VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

OCCUPATIONAL AND BUSINESS REGULATION LIST

VCAT REFERENCE NO. B253/2008

CATCHWORDS

Occupational and Business Regulation List; Application by media organisation to discharge pseudonym order made under Section 101 *Victorian Civil and Administrative Tribunal Act* 1998; '*Open Justice Principal*'; Pending suppression orders made under Section 75 *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997; Applicant acquitted of murder for events occurring in 1990 at trial in 1992 on ground of insanity; Released pursuant to *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 with identity suppressed; Whether order in Tribunal proceeding that he be identified only by a pseudonym should be discharged; *Charter of Human Rights and Responsibilities Act* 2006; Right to freedom of expression Section 15

APPLICANT	XFJ
RESPONDENT	Director of Public Transport
JOINED PARTY	The Herald and Weekly Times Pty Ltd
WHERE HELD	Melbourne
BEFORE	M.F. Macnamara, Deputy President
HEARING TYPE	Hearing
DATE OF HEARING	28 January 2009
DATE OF ORDER	9 February 2009
CITATION	XFJ v Director of Public Transport (Occupational and Business Regulation) [2009] VCAT 96

ORDER

Application to discharge Order 4 made 28 August 2008 is dismissed.

M.F. Macnamara
Deputy President

APPEARANCES:

For Applicant	Mr Michael Stanton of Counsel instructed by Mental Health Legal Centre Inc.
For Respondent	Ms D.S. Mortimer SC and Mr C. Young instructed by Legal Department, Department of Transport
For Joined Party	Mr Justin Quill, Solicitor of Kelly Hazel Quill lawyers

REASONS

BACKGROUND

1 On 31 October 2008 I heard and determined an application for review by the applicant, XFJ of a decision made adversely to him by the respondent, Director of Public Transport as to his suitability to act as a taxi driver in the State of Victoria. I set aside the Director's determination and ordered that XFJ be granted a driver's accreditation to drive a commercial passenger vehicle for a term of not more than 18 months from the date of issue. In 1992 XFJ had been acquitted on the ground of insanity on a charge of murdering his wife in 1990. The consequence of that acquittal as the law then stood was that XFJ was liable to detention for an indefinite period at the Governor's pleasure. Following an amendment to the law in 1997 XFJ was conditionally released by order of the Supreme Court and by further order in 2003 he was unconditionally released. In determining the matter in XFJ's favour I accepted evidence from two consultant psychiatrists one of whom had been involved with XFJ's treatment during his period of post-release supervision and the other of whom had examined XFJ for medico-legal purposes in the present application at the request of the respondent Director. Both psychiatrists said that XFJ was sane and free of mental health symptoms. The second psychiatrist noted that XFJ had been symptom free for 14 years and had maintained good mental health without medication.

2 As the legislation stood, the Director would have been obliged to refuse XFJ's application had he been acquitted on the ground of insanity or mental unfitness under the new law on the subject enacted in 1997. That consequence of automatic disqualification did not according to the terms of the statute attach to someone who had been acquitted on the ground of insanity under the old law.

3 On 26 November the *Herald Sun*, the largest circulation daily newspaper in the State of Victoria and published by the applicant in the present application, The Herald and Weekly Times Pty Ltd reported my determination on the front page under a bold headline *'Killer Cabbie on our Roads'*, a lowercase headline below stated *'… but law stops us telling you who wife stabber is'*. The opening paragraph of the report stated:

> An insane killer who stabbed his wife to death has won the right to drive a cab – but passengers are not allowed to know his identity.

4 Referring to the differential treatment of insanity acquittal before and after 1997, the *Herald Sun* the following day carried a report that the State Minister of Transport had *'vowed'* to introduce amendments to the *Transport Act* to remove this *'loophole'*. The article was headed *'Red-faced Lynne Kosky admits to loophole'*. A larger headline below stated *'Vow to act on killer cabbie'*. Later the Minister announced that the Director of Transport would appeal against the Tribunal's decision. The

Herald Sun reported this under the heading *'Decision to give murderer a cab license to be appealed'*.

