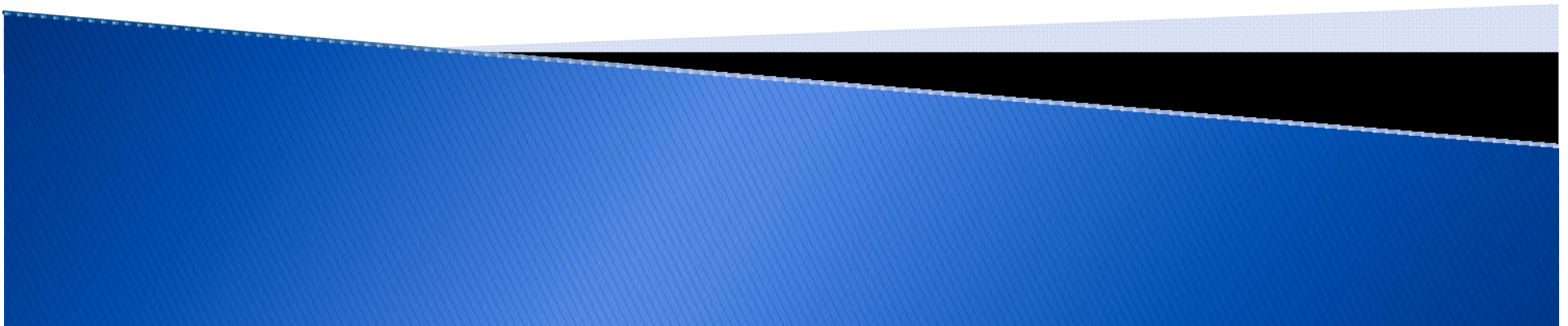


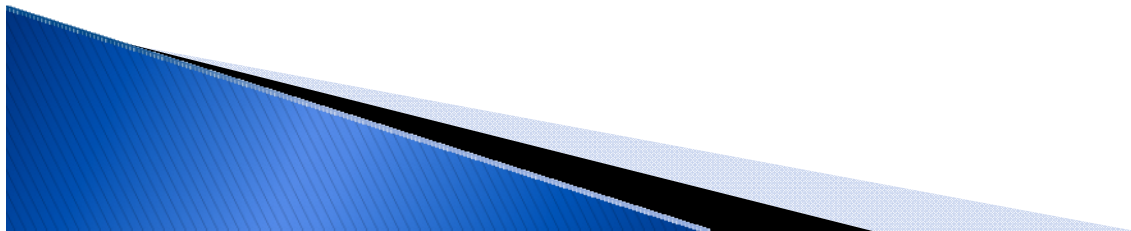
Privacy Law and Decision Making

Kate Eastman
Sixth Floor St James Hall Chambers
NSW COAT State Conference
14 September 2012



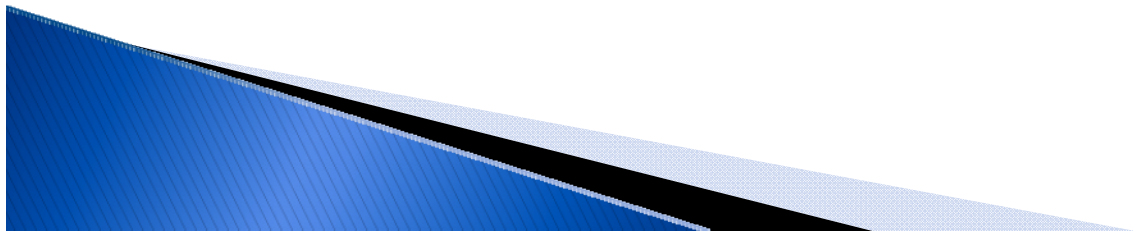
Introduction

- ▶ Are the concepts of ‘open justice’ and privacy in conflict?
- ▶ Concept of ‘open justice’
 - Justice being seen to be done
 - “Publicity is the very sole of justice” (Bentham)



Privacy

- ▶ Privacy and values
- ▶ Types of privacy
 - Physical
 - Property
 - Information
 - Relationships
- ▶ Cultural specific and changeable
- ▶ Modern media and communication of personal information



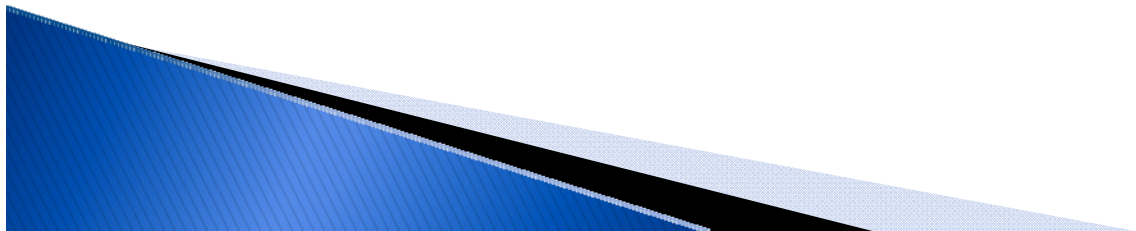
Privacy and legal rights

- ▶ Human Rights

- Article 17 International Covenant on Civil and Political Rights :
No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation

