associated in successfully defending the criminal proceedings.

17. It is important to remember, if you are successful under the CCCA, you are not guaranteeing your client a set amount. You are guaranteeing your client that some monies will be repaid – how much will be determined by the Director General of the Attorney General's Department following application for payment from the Consolidated Fund for costs in incurred in the proceedings to which the certificate relates.

18. It is noted that as the CPA costs provisions have no application in trials the District Court or Supreme Court, the CCCA is the only option for those types of matters.

19. The principal question an application under s.2 of the CCCA is whether, if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings (section 3(1)(a) of the Act). As Hunt J said in *R v Dunne* (unreported, 17 May 1990), the Court must put itself "in the hypothetical place of the prosecution possessed of knowledge of all the facts which have now become apparent", examining the matter "with the knowledge gained from such an omniscient crystal ball ...".

20. Such an application the Court must determine (*on the balance of probabilities*):
    a. What the *relevant facts* are; and,
    b. Whether the prosecution, had they known those relevant facts when commencing proceedings, acted *reasonably* in initiating those proceedings.

Relevant facts

21. In *R v Tooes* [2008] NSWSC 291 (4 April 2008) Studdert AJ considered the meaning of the words "all the relevant facts". In so doing, His Honour referred to the judgment of Sugerman P with whose judgment O'Brien J agreed in *R v Williams* (1970) NSWLR 81. At paragraph 5 of his judgment, Studdert AJ said:

"5 In Williams Sugerman P, with whose judgment O'Brien J agreed, said as to the concept of "all the relevant facts" contained in s 3(1)(a):

> *"I draw attention in particular to the phrase: 'been in possession of evidence of all the relevant facts' and the emphasis which I have supplied is, I think, the emphasis with which the phrase must be read. This imports that there were relevant facts, evidence of which was not in the possession of the prosecution, before the institution of the proceedings.*
>
> *What relevant facts? Not 'all' the relevant facts in any literal or absolute sense; omniscience is not to be attributed to the prosecution in the hypothetical inquiry which, I agree with Mr Bowie, is required. 'All the relevant facts' means, in my opinion, all the relevant facts as they finally emerge at the trial; the facts in the prosecution's case but, as well, the facts in the accused's case as those emerged from cross-examination of the prosecution's witnesses or from evidence called by the accused. That seems to me to be the nature of the hypothetical inquiry which is called for by s.3(1)(a). Suppose the prosecution before the proceedings were instituted had been in possession of evidence of the relevant facts in the accused's case as well as of those in its own - suppose it had been in possession of evidence of all the relevant facts and not merely of evidence of the relevant facts in its own case - would it have been reasonable to institute the proceedings?"* (emphasis added)

Reasonableness

22. Once the Court has determined the relevant facts, it must assess whether, had the prosecutor known those facts at the time the proceedings were initiated, it was reasonable to proceed.

23. The reasonableness or otherwise of the decision to institute proceedings is not based upon other existing tests e.g. the test used by prosecution agencies (that a reasonable jury would be likely to convict or the test of reasonable suspicion which is used to justify arrest. It is also not necessarily reasonable because a prima facie case existed. What is required is an objective analysis of the whole of the relevant evidence concerning central facts necessary to establish guilt.

24. Further discussion on this issue is contained in the judgment of McColl JA in *Morduant v DPP* [2007] NSWCA 121 as she distils the key principles to apply in such applications. The key excerpt from that decision on the issue of credibility is as follows:

> *"[m] Section 3 [of the CCCA] calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case; matters of judgment concerning credibility, demeanour and the like are likely to fall*

on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury: Manley per Wood CJ at CL (at [14]); Johnston (at [26] [29]) per Simpson J (with whom Wood CJ at CL and Sully J agreed); it is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit: R v Dunne (Hunt J, 17 May 1990, unreported)" (underlining added)

Credibility

25. *Field v DPP [2010] 2010 NSWDC* – In this case the Crown case depended on the reliability and truthfulness of a witness who by the end of the trial was 'very substantially lacking in credit'.

26. In *R v CPR [2009] NSWDC* 219 the Court concluded that in assessing the evidence of the complainant, the prosecution should have had "serious doubts" about the reliability of her evidence and the extent to which that evidence could convince any reasonable jury of the essential elements of each of the charges beyond reasonable doubt.

