Suppression Orders after *Fairfax v Ibrahim:* Implications for Internet Communications†

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Abstract

This article considers the scope for utilising suppression orders to prevent the risk of prejudice to the administration of justice, in light of the wide availability of internet communications. Drawing from principles articulated in the NSW Court of Criminal Appeal case, Fairfax v Ibrahim, this article will explain the form in which such orders may take, and the significance of the 'notice and takedown' procedure adopted by the court. The article will further outline the considerations (of specific interest to search engines and social media platforms) that a court will take into account in deciding whether a suppression order is necessary in the circumstances.

Contents

Introduction 2
The Internet and the administration of justice 2
The power of courts to suppress information 2
Anticipatory suppression orders 3
Court Suppression and Non-publication Orders Act 2010 (NSW) 4
The order in *Fairfax v Ibrahim* 5
Inherent jurisdiction 5
Constitutional validity 7
Construction of statute: what is necessary? 9
Practical considerations for online material 10
Jury's adherence to orders 11
Method of limiting access 11
Parties resident in or operating from the jurisdiction 13
Notice and takedown procedure 13
The significance of notice and takedown 14
Contempt and the court's inherent jurisdiction 15
Conclusion 16

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Introduction

The internet has profoundly changed the way in which we as a society communicate with one another. Users of online platforms such as Twitter and Facebook are able to instantaneously reach a vast audience that transcends jurisdictional borders. A search term on Google can bring up thousands of search results or "hits" within seconds. One question that arises for courts is the manner in which this ready access to online information impacts the administration of justice. In particular, courts have had to assess the role of suppression orders in managing the risk of jurors being exposed to prejudicial information communicated via the internet.

This paper looks at the recent NSW Court of Criminal Appeal case of *Fairfax v Ibrahim*[1] which provides guidance to a court issuing such orders. The court in this case adopts a "notice and takedown" procedure. Under this approach, the prosecutor or interested party has the responsibility to notify the offending party of prejudicial material and request removal of the material, before applying to the court for a suppression order. This procedure has the potential to lead to a greater level of certainty especially for Internet Service Providers (ISPs). Furthermore, the principles expounded by the court enhance our understanding of the role of suppression orders in today's internet society, and makes clear that such orders are not exempt from the accepted standards of certainty and fairness within the court system.

The Internet and the administration of justice

In the context of criminal justice, there have been increasing concerns that discussions on the internet and on social media platforms could prejudice the fairness of trials. The vast majority of criminal trials fail to capture the attention of the public, but when they do, the internet, particularly social media, is often the first place people turn to as an outlet for their opinions.

In discussing criminal trials, users of social media have, at times, failed to appreciate an important distinction between traditional forms of discussions and social media discussions. Instead of being a one-on-one conversation between persons that is transient or ephemeral in nature, social media conversations can be recorded with varying degrees of permanency and tend to be open to public view.[2] The wide and active circulation of ill-informed, biased or malicious information may increase the risk of a juror being exposed to such information, which could in turn lead to a failure by the juror to base their decision purely on the evidence admissible before the court.

The power of courts to suppress information

Conventionally, it is accepted that a superior court has inherent power to prevent an interference with the administration of justice.[3] This inherent power includes the ability to control the criminal process and to protect the fundamental right of the citizen to a fair trial.[4] Publication of material that has a tendency to influence the conduct of particular legal proceedings is said to breach the *sub judice* rule.[5]

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[1] *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* [2012] NSWCCA 125.

[2] The public nature of communications on Facebook may depend on the privacy settings of an individual user's account. However, comments on a public Facebook page and on Twitter are generally available to the public.

[3] *Jago v The District Court of New South Wales* (1989) 168 CLR 23; *Dietrich v The Queen* (1992) 177 CLR 292.

[4] Ibid.