5 When the Tribunal hearing had initially been fixed on 29 August 2008 it came on before Deputy President Coghlan. The matter did not proceed on that day because Mrs Coghlan required that the psychiatrists who had given opinions on XFJ's mental health should be available to give viva voce evidence. The hearing was adjourned over to enable this to be done. On that day Mrs Coghlan made the following additional orders:

> 3. Direct pursuant to s.146(4)(b) of the *Victorian Civil and Administrative Tribunal Act* 1998, that until further order no person other than the parties to the proceeding or their legal representatives shall inspect the file.
>
> 4. The Tribunal orders that the applicant in this proceeding be anonymised and referred to as *'XFJ'*.

6 On 26 November 2008 the Herald and Weekly Times wrote to the Registrar stating it wished to apply to set aside Orders 3 and 4 made by Mrs Coghlan. This application came on before me on 15 December 2008 and was adjourned on the application of XFJ and the Director to 28 January 2009. On that day Mr Quill who represents the Herald and Weekly Times stated that the application to set aside Order No. 3 should be *'stood over'* until the determination of the application to set aside Order No. 4. The parties did not oppose this course of action.

7 When the Supreme Court ordered XFJ's conditional release under supervision in 1998 pursuant to the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 the first order made by the Court was as follows:

> 1. Pursuant to Section 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 that until further order of the Court no corporation, body or person shall publish, or cause to be published, or broadcast by means of radio, television or other means any matter which might directly or indirectly enable:
>
> (i) Identification of the applicant as applicant in these proceedings or his place of residence;
>
> (ii) Identification of the victim of the crime or her place of residence or former place of residence; or
>
> (iii) Identification of any member of the family of the Applicant or his or her place of residence.

8 When the matter returned to the Court in 2003 and XFJ was ordered to be released unconditionally, the Court made a further suppression order in the same terms.

9 The Judge who made the first suppression order is still serving as a judge of the Court and the judge who made the second order has since retired. Mr Quill on behalf of the Herald and Weekly Times stated that his client was

seeking to have the Supreme Court's suppression orders lifted and had arranged to have the matter mentioned before the still serving Judge on 3 February 2009.

SUBMISSIONS ON BEHALF OF THE HERALD AND WEEKLY TIMES

10 Mr Quill submitted that the suppression order was an unjustified derogation from the principle of Open Justice. He said there was no evidence which could justify the continuation of the order and it should be set aside.

11 He said the Open Justice principle was a fundamental and defining principle of our legal system. He referred to the judgment of Gibbs J (as he then was) in *Russell v Russell* (1996) 134 CLR 495, 520. The Open Justice principle was Mr Quill said *'enshrined'* in the *Victorian Civil and Administrative Tribunal Act* 1998. He said Section 101(1) of that Act:

> States that all hearings in the Tribunal must be held in public unless another provision of the Act provides otherwise.

12 He contended that media representatives not only had the right to attend proceedings held in open session *'but also the right to report the proceedings in a fair and accurate way'*. He referred to the judgment of Hedigan J in *The Herald and Weekly Times Limited v Medical Practitioners Board of Victoria* [1999] 1 VR 267, and *Attorney-General v Guardian Newspapers (No. 2)* [1990] 1 AC 109; *Attorney-General v Leveller Magazine Limited* [1979] AC 440, 450 per Lord Diplock and *John Fairfax and Sons Limited v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 476-7 per McHugh JA as he then was. Next, he submitted:

> 'that the Open Justice principle applies equally to pseudonym orders as to orders suppressing facts or evidence adduced during a proceeding'

13 He referred to the judgment of Hedigan J in the *Medical Practitioner's Board of Victoria* case and a judgment of Beach J in *The Herald and Weekly Times Limited v The Magistrates' Court of Victoria* [1999] 2 VR 672, 678, 679. This Open Justice Principle, he said, applied equally to superior and inferior courts and tribunals including this one. He said the Open Justice Principle meant it was an essential feature of proceedings in Courts of Law that they were held openly and not in secret. He referred to *Russell v Russell* and *Moularis v Nankervis* [1985] VR 369, 377 per Ormiston J (as the then was). He said it was a wholly exceptional circumstance in which this rule was departed from *R v Richards* (1999) 107A Crim R 318 [37] – [39] per Spigelman CJ; and *R v Pomeroy* [2002] VSC 179. He submitted that any provision authorising a departure from the Open Justice Principle *'must be construed narrowly'*. He referred to the judgment of Beach J in *The Magistrates' Court of Victoria* case. Hence said Mr Quill:

> The relevant provisions of the [VCAT] Act must be construed narrowly and in a manner which upholds the principle of Open Justice.

