The New South Wales Law Reform Commission
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SYDNEY NSW 2001 AUSTRALIA

MEMORANDUM

To: **The NSW Law Reform Commission**

From: **Lachlan Patey, Student at the University of Newcastle**

Regarding: **A review of the operation of NSW court suppression and non-publication orders during civil proceedings, particularly terms of reference a), b), e), i) and j).**

1. This preliminary submission memorandum explores perceived deficiencies in the law regarding the operation of NSW court suppression and non-publication orders under both the *Court Suppression and Non-publication Orders Act 2010* (NSW) ('CSNPO Act') and the common law, in the context of the overarching tension between the principles of open justice and procedural fairness. Overall, the NSW jurisdiction is out of line with other jurisdictions with regards to the high weight that should be apportioned to the open justice principle, and NSW courts are given too much discretion to restrict this tenet of the Australian legal system with regards to material that arises both within and extraneous to civil proceedings. Firstly, for material within proceedings, the discretion is given to the court under the CSNPO Act to make a suppression or non-publication order, by balancing open justice against 'public interest', is a much wider provision than other primary jurisdictions within Australia. The removal of such a provision from the CSNPO Act would give more weight to the principle of open justice. Secondly, in the context of digital media, which is both rapidly evolving and increasing in prevalence, a power to deal with material extraneous to proceedings through the issuance of internet take-down notices by the court should be strongly considered as a model for reform of digital suppression and non-publication order provisions in the CSNPO Act. This is examined in opposition to a similar common law power under an equitable instrument in *quia timet* injunctions, that is historically wider in NSW and far less precise, making it conversely unsuitable for the digital media age.

I Suppressing Material Within Proceedings

A *Open Justice versus Procedural Fairness*

2. Central to any consideration of suppression and non-publication orders is the principle of open justice. It remains one of the most fundamental tenets of the civil justice system in Australia, and as stated by Spigelman CJ, "the conduct of proceedings in public…is an essential quality of an Australian court of justice".[1] Departure from this tenet to afford procedural fairness or to secure the proper administration of justice is an inherent power of a superior court, and given the weight of open justice, can only occur where it is considered "really necessary" to do so,[2] and in "wholly exceptional" circumstances.[3] Therefore, primary weight should be given to open justice when there are questions about whether to "close" justice.

B *Conflict within the New South Wales Legislation*

3. The primary statutory instrument for making suppression and non-publication orders in NSW is the *Court Suppression and Non-publication Orders Act 2010* (NSW). When this is compared with the common law, and both Federal and Victorian statutes, a significant conflict emerges between NSW and these jurisdictions that works contrary to the principle of open justice and furthers its tension with procedural fairness.
4. The grounds by which such an order can be made are contained within section 8 of the Act, with the primary consideration that of necessity, a term which has been largely given a strict,[4] and objective,[5] approach by NSW courts in light of a requirement to produce materials that demonstrate the reasonable necessity for a suppression order (not just mere belief).[6] Once this NSW threshold has been met, it must be balanced with subsections (1)(a)–(1)(e) which outlines the grounds by which to base the necessity of the order on. While (1)(a)–(1)(d) are narrow and consistent with other jurisdictions,[7] the stipulation of (1)(e) to 'balance' the necessity of the order with regards to 'public interest' broadens the provision significantly, clearly

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[1] *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 [18].
[2] *John Fairfax & Sons Pty Ltd v Police Tribunal (NSW)* (1985) 5 NSWLR 465.
[3] *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512.
[4] Ibid.
[5] *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452.
[6] *R v Perish* [2011] NSWSC 1101.
[7] See *Open Courts Act 2013* (Vic) and *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

conflicting with the High Court's preferred approach. This wider provision enables NSW courts and judges to utilise the suppression order on greater discretionary terms, and thus erodes into the foundations of open justice.