[5] New South Wales Law Reform Commission, Contempt by Publication - Report 100 (June 2003) [1.12], available at http://www.lawreform.llawlin.nsw.gov.au/agdbaagd7wr/lrc/documents/ppd/report_100.pdf (accessed on 8 July 2013). The report notes that the phrase "sub judice" means "under or before a judge or court". See also *Fairfax v Ibrahim* at [33] and [36]. The *sub judice* principle is described by Basten JA at [36] as "...the protection of the jury from inflammatory or irrelevant material while the proceedings are on foot".

Superior courts have power to restrict publications which breach the *sub judice* rule under the law of contempt, but their power to do so does not extend beyond that which is necessary for the administration of justice.[6]

In addition, superior and lower courts may have express statutory authority to suppress information under specific powers granted under legislation. These specific powers may, for example, cover the identity of victims in prescribed sexual offences[7] and the identity of children involved in proceedings.[8]

In the State of New South Wales, legislation has been introduced to consolidate the law relating to the issuance of non-publication and suppression orders[9] by the courts.[10] The *Court Suppression and Non-publication Orders Act 2010* (NSW) ("Suppression Orders Act") is based on model provisions developed by the Standing Committee of Attorney-General (SCAG), part of a greater effort to clarify and create uniformity in the system of suppression and non-publication orders across Australia.[11] NSW is currently the only jurisdiction to implement the model provisions. While the Suppression Orders Act consolidates the law and aims to provide greater clarity, it is not intended to affect the operation of the common law or dilute the specific legislative provisions.[12]

Anticipatory suppression orders

Assuming that certain types of information have the tendency to prejudice the fairness of a forthcoming trial, the key questions in the online environment is what orders would be valid and who could be bound.[13] Australian courts grappling with this issue in some instances have issued broad suppression orders which purport to bind the world.[14] The NSW Court of Criminal Appeal,[15] the highest criminal court in the State of NSW however, has taken a more measured approach. In *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* ("Fairfax v Ibrahim"),[16] the court applied the legislative provisions in the Suppression Orders Act, taking into account the broader policy and practical considerations applicable to communications on the internet. In particular, the court indicated the procedural requirements to be followed before a suppression order should be issued, the relevant factors in considering whether an order is necessary, and the form in which such an order should take. In addition, the court highlighted the ongoing operation of the law of contempt, which operates in conjunction with the legislative provisions, to prevent prejudice to the proper administration of justice.

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[6] *Riley McKay Pty Ltd v McKay* (1982) 1 NSWLR 264, 270.
[7] *Crimes Act 1900* (NSW), s 578A.
[8] See e.g. *Children (Criminal Proceedings) Act 1987* (NSW), s 11; *Crimes Act 1900* (NSW), s 562NB(1).
[9] The terms are defined as follows in s 3 of the *Court Suppression and Non-publication Orders Act 2010* (NSW):
> *non-publication order* means an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information).
> *suppression order* means an order that prohibits or restricts the disclosure of information (by publication or otherwise).

[10] See Second Reading Speech (The Hon. Michael Veitch, Parliamentary Secretary on behalf of the Hon. John Hatzistergos), Court Suppression and Non-publication Orders Bill 2010, 23 November 2010. The *Court Suppression and Non-publication Orders Act 2010* (NSW) was the result of a consultation process, beginning with the NSW Law Reform Commission's 2003 Review of the Law of Contempt by Publication.
[11] Ibid. On the operation of the Suppression Orders Act, see generally *Rinehart v Welker* [2011] NSWCA 403.
[12] *Court Suppression and Non-publication Orders Act 2010* (NSW), s 5.
[13] Note that the court in *Fairfax Digital v Ibrahim* [2012] NSWCCA 125 at [61] affirmed that an order preventing public access to *existing* material, including a publication on a website, clearly falls within the scope of the Suppression Orders Act, s 7.
[14] E.g. *R v DEBS* [2011] NSWSC 1248.
[15] The Court of Criminal Appeal is constituted by three or more judges of the Supreme Court. See *Criminal Appeal Act 1912* (NSW), s 3.
[16] [2012] NSWCCA 125.