14 According to Mr Quill embarrassment, fear, damage to reputation and loss:

> are not exceptions to the general principle of Open Justice and the right of the public to the open administration and justice.

15 He referred to the judgment of Hedigan J in *The Medical Practitioner's Board of Victoria* case, to the New South Wales Court of Appeal in *The Police Tribunal of New South Wales* case and to *Jonston v Camlon* [2002] FCR 948 and *The Herald and Weekly Times Limited v Gregory Williams* (2003) 201 ALR 489. He placed particular reliance on the judgment of Beach J in *The Magistrates' Court of Victoria* case and of Kirby P in *The Police Tribunal of New South Wales* case. He referred also to the judgments of Fitzgerald P and Lee J in *J. v L. & A. Services Pty Ltd (No. 2)* [19095] 2 Qd R 10 and those of Mahoney JA (as he then was) in *Nationwide News Pty Ltd v District Council of NSW* (1996) 40 NSWLR 486, 493-5.

16 Mr Quill contended that his client had standing to make its application. He submitted it was well established at common law:

> That the media have standing to be heard in relation to suppression orders which depart from the Open Justice principle.

17 He noted that media companies were regularly granted leave to make submissions in Victorian Courts and Tribunals. He referred to the judgment of Hedigan J in *The Medical Practitioner's Board of Victoria* case.

18 According to Mr Quill it was not clear to his client the precise basis upon which the suppression order was made pursuant to Section 101 of the *Victorian Civil and Administrative Tribunal Act*. On whatever basis the order was made he submitted that:

> There are not sufficient grounds under Section 101 of the Act for a suppression order to be maintained in this matter because the parties cannot establish that the orders are 'necessary' as required by Section 101 of the Act.

19 He referred to the judgment of Teague J in *R. v Pomeroy* [2002] VSC 179 and the judgment of Kellam J (as he then was) in *An application by the Age re Carl Anthony Williams* [2004] VSC 413 [14]. Mr Quill concluded:

> There is simply no evidence currently before the Tribunal which is sufficient to satisfy the difficult test of necessity.

20 He said the order was made:

> simply by consent between the parties and without regard to the hurdle of necessity which must be overcome.

21 He noted that since the substantive application had been heard and determined revelation of the applicant's name could not interfere with the further determination of the matter and:

> The stability of the applicant's mental state was a fundamental consideration in Deputy President Macnamara's reasoning in the granting of the applicant's accreditation. It would be nonsense to conclude that the applicant is therefore particularly sensitive to media reporting because of mental health issues experienced a long time ago. [This submission is not without irony given that the *Herald Sun* described XFJ in its front page article as 'an insane killer' thereby indicating a continued and presently existing state of insanity on his part.]

22 Mr Quill said his client understood:

> That there was no affidavit evidence or vive (sic) voce evidence before the Court when the orders were made.

23 Mr Quill submitted that the matter was one of *'significant public interest'* which had already been the subject of a *'large amount of media reporting'*. He continued:

> In order to allow fully informed and educated debate on this issue XFJ's identity should be disclosed … it is also in the public interest to allow identification of XFJ in order to allow potential taxi cab patrons to exercise their fundamental right as a consumer to choose whether or not to enter a taxi being driven by the applicant.

24 Mr Quill submitted as an alternative *'fall back'* position that if contrary to his principal contention XFJ's name were not disclosed, an order could be made whereby his image might be published, presumably to enable the hypothetical public consumer to identify him if driving his cab.

THE HERALD AND WEEKLY TIMES' SUBMISSIONS IN REPLY

25 Mr Quill said that the suppression order could be revoked in reliance on Section 120 of the *Victorian Civil and Administrative Tribunal Act:*

> Alternatively, [he said] the Tribunal has power to hear and determine the matter as part of its statutory implied powers and is not *functus officio*.

26 He noted that Section 120 allows a person in respect of whom an order has been made to apply to the Tribunal to review that order if the person did not appear and was not represented at the hearing. That was the case here he said and since the pseudonym order affected his client, the Herald and Weekly Times was therefore clearly a person in respect of whom the order was made. Moreover, he said, his client had a reasonable excuse for not attending or being represented at the hearing because it was not notified of it or that a suppression order was in contemplation. He said that as to the 14 day limit on such applications imposed by Rule 4.18 of the Tribunal's

Rules, his client became aware of the order on 25 November 2008 and made its application within 14 days.