27. *JC v DPP [2009] NSWDC 424* – the complainant's evidence ended 'substantially without credit' in a trial for a number of counts of sexual intercourse without consent;

28. In *R v Cardona [2002] NSWSC 823* at [22] the Court found that the complainant's evidence "could not withstand scrutiny" to the extent that the Crown case had been "dealt a mortal blow" by its close. Hidden J concluded that this was truly a case "where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit".

29. In *Regina v Hatfield* [2001] NSWSC 334 Justice Simpson stated at [14] that 'very substantially lacking in credit' meant:

> *"…so substantially lacking in credit that it was unreasonable for the Crown to have relied upon it; and that, without reliance upon their evidence, it would have been unreasonable for the Crown to have brought the prosecution."*

30. Later, Justice Simpson noted that the above definition must be expressed by giving appropriate regard to the assessment of credibility as at the time of the application, i.e, at the conclusion of all the evidence. He stated:

> "[14] *... I accept also, that, if it be demonstrated that, with the benefit of hindsight, the evidence of those witnesses was so substantially lacking in credit as to make it unreasonable for the Crown to rely on it, then, imputing knowledge of that lack of credibility retrospectively to the Crown, it would not have been reasonable to initiate the proceedings."*

31. Further, in concluding that the application for costs was to be refused, Justice Simpson placed weight on two other factors when answering this question – the seriousness of the allegation, and the strength of the corroborative material:

"[51] ... Removing the double negative, and putting the conclusion in plain language that nevertheless properly reflects the exercise I am to perform, and the conclusion I have reached, I am satisfied that, even if the prosecution had, before the proceedings were instituted, been in possession of all the relevant facts, it would nevertheless have been reasonable to institute the proceedings. Indeed, having regard to the seriousness of the allegation, and the strength of the corroborative material, I am of the view that to fail to institute the proceeding would have left the prosecution open to criticism."

32. In *AB v DPP* [2014] NSWCCA 122 the Court concludes that the test in *Mordaunt* should not be seen as an inflexible rule, nor a test that must be applied when assessing applications for costs in such applications where the credibility of a witness is key. It reiterates that the Court should not be unnecessarily restricted when it is being asked to make an evaluation of evidence and relevant facts in such applications:

" [62] ... The observations in Mordaunt were not intended to lay down binding principles governing the making of the evaluative judgment required by ss 2 and 3 of the Act. McColl JA was at pains to say that there can be no exhaustive test of unreasonableness and that a great range of matters may be relevant to the determination required on an application for a costs certificate (at [36(g)]). The latter part of sub-para [36(m)] of her Honour's judgment merely makes the point that ordinarily it would not be considered unreasonable for a prosecution to be instituted if the outcome depends upon the jury resolving a conflict between the evidence of the complainant and the accused. Sub-paragraph [36(m)] makes the further point that the position would be different if the Crown case depended on the evidence of a witness who had been demonstrated to be very substantially lacking in credit. Perhaps it may have been clearer if sub-para [36(m)] had used the word "might" instead of "would". However, I do not understand the court to have intended to lay down an inflexible rule to be applied whenever a key witness is shown to have been substantially lacking in credit." (underlining added)

SIX TIPS TO PREPARE FOR A COSTS APPLICATION

1. Conduct your matter from the beginning in such a way as to prepare for such an application.

2. Identify the risks? What is the statutory basis of your application?

3. How much are you asking for and why?

4. Evidence?
    a. Costs
    b. Correspondence
    c. Chronology

5. Reimbursement not punishment - don't forget *Latoudis v Casey*.

6. Be prepared. Costs applications are run on the day.

Criminal Procedure Act 1986 (NSW)	**Investigation was unreasonable or improper**	**Proceedings initiated in bad faith or w/out reasonable cause etc**	**Unreasonable failure to investigate etc**	**Exceptional circumstances etc**
Summary (s 213)	s 214(1)(a)	s 214(1)(b)	s 214(1)(c)	s 214(1)(d)
Committal (s 116)	s 117(1)(a)	s 117(1)b)	s 117(1)(c)	s 117(1)(d)
Sup Ct (s 257C)	s 257D(1)(a)	s 257D(1)(b)	s 257(1)(c)	s 257(1)(d)