5. An example of the wider approach taken by NSW courts was found within *Welker & ors v Rinehart*,[8] which despite being overturned upon appeal,[9] remains evidence of the consequence of (1)(e) being applied. Brenton J stated with regards to the suppression order issued in earlier proceedings that "public interest in open justice may attract less weight where private issues and interests are concerned".[10] This demonstrates the large amount of discretion that the NSW courts have, being the utilisation of the competing considerations of (1)(e), in making a suppression or non-publication order.
6. The absence of any mention of "public interest" in mirror provisions in both the Victorian,[11] (except in the specific and limited instance of the Coroner's Court),[12] and Federal jurisdiction[13] provide the most obvious example of conflict and inconsistency between the NSW legislation and wider Australian jurisdictions. The absence of any provision referencing public interest in legislation subsequently drafted in provisions virtually identical to that of section 8[14] demonstrates a deliberate effort on the part of the legislature to restrict the making of suppression orders that balance necessity with public interest and adds significant weight to the notion that (1)(e) works to degrade the vital principle of open justice.
7. The origins of suppression and non-publication orders at the common law makes no reference to any element of public interest, and instead revolve around the principle that open justice cannot be departed from, except in specific instances where it is necessary to do so to prevent corruption of the administration of justice.[15] The majority of the House of Lords in *Scott v Scott*[16] elucidated the beginning of such a power of the court, holding that a court could close a hearing, at common law, where hearing the case publicly would inhibit the proper administration of justice.[17] Specific

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[8] [2011] NSWSC 1094.
[9] *Rinehart v Welker* [2012] NSWCA 403.
[10] *Welker & ors v Rinehart* [2011] NSWSC 1094.
[11] *Open Courts Act 2013* (Vic) s 18.
[12] Ibid s 18(2)(b).
[13] *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth) Sch 2 and *Federal Court Act 1976* (Cth) s 50.
[14] *Court Suppression and Non-publication Orders Act 2010* (NSW).
[15] *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.
[16] [1913] AC 417.
[17] Andrew Kenyon, 'Not Seeing Justice Done: Suppression Orders in Australian Law and Practice' (2006) 27 *Adelaide Law Review*, 283.

instances have then developed whereby the court may close the court, chief among which and relevant to civil cases is the instance of trade secrets or confidential information being revealed.[18] Other established instances, specifically in the English common law, include cases involving police informers[19] and blackmail.[20] Such categories are limited, given the important weight that is apportioned to any derogation from the principle of open justice.[21] This approach under the common law makes no reference to any broader 'public interests' consideration and instead to the high threshold of established categories, that if heard publicly would be an affront to the administration of justice. Such an approach is clearly stricter and can be distinguished from subsection (1)(e) of the CSNPO Act; specifically, it works more to uphold the important principle of open justice.

8. Furthermore, the High Court in *Hogan v Australian Crime Commission*[22] ruled to narrow the test of necessity regarding the federal mirror provision[23] of section 8;[24]this is consistent with the common law approach, but importantly conflicts with the current NSW legislative scheme. Necessity had already been found to "suggest parliament was not dealing with trivialities";[25] the majority made it clear that it was "…insufficient that the making or continuation of an order under s 50 appears to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some 'balancing exercise'",[26] meaning that necessity is the primary consideration. This can clearly be distinguished from the balancing considerations contained within section 8 of the CSNPO Act which enable the court to weigh up, in the case of (1)(e), a necessity against the public interest, which is a clearly broader and more discretionary approach.

[18] *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294.
[19] *Witness v Marsden* (2000) 49 NSWLR 429.
[20] *R v Socialist Worker Printers and Publishers* [1975] 1 QB 637.
[21] Above n 6, 286.
[22] [2010] HCA 21.
[23] *Federal Court of Australia Act 1976* (Cth) s 50.
[24] *Court Suppression and Non-publication Orders Act 2010* (NSW) s 8.
[25] *Australian Broadcasting Corporation v Parish* (1980) 29 ALR 228 at 234.
[26] *Hogan v Australian Crime Commission* [2010] HCA 21 [31].