27 Mr Quill said that the Tribunal was not *functus officio* where there was a jurisdictional error it had a duty to re-visit its decision. He referred to the decision of the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 [51] – [53]. He referred to *Minister for Multicultural and Immigration Affairs v Yusuf* (2001) 206 CLR 323 [82] contending that the Tribunal was led into jurisdictional error in making the suppression order on 28 August. The Tribunal could not have been satisfied that the making of the suppression order was '*necessary*'. Even if there were no jurisdictional errors, he submitted the Tribunal was not *functus offico*. He referred to *Jeffery v Corrections Victoria and The Herald and Weekly Times* [2004] VCAT 1211. He submitted there were two primary reasons why the doctrine of *functus offico 'should not be rigidly applied in the application by HWT to review'* the suppression order. First, he said there was a departure from the principle of Open Justice, secondly he said, since only this Tribunal could make suppression orders with respect to its proceedings, it was:

> Therefore appropriate as a matter of principle that the Tribunal maintain that power even after judgment is entered, in order to preserve its powers. A failure to do so would render the protections afforded by Section 101 of the *VCAT Act* ineffective in many cases and would unfairly curtail the principle of Open Justice.

28 Mr Quill contended that all the relevant statutory provisions needed to be interpreted in accordance with the provisions of the *Charter of Human Rights and Responsibilities Act* 2006.

29 Mr Quill noted that the Director and Counsel for XJF had made submissions relative to the Charter. He contended however that:

> Any human rights invoked by XFJ must be balanced against the right to freedom of expression enshrined in Section 15 of the Charter.

30 He noted that Section 15 gave persons the right to freedom of expression:

> Which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria …

31 The suppression order was therefore a restriction of that fundamental freedom and '*clearly contrary to the right created by Section 15 of the Charter*'. He submitted that the right to freedom of information was:

> A paramount right and should prevail when in conflict with other human rights in most cases.

32 He referred to *R v Croydon Town Court* (*Ex parte Trinity Plc)* [2008] EWCA Crim 50. According to Mr Quill:

> The finding by the Court [sc XFJ's acquittal on the ground of insanity] and the treatment of XFJ is as much a part of the operation of the criminal justice system as a person convicted and sentenced. Full

> publication of such material is fundamental to the principle of Open Justice.

33 He noted that whilst Section 15 of the *Charter* allowed freedom of expression to be curtailed by laws which protected the reputation of individuals such a provision was necessary for Parliament to enact laws relating to defamation:

> This provision does not give the Tribunal the power to make or maintain a suppression order so as to protect a person's reputation. These laws are comprehensive and have been developed over time as part of a functioning Australian democracy. They are the appropriate mechanisms for protecting a person's reputation.

34 He continued:

> The dictates of public order require that XFJ be identified in order to allow taxi patrons to make an informed choice as to whether or not they choose to enter a taxi with any person.

35 None of the exceptions referred to in Section 15 were according to Mr Quill reasonably necessary in the present circumstance.

36 Mr Quill denied that publication would prejudice XFJ's right to freedom from discrimination or from cruel and human and degrading treatment. As to his claim to a right of privacy, according to Mr Quill:

> It is not accepted that XFJ's right to privacy will be violated by publication of his name in relation to these matters.

37 He also denied that any right to protection of XFJ's child should stand in the way of the lifting of the suppression order.

38 As to the Supreme Court's suppression orders he said:

> If the VCAT suppression orders are lifted, it will be possible for media organisations to report within the parameters of the Supreme Court orders and which does not violate and frustrate those orders. In any event, that is a matter for the relevant media organisations, properly advised, to decide. If there be any publication and breach of or frustrating the Supreme Court orders, then criminal sanctions may be imposed.

39 He said it was not for the Tribunal to prevent reporting of its own proceedings:

> In order to protect against unlawful media reporting. The law of contempt is the appropriate remedy for unlawful media reporting.

40 Mr Quill after taking further instructions informed me that pending the application to lift the Supreme Court suppression orders, his client had no intention of disclosing the identity of XFJ if the Tribunal's suppression orders were lifted.

41 Finally, Mr Quill said the stage of the Tribunal proceeding at which the present application was made did not tell against its success. He said:

> There was no evidence before the Tribunal that either party would suffer a forensic disadvantage for having XFJ's name made public. Indeed it is not clear that any party would now suffer prejudice to its legal position (aside from any personal grievances) by publication of XFJ's name.