- ▶ Limited Australian common law protections

- *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479
- *McManus v Scott-Charlton* (1996) 140 ALR 625
- *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199



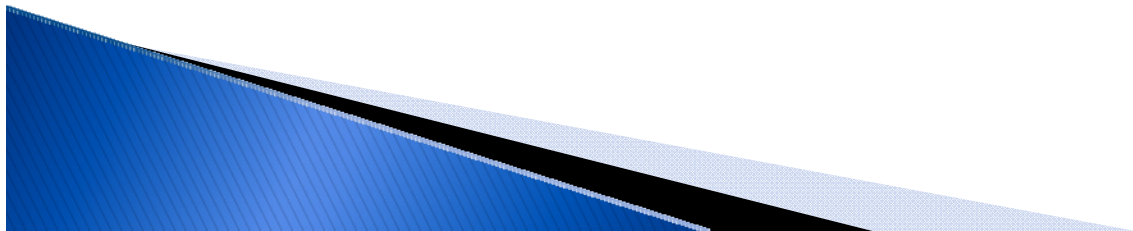
Privacy and litigation strategy

- ▶ Acknowledge different issues and agendas concerning privacy for:
 - Litigants (applicants v respondents)
 - Witnesses and third parties
 - Experts
 - Legal representatives
 - Tribunals



Pre-hearing

- ▶ First stage in collection of personal information
 - what is required from the parties?
 - who has access to information at that point?
 - compulsory powers to summons information or persons?
- ▶ Role of initial complaint handling bodies
- ▶ Conciliation and mediation conducted in confidence and in private

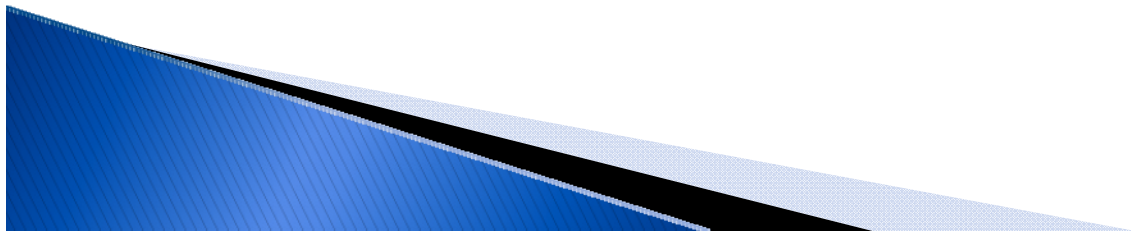


Pre hearing restrictions

- ▶ Before evidence is tendered and tested
 - Suppression of names or other information
 - Confidentiality orders and undertakings
 - Is privacy a relevant discretionary consideration?

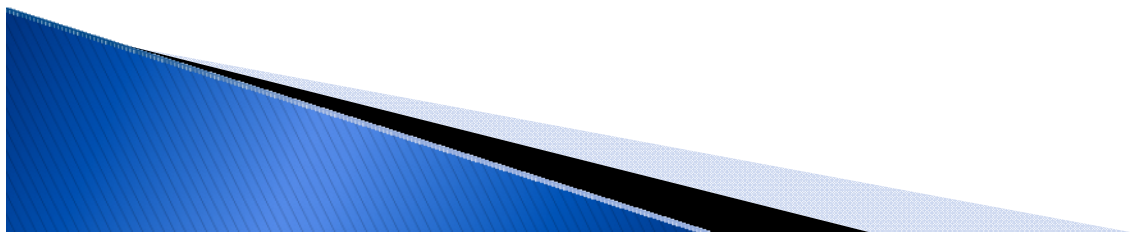
- ▶ *Court Suppression and Non-publication Orders Act 2010* (NSW):
s 8
 - (a) prevent prejudice to the proper administration of justice
 - (b) prevent prejudice to national or international security,
 - (c) protect the safety of any person,
 - (d) avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)
 - (e) in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

- ▶ *Rinehart v Welker and Ors* [2011] NSWCA 345



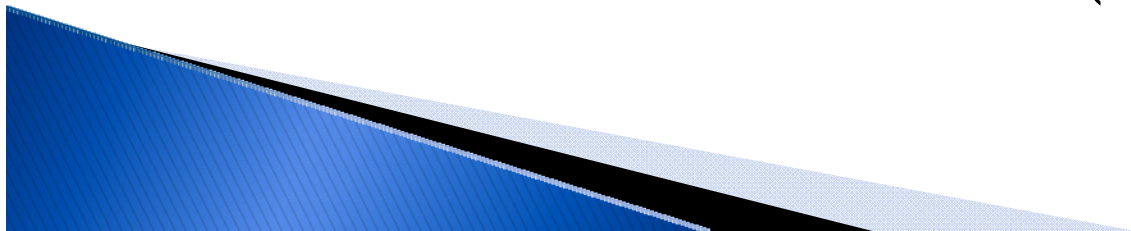
Other specific laws

- ▶ Family law –s 121 *Family Law Act* 1975 (Cth)
- ▶ Child protection –s 29(1)(f) and s 105 *Children and Young Persons (Care and Protection) Act* 1998, and s 25 *Status of Children Act* 1996
- ▶ Minors –s 43(5) *Minors (Property and Contracts) Act* 1970
- ▶ Health –Sch 2, cl 7 of the *Mental Health Act* 2007 and s 35 of the *Public Health Act* 1991.