II SUPPRESSING MATERIAL EXTRANEOUS TO PROCEEDINGS

A *Quia Timet Injunctions – the Historical Power of the Courts*

9. The next vital consideration is that of information published from a source extraneous to judicial proceedings but still is found by the court to concern proceedings before it. There exists an important distinction between material within proceedings – information revealing evidence or details of parties as prescribed under the CSNPO Act,[27] and material that is extraneous to proceedings (and is thus not derived explicitly from it); namely, that the former is protected by the principle of open justice.[28] The latter is not protected by open justice, and thus an individual who publishes such information deemed prejudicial to proceedings will become exposed to criminal liability under the common law of sub judice contempt,[29] even in the important context of civil litigation. A suppression order restraining sub judice contempt of court under section 7 of the CSNPO Act was considered by the court in *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*,[30] with its boundaries defined in relation to the digital era and takedown orders. However, given the gravity of such exposure, it is pertinent to first look to the historical empowerment of the courts to make suppression or non-publication orders under the common law to prevent parties from committing sub judice contempt.
10. The historical and primary mechanism for the courts to suppress information it deems prejudicial to proceedings lies in NSW in the inherent jurisdiction of, almost exclusively,[31] the Supreme Court (as a superior court) to restrain publication and prevent sub judice contempt via the equitable instrument of a *quia timet* injunction. Importantly, case law demonstrates such an application is broader in nature than other jurisdictions (namely England). Firstly, the standard of proof required on application of a *quia timet* injunction in the Equitable or Common Law divisions of the Supreme Court of NSW is civil (rather than a criminal standard, as is required in England) – this has the effect of requiring only a demonstration that contempt of court would *likely* result from publication. Such an order can be sought on an interlocutory basis,

[27] *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.
[28] Jason Boland, "Restraining 'Extraneous' Prejudicial Publicity: Victoria And New South Wales Compared" (2018) 41(4) *UNSW Law Journal*, 1263.
[29] *Attorney General of New South Wales v John Fairfax & Sons Ltd and Bacon* (1985) 6 NSWLR 695, 697.
[30] *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim and ors* [2012] NSWCCA 125.
[31] *Re South Australia Telecasters Ltd* [1998] FamCA 117.

with the requisite standard in that instance being that if the publication in issue to go ahead, the balance of probabilities would lead to a sub judice contempt occurring.[32]

11. Following this civil standard of proof that is required, upon application to issue a *quia timet* injunction it is only needed to be shown that there is evidence that the defendant would *likely* publish the prejudicial material, and what that material would *likely* be.[33] Pertinent to how wide the principle is in NSW, *Doe v Fairfax* made it clear that both of these evidentiary standards could be satisfied by way of inference – drawn from the defendant's past conduct, or importantly subjective public interest that may be generated by the material in question.[34] It, therefore, follows that a *quia timet* injunction could be granted by the Supreme Court of NSW theoretically on a far more speculative and discretionary basis, which is extremely relevant given its possible application to the increasing amount of extraneous information published on digital media and publications. However, the theoretically broad basis for such a power has been narrowed by the court's interpretation of such a power instead under the CSNPO Act.

B *Open Justice in the Digital Age*

12. The internet has revolutionised the ways in which media of all forms is disseminated and consumed by individuals; newspapers are increasingly moving online, and traditional news is replaced by innovative forms such as podcasting and social media.[35] The integration of the digital media with the courts is apparent in the United Kingdom, wherein 2011, the Lord Chief Justice announced that journalists could publish information on Twitter freely from the courtroom (that is, without seeking leave).[36] Such looser definition of media leads inevitably to masses of less defined information possibly being published about court proceedings, both within the proceedings themselves and prejudicially extraneous. The as-established wider definition of the *quia timet* injunction in NSW under the common law is one instrument that empowers the court to restrain the publication or dissemination of material that may be difficult to define (under a power to prevent general sub judice