Court Suppression and Non-publication Orders Act 2010 (NSW)

Section 7 of the Suppression Orders Act expresses the power of courts to make suppression and non-publication orders. It states:

> A court may, by making a suppression order or non-publication order on grounds permitted by this Act, prohibit or restrict the publication or other disclosure of:
>
> (a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or
>
> (b) information that comprises evidence, or information about evidence, given in proceedings before the court.

Among the grounds set out in section 8(1) of the Act are:

> (a) the order is necessary to prevent prejudice to the proper administration of justice; and
>
> (e) the order 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.[17]

The term "publication" is given a wide definition under the Act to mean "disseminate or provide access to the public or a section of the public by any means, including by ... broadcast or publication by means of the Internet."[18] With reference to the High Court's view of publication in the context of defamation in *Dow Jones v Gutnick*,[19] Basten JA in *Fairfax v Ibrahim*[20] considered publication to be "a continuing act in the case of a website: access is provided to the public for so long as material is available on the web".[21]

In addition, s 7 is phrased widely and refers to "publication or other disclosure". Basten JA noted that:

> On one view, the phrase "disclosure of information" was intended to have a wider meaning than "publication of information. However, the breadth of the definition of "publish"" including by providing access to the public or a section thereof, and including within that reference "publication by means of the Internet", tends to diminish the significance of any attempt to distinguish between the respective concepts.[22]

Therefore, a broad range of internet communications, including blogs and discussions on social media platforms, would fall within this expansive notion of publication.

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[17] Grounds in subparagraphs (b), (c) and (d) respectively relate to national and international security, the safety of persons, and the avoidance of undue distress to parties or witnesses in criminal proceedings involving an offence of a sexual nature.
[18] *Court Suppression and Non-Publication Orders Act 2010* (NSW), s 3.
[19] [2002] HCA 56; 210 CLR 275, [16].
[20] [2012] NSWCCA 125.
[21] Ibid, [43]
[22] Ibid, [40].

The order in *Fairfax v Ibrahim*

Fairfax v Ibrahim[23] concerned an appeal to the NSW Court of Criminal Appeal against the issuance of an order under the Suppression Orders Act. The respondents were parties in criminal proceedings in the District Court, and the trial judge had made an order prohibiting the publication of material referring to any criminal proceeding in which the respondents were parties or witnesses. The broad suppression order, which was not limited in its application to specific persons or specific items, was made in the following terms:

> Until further order, within the Commonwealth of Australia, there is to be no disclosure, dissemination, or provision of access, to the public or a section of the public, by any means, including by publication in a book, newspaper, magazine or other written publication, or broadcast by radio or television, or public exhibition, or broadcast or publication by means of the Internet of any:
>
> (a) Material containing any reference to any other criminal proceedings in which the accused Rodney Atkinson, Fadi Ibrahim, or Michael Ibrahim are **or were** parties or witnesses; or
>
> (b) Material containing any reference to any other alleged unlawful conduct in which the accused Rodney Atkinson, Fadi Ibrahim, or Michael Ibrahim are **or were** suspected to be complicit or of which they are **or were** suspected to have knowledge.[24]

The applicants, a number of media companies including Fairfax Digital, Nationwide News, Seven Network and Ninemsn, appealed the matter to the Court of Criminal Appeal, and argued that the order was not a valid exercise of power under the Suppression Orders Act. They also submitted that the form of the order was inconsistent with Schedule 5 of the *Broadcasting Services Act 1992* (Cth) ("BSA"), and was therefore invalid to the extent that it was inconsistent with the Commonwealth Act pursuant to s 109 of the Commonwealth Constitution.

The appeal was heard by Bathurst CJ, Basten and Whealy JJA. The leading judgment was delivered by Basten JA, with whom Bathurst CJ and Whealy JA agreed. Basten JA approached the issue of whether the order was valid from three perspectives, namely:

- whether the Suppression Orders Act expanded the inherent jurisdiction of superior courts to prevent prejudice to the administration of justice;
- inconsistency with the BSA and constitutional validity; and
- whether the order was "necessary" in accordance with the language of the statute.

