Sunshine in *Litigation*

Confidentiality and secrecy are commonplace in litigation in Australia. Defendants and others in possession of documents often require confidentiality agreements and court orders as a condition precedent to production. Terms of settlement are often cloaked in secrecy and usually given judicial imprimatur. Documents produced on discovery, or obtained from third parties by subpoena, are often required to be returned or destroyed at the conclusion of the litigation.

Legitimate commercial concerns to protect information which is truly commercially confidential, or which may comprise genuine trade secrets, is understandable. However, what about the concern to ensure that information relevant to the safety of products, or the dangerous propensities of drugs and therapeutic devices, does not become available to other potential plaintiffs who may be encouraged to bring claims in light of the disclosure of damaging information? To what extent should such information be secreted when disclosure may prevent further injuries?

The recent controversy in the United States arising out of the alleged failure of Bridgestone/Firestone to disclose evidence of tyre safety problems is one illustration of a more pervasive problem.

Early failure to deal with the problem has resulted in the second largest tyre recall in history. Evidence indicates that the company knew, as far back as 1996, that the tyres had a potentially lethal defect. Over 100 people have died and hundreds more have been injured in rollovers of Ford Explorers caused by tyre failures. A federal congressional enquiry is investigating the matter, including court approved secrecy agreements and the failure of regulatory bodies to either obtain adequate information or to expeditiously investigate reported problems. One legislative initiative seeks to reform United States federal laws in relation to protective orders, the sealing of cases and disclosure of discovery information in civil actions.

At a state level, various legislatures and state courts in recent years have adopted measures designed to ensure greater sunshine in litigation. In California, the Judicial Council is currently considering proposals to amend civil rules that would discourage judges from sealing court documents and records. In that State, a bill has been introduced which would prohibit the concealment of documents in cases aris-

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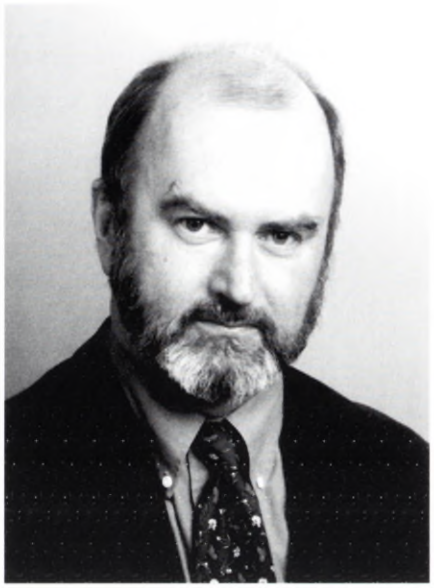

ing out of financial fraud, defective products and environmental hazards.

Recent litigation against the tobacco industry illustrates one dimension of the pernicious role of secrecy and legal professional privilege. The Council for Tobacco Research conducted a "special projects" unit which commissioned research, under the control and supervision of lawyers, in order to use legal professional privilege to prevent disclosure. The problem is not confined to the tobacco industry and the territorial nexus is not limited to North America.

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Even where there may be disagreement between legal and scientific experts as to whether something is truly dangerous, on what legitimate commercial or legal basis should the public be denied the right to know of the risks revealed by such evidence? Where this may save lives, the public interest is surely paramount. Where disclosure may assist others who have already been injured, plaintiff lawyers should oppose concealment. All too often in Australia our laws, court orders and settlement agreements serve to sanction secrecy.

A current Australian case illustrates one aspect of the problem. In product liability proceedings arising out of an allegedly defective medical product surgically implanted in numerous patients in Australia and in other countries, documents were subpoenaed from a Federal Government agency. The agency insisted, as a condition precedent to compliance with the subpoena, that the plaintiff's solicitors sign a blanket confidentiality agreement. The plaintiff's solicitors proposed the following clause for insertion into the agreement: 'This undertaking does not preclude disclosure of information contained in the documents which is necessary to prevent injury to others'. The lawyers for the government agency refused to agree to the proposed term. In order to resolve the dispute, and to facilitate production and inspection of the documents without further delay, expense and legal argument before the trial judge, the following compromise clause was proposed by the plaintiff's lawyers and agreed to by the lawyers for the government agency: 'This undertaking does not preclude an application to the court for leave to permit disclosure of information contained in the documents where such disclosure is reasonably necessary to prevent injury to others'.

It is time for the reform of Australian laws and court procedures in order to restrict the currently wide ambit of secrecy. Sunshine in litigation is essential where questions of public health and safety are in issue. However, the path to reform is not without obstacles. Confidentiality proponents are able to point to a number of private and public interest considerations in favour of secrecy. Public access advocates oppose the concealment of information that is in the public interest or that is relevant to public health and safety. A review of competing considerations is beyond the scope of the present article. However, in far too many areas the balance has tilted too much in favour of concealment. PL