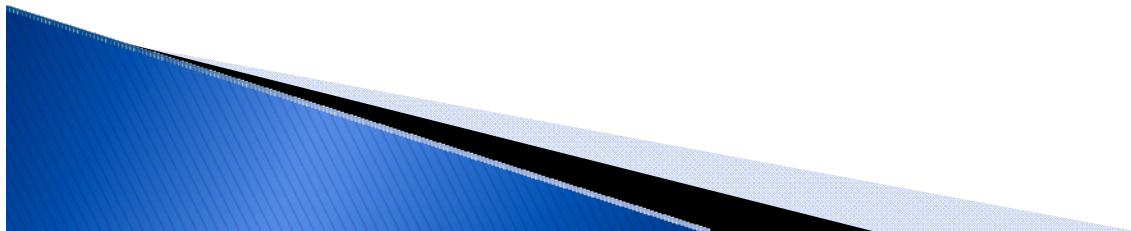
Hearing

- ▶ Public hearing
- ▶ When are *in camera* hearings appropriate on the ground of privacy?
 - *Ashton v Pratt* [2011] NSWSC 1092
- ▶ When should non-publication orders be made or use of pseudonyms
- ▶ Media reporting and litigants use of social media during a hearing
 - UK Lord Chief Justice – *Guidance on Live, Text-Based Communications from Court* (2011)



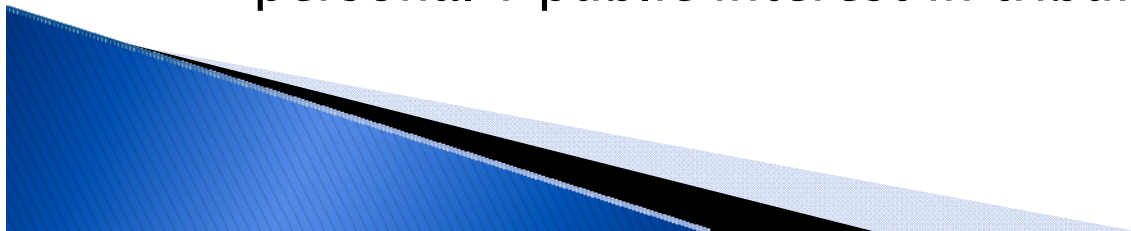
Post hearing

- ▶ Access to tribunal files following hearing
- ▶ Settlements and confidential agreements
- ▶ NSW Supreme Court *Identity theft prevention and anonymisation policy (2010)*
 - transcript
 - other records



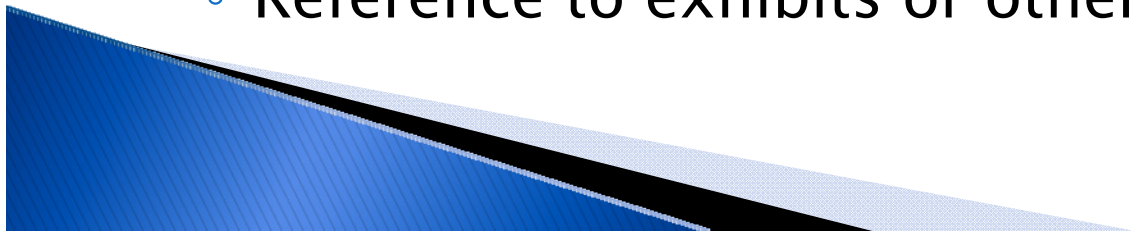
Decision writing and privacy

- ▶ Requirement to provide reasons and the issue of 'adequate reasons'
- ▶ Exposure to an appeal or rehearing if reasons are not adequate.
- ▶ Is the privacy of any person relevant to decision writing ?
- ▶ Should the ready access to tribunal decisions restrain discussion of personal information?
 - Google search v '*who do you think you are*'?
 - personal v public interest in tribunal record



Include or omit?

- ▶ If there is a genuine concern about identity theft or privacy – consider the relevance of the personal information
 - Address, location
 - Key dates in a person's life
 - Ancestry or description of family
 - Identification – passport, licences etc
- ▶ Consider other ways of expressing the information
 - General references/ descriptions
 - Reference to exhibits or other sources



Concluding thoughts

- ▶ Concepts of privacy continue to evolve
 - ▶ Importance of open justice and transparent processes
 - ▶ UK – “superinjunctions” and use of the judicial process to protect privacy or evade public scrutiny
 - ▶ Integrity of the process and public confidence in the tribunal system
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