42 He noted that the matter was dealt with in open session such that any person could attend and the text of my determination was available *'on line'*.

CONCLUSIONS

Standing

43 For the purposes of my determination I will assume that the Herald and Weekly Times Pty Ltd has standing to seek to set aside the Tribunal's suppression order.

Functus Officio

44 Ms Mortimer SC who appeared with Mr C Young on behalf of the Director of Public Transport, contended that Section 120 of the *Victorian Civil and Administrative Tribunal Act* 1998 had no application in the present circumstances. She further submitted however that the doctrine of *functus officio* did not prevent the Tribunal from re-visiting the suppression order which had been made.

45 Again, I will assume that the Tribunal in the present circumstances is entitled to re-visit the suppression order.

Merits

46 No reasons seem to have been given for the two Supreme Court suppression orders which were made in the case of XFJ. Mr Stanton who appeared on behalf of XFJ however relied upon an unreported judgment of Cummins J in *Re An Application by PL* [1998] VS 209 in which His Honour made a suppression order along the same lines as the ones made with respect to XFJ. His Honour's judgment in this respect was, it was said, the leading judgment on the point. At paragraph [27] of his judgment, his Honour said:

> The activating criterion in s.75(1) ("that it is in the public interest to do so") includes the public interest in the applicant's progressive rehabilitation not being deflected or defeated. That is an important interest which must be given due and proper weight. However, a suppression order of its nature is antipathetic to the judicial process. It follows that suppression orders should not be granted, or come to be granted, routinely. The powerful and fundamental value of the community's knowledge of the judicial process in its midst should not be whittled down by a developing habit of suppression. Nearly always, publication of the identity of an applicant will be likely to cause some difficulty to the applicant or to have some deleterious

> effect upon rehabilitation. Plainly, in some cases the degree of such negative impact will justify, indeed necessitate, a suppression order. But in others it will not. The degree of likely negative impact needs to be examined in each case. The existence of negative impact will not of itself justify a suppression order. Sufficient negative impact needs to be established to justify departure from the fundamental that courts are open.

47 Earlier, His Honour had said at [15]

> However, it must be remembered that applicants found not guilty by reason of mental impairment (or previously insanity) have not been convicted of a crime. Characteristically, they have suffered from a mental illness. The court's jurisdiction in that respect is protective. It should be remembered that ultimately the best protection for the community is that persons found not guilty by reason of mental impairment are able to return to the community as useful citizens.

48 It is in this context so far as I can see that the suppression orders were made in 1998 and 2003. They were made as part of a jurisdiction that is protective and with the object as Cummins J indicated of enabling a person in the situation of XFJ to return to the community as a useful citizen.

49 The orders were made pursuant to Section 75 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 which provides as follows:

> **75 Suppression orders**
>
> (1) In any proceeding before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order—
>
> (a) that any evidence given in the proceeding;
>
> (b) that the content of any report or other document put before the court in the proceeding;
>
> (c) that any information that might enable a defendant or another person who has appeared or given evidence in the proceeding to be identified—
>
> must not be published except in the manner and to the extent (if any) specified in the order.
>
> (2) An order under this section may be made on the application of a party or on the court's own initiative.
>
> (3) A person must not publish or cause to be published any material in contravention of an order under this section.
>
> Penalty: 500 penalty units in the case of a body corporate;
>
> 120 penalty units or imprisonment for 1 year or both in any other case.

50 It is reasonable to infer that the judges were satisfied that the suppression was appropriate to achieve the public interest *'in the applicant's progressive rehabilitation not being deflected or defeated'* to quote the

words of Cummins J. The Tribunal's suppression order was made under Section 101(3) and (4) which sub-sections state as follows:

> (3) In the circumstances set out in subsection (4) the Tribunal may order—
>
> (a) that any evidence given before it;
>
> (b) that the contents of any documents produced to it;
>
> (c) that any information that might enable a person who has appeared before it to be identified—
>
> must not be published except in the manner and to the persons (if any) specified by the Tribunal.
>
> (4) The Tribunal may make an order under subsection (3) if the Tribunal considers it is necessary to do so—
>
> (a) to avoid—
>
> (i) endangering the national security or international security of Australia; or
>
> (ii) prejudicing the administration of justice; or
>
> (iii) endangering the physical safety of any person; or
>
> (iv) offending public decency or morality; or
>
> (v) the publication of confidential information or information the subject of a certificate under section 53 or 54; or
>
> (b) for any other reason in the interests of justice

51 Whilst Mrs Coghlan gave no written reasons for the pronouncement of the suppression order, it may be inferred that it was made in terms of Section 101(4)(b) on the basis of *'any other reason in the interests of justice'*. Perhaps or under Section 101(4)(a)(ii) to avoid prejudicing the administration of justice. The interests of justice here being the achievements of the objectives of the proceeding under the 1997 Act, namely the return of XFJ to the community as a useful citizen.