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[32] *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554.
[33] *Doe v Fairfax* (1995) 125 FLR 372, 391.
[34] Ibid, 392.
[35] Roxanne Burd, "Is There a Case for Suppression Orders in an Online World?" (2012) 17 *Media and Arts Law Review* 107.
[36] Christopher Williams, 'Top Judge Relaxes Rules On Twitter In Court', The Daily Telegraph (online) 14 December 2011 <http://www.telegraph.co.uk/technology/twitter/8955530/Topjudge-relaxes-rules-on-Twitter-in-court.html>.

contempt of court). More importantly, the CSNPO Act also provides provisions[37] that empower a court to restrain extraneous or less-specific information that is now so prevalent in the digital age, under internet takedown orders. This approach has been preferred in NSW.

13. The Criminal Court of Appeal elucidated important principles relating to the restraining of internet material in *Fairfax v Ibrahim*,[38] under s 7 of the CSNPO Act, and how it can issue a takedown order for the material – importantly, this was held to extend to civil litigation as well. This effectively adapts the common law power of a *quia timet* injunction to restrain broader prejudicial content for the modern digital age but narrows it to give effect to the principle of open justice. The court outlined the procedure for such takedown orders, holding that the wording of "any person who is related to or otherwise associated with any party to or witness in proceedings before the court" within section 7 extended to extraneous material in a manner similar to a *quia timet* order. Take down orders, the court held, place the primary responsibility on the interested parties themselves to monitor discussion or posts on digital media, and bring to the courts' attention the specific posts/discussion they believe prejudices the proceedings.[39] Before issuing a blanket suppression order and ordering the takedown of all content related to the proceedings on the internet, the court will first consider each piece of content raised by the applicant and what steps they have taken. Only in the event of a specific order against them do internet content hosts become involved and are then required to monitor discussion themselves.[40]
14. By placing the onus first on parties involved in proceedings to monitor the internet and elucidating a clear takedown procedure, the court provides a degree of certainty to both internet users and content creators that may not be necessarily afforded with a blanket and far broader *quia timet* injunction issued. Therefore, a take-down order clarified by the court in *Fairfax v Ibrahim* should be seen as a model approach to reforming suppression and non-publication orders for the modern age, and a more efficient way of dealing with the issue of masses of potentially prejudicial media and information.

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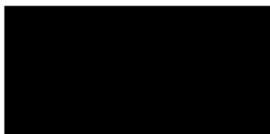
[37] *Court Suppression and Non-publication Orders Act 2010* (NSW) s 7.
[38] *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim and ors* [2012] NSWCCA 125.
[39] Brian Fitzgerald and Cheryl Foong, "Suppression orders after Fairfax v Ibrahim: Implications for internet communications" (2013) 37 *Australian Bar Review* 175, 190.
[40] Ibid.

III Conclusions

15. Any reform of the *Court Suppression and Non-publication Orders Act 2010* (NSW) regarding its operation during civil proceedings needs to give appropriate weight to the vital principle of open justice, while also effectively balancing it with procedural fairness. Firstly, the NSW Law Reform Commission should strongly consider the removal of s 8(1)(e) from the CSNPO Act, as balancing open justice with 'public interest' is a broad discretionary power that is not reflected by mirror provisions in other jurisdictions within Australia or the roots of the power at common law. Such roots and mirror provisions give the appropriate weight to the principle of open justice, which should thus be reflected in the NSW legislative provisions. Furthermore, the NSW Law Reform Commission should look to the operation of internet take-down orders as elucidated within *Fairfax v Ibrahim* as a model for digital media reform of the CSNPO Act, given that the alternative power of the court under a *quia timet* injunction within NSW is too broad to operate effectively in a digital environment.

Yours sincerely,

Lachlan Patey



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