52 Mr Quill referred to authorities which laid stress upon the word *'necessary'* in a context such as Section 101(4) as meaning essential and thereby creating a very-high hurdle. The power to make suppression orders under Section 75 of the 1997 Act does not operate by reference to the criterion of necessity. The criterion rather is that the Court may make the suppression order *'if satisfied that it is in the public interest to do so'*. Despite all that has been said about the strictness of the criterion of necessity I cannot think that a Court considering making an order under Section 75 could be *'satisfied'* to the necessary extent if the order which it contemplated making was not thought to be *'necessary'* to achieve the relevant public interest.

53 Accordingly, I start from the position that the Supreme Court was of the view that the revelation of XFJ's identity to the wider community was not in the public interest in 1998 or 2003 even despite the strong presumption in favour of Open Justice. There is in my view a strong consideration in the interests of justice, namely the achievement of the purpose of the proceeding under the 1997 Act that XFJ's identity as the person who was before the Court in 1998 and 2003. I framed my reasons in the context of the suppression order which had already been made in the proceeding. The reasons disclosed that the person known as XFJ had been before the Court under the 1997 Act in 1998 and in 2003. The front page report in the *Herald Sun* likewise, disclosed this. Not to continue the Tribunal's suppression order would in my view be contrary to the interests of justice. Of course if the Court sees fit to lift its suppression orders this would be a powerful indication that the Court which after all has the control and supervision of matters under the 1997 Act no longer sees the need for XFJ's anonymity for those purposes. If that point were reached an application that the Tribunal's suppression order should be lifted would raise different questions. These conclusions are not dictated by any view that the Tribunal must somehow act in aid of the Supreme Court's orders. As Mr Quill correctly observed, the Supreme Court orders operate by their own force and the Supreme Court has its own machinery to enforce its orders. It does not require the Tribunal's assistance to do that.

54 Nevertheless, there is force, I think, in the suggestion made by Ms Mortimer SC subject to any issue of immunity which I as a Tribunal might possess, there would be a question whether in the events that have occurred including the publication of my reasons referring to the applicant by the pseudonym XFJ and their publication in the press, that taking a step now to disclose XFJ's identity might be at odds with the pending orders of the Court. I have recorded Mr Quill's statements as to his client's intentions if the Tribunal's suppression order is lifted but the Supreme Court orders remain in force. This was not an undertaking, only a statement of intention. Moreover whilst the Herald and Weekly Times *'broke'* the XFJ story it has attracted media attention from other quarters. We have no knowledge as to the intentions of these other parties. I do not rest my decision primarily upon those considerations, rather I rest the conclusion upon the view that it is necessary and necessary to the extent required by the authorities on the use of that word in the present context that the Tribunal's determination and reasons if linked to the identity of XFJ would create a situation that was inimical to the administration of justice by prejudicing the achievement of the objective of the proceedings in the Supreme Court.

55 I have already commented upon the irony of the Herald and Weekly Times describing XFJ as an *'insane killer'* on the front page of its largest circulating daily newspaper and contending in the Tribunal that his rehabilitation cannot be prejudiced by the upsurge in publicity based upon the good psychiatric health which he has kept for many years. The

sensationalised reporting of XFJ's application laced with emotive language and replete with inaccuracies, describing him as *'insane'* and as *'a murderer'* has the capacity to set back his rehabilitation by years. This was not the subject of any expert psychiatric evidence before me but Teague J in *Pomeroy's* case felt able to draw reasonable inferences and upon his own life experiences to reach conclusions as to the likely effect of publicity. The very objective espoused by the Herald and Weekly Times Pty Ltd makes this point eloquently. It wishes consumers to be able to identify XFJ, if necessary circulating his image to assist in the process. It wishes to place the mark on Cain (according to the Bible the first killer in the human race) upon him despite describing him in the present proceeding as being in good psychiatric health and conceding that he has been convicted of no crime. It may be thought ironic that in the Book of Genesis God places the mark of Cain not so that he may be avoided and vilified (as the proposed actions of the *Herald Sun* would do for XFJ) but as a protection. *Genesis* Chapter 3 Verse 15. For XFJ what the Herald and Weekly Times contemplates doing could scarcely be more damaging for his rehabilitation as a useful citizen in our society. Even people who have actually been convicted of homicide have been held entitled to be protected against this sort of process. See *X & Y v O'Brian* [2003] EWHC QB 1101.

56 Needless to say anyone who is involved in the criminal justice system certainly as a defendant accused or convicted person and even as a complainant may wish to avoid embarrassing disclosures. The law's response to the convict or criminal defendant save in exceptional circumstances such as the *X & Y* case is that the embarrassment must be put up with to secure the Open Justice Principle. *The Magistrates' Court of Victoria* case (Beach J) shows that this rule extends to complainants who could be regarded as aggrieved parties rather than persons who should be *'named and shamed'* by the criminal justice system. The present case however goes far beyond mere embarrassment as I have sought to indicate.

57 It is difficult to accept that potential taxi passengers have some sort of human right to be made aware of XFJ's identity. A taxi passenger may find himself in the same vehicle as a taxi driver for 15 minutes, 20 minutes, 60 minutes. XFJ was released initially conditionally and then absolutely. Once living in the community he presumably had next door neighbours. He had work colleagues. The evidence before me at the hearing showed that he had worked in the aged care industry hence helpless aged persons were in his care. All of those people, neighbours, work colleagues, people in his care and an even wider class such as people who might sit next to him on a tram or a train would seem to have no less an entitlement than a putative passenger in his taxi (should he ever take up that calling) to know his antecedents. The policy adopted by the Supreme Court and those responsible for XFJ's rehabilitation was that society's interest in rehabilitating him as a useful citizen overrode any such alleged rights.

The Charter

58 Whilst in the United States of America the Free Speech Clause of the *First Amendment* has been regarded as the overriding right protected by the US *Constitution* and one which trumps other rights such as express guarantees of fair trial and implied guarantees of privacy, there is nothing in the text of the Victorian *Charter* which would lead to the same conclusion. The right of freedom of expression in the Victorian *Charter* is specifically rendered subject to a variety of lawful restrictions:

> (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
>
> (a) to respect the rights and reputation of other persons; or
>
> (b) for the protection of national security, public order, public health or public morality.

59 Section 101 of the *Victorian Civil and Administrative Tribunal Act* is in my view a lawful restriction and one which in the present circumstance is properly deployed to ensure respect for the rights of XFJ. As Ms Mortimer SC observed, a five Judge panel of the English Court of Appeal in the case *In Re Trinity Law PLC* [2008] QB 770 held that the corresponding right in the British human rights legislation had to be balanced against other rights secured by the same statute [2008] QB 770, 783 [32]. The right to freedom of expression is not paramount and the *'Open Justice'* principle must on occasions be restricted. The express power given to the Supreme Court to make suppressions orders under the 1997 Act and the willingness of the Court to make such orders show that both Parliament and the Court accept that the process of rehabilitating those acquitted of crime on the basis of mental impairment is an area which may properly be exempted from the *Open Justice* principle.

60 For these reasons the application to discharge the suppression order is dismissed.

POSTSCRIPT

61 Since dictating the above I have received a copy of a facsimile transmission from the solicitors for the Herald and Weekly Times Pty Ltd, Kelly Hazel Quill. The facsimile attaches a determination of Vice President Judge IJK Ross in the matter of *Seachange Management Pty Ltd and Devnal Constructions and Developments Pty Ltd* [2009] VCAT 38. In that case a respondent to counterclaim sought suppression of the Tribunal's decision upon an application by this respondent to counterclaim to stay the proceeding against him because it might require him to forego or waive his right to silence such that his interests might be adversely affected in subsequent criminal proceedings. Interestingly a party opposing the suppression order application contended that the Tribunal was *functus officio* and so could not grant a suppression order. In the end His Honour

did not have to rule on that point or another jurisdictional point that Section 101 did not empower the Tribunal to make an order suppressing the publication of a decision. His Honour refused the request on the merits. I accept that His Honour's ruling is a further exemplification of the *'Open Justice principle'* which is the overriding informant to discretions on these suppression order matters. Beyond that it is difficult to see that it has much specific to say as to the facts of the present proceeding.

MFM:RB