Inherent jurisdiction

In considering the powers granted upon courts under the Suppression Orders Act, Basten JA accepted that section 7 extends the power to make orders preventing threatened interference with a trial to lower

[23] [2012] NSWCCA 125.

[24] Note that Basten JA at [51] considered it "desirable to distinguish between two kinds of constraints..., namely constraints on publication of material disclosed in court proceedings and publication of material having no connection with court proceedings except its capacity to affect current or future proceedings" because orders which relate to material having no connection with court proceedings do not involve a constrain upon the principle of open justice. See also [33] and [53]-[55].

courts (i.e. a power which exists in superior courts under the general law of contempt).[25] The question that remained was whether the statute expanded the scope of such inherent powers. In other words, did the statute merely restate the powers of the courts which existed under the common law, or did the statute expand the power over and above that which existed under the general law? Therefore, before considering the construction and language of the statute, His Honour found it necessary to consider the scope of the Supreme Court's power under its inherent jurisdiction.[26]

Referring to several cases, including the Victorian Supreme Court decision of *General Television Corporation Pty Ltd v DPP*[27] and NSW Court of Appeal decision of *John Fairfax & Sons Ltd v Police Tribunal of NSW*,[28] Basten JA accepted that superior courts did not have the power to make orders binding the world at large.

In *General Television Corporation Pty Ltd v DPP*,[29] the Victorian Court of Appeal considered an appeal against orders in the following terms:

> 1. The transmission, publication, broadcasting or exhibiting of the production referred to as 'Underbelly' be prohibited in the State of Victoria until after the completion of the trial and verdict in the matter of *R v [A]*.
>
> 2. Direct that the television series referred to as "Underbelly" not be published on the internet in Victoria and the "Family Tree site - inside the Underbelly, which looks at the evolving relationships between the key characters" be prohibited until after the trial and verdict in the matter of *[A]*.

As Basten JA in *Fairfax v Ibrahim* noted,[30] Warren CJ, Vincent and Kellam JJA of the Victorian Court of Appeal focussed on the breadth of the orders and the fact that they sought to bind every person in Victoria.[31] The Victorian Court concluded that it was not necessary for the first order to be in such wide terms, and that an order directed at the applicant not to publish the program in Victoria until after the completion of the trial was all that was required.[32]

Likewise, McHugh JA of the NSW Court of Appeal, with Glass JA agreeing, held in *John Fairfax & Sons Ltd v Police Tribunal of NSW* that:

> An order made in court is no doubt binding on the parties, the witnesses and other persons in the courtroom. But an order purporting to operate as a common rule and to bind people generally is an exercise of legislative - not judicial - power.[33]

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[25] [2012] NSWCCA 125, [52].
[26] See [2012] NSWCCA 125, [33].
[27] [2008] VSCA 49. See [29], where the Victorian Supreme Court stated "we accept that the Court does not have power to 'bind the world' by a suppression order made in the exercise of its inherent jurisdiction to ensure a fair trial".
[28] [2004] NSWCA 324; 61 NSWLR 344.
[29] [2008] VSCA 49.
[30] *Fairfax v Ibrahim* [2012] NSWCCA 125, [56]
[31] *General Television Corporation Pty Ltd v DPP* [2008] VSCA 49, [65].
[32] Ibid, [65] & [67].
[33] (1986) 5 NSWLR 465 at 477 per McHugh JA (Glass JA agreeing). Note that parties unconnected with legal proceedings may still be subject to the court's judicial power under the law of contempt. This is discussed later in this paper.

If section 7 conferred upon courts the power to bind the world at large, Basten JA held that "it would be a remarkable consequence of the language employed".[34] His Honour noted that there was no suggestion in the NSW Law Reform Commission Report, *Contempt by Publication*, that any such power previously existing in the courts, or that it was intended to be conferred by statute.[35] Equivalent provisions, such as s 50 of the *Federal Court of Australia Act*, were limited to an order "forbidding or restricting the publication of particular evidence".[36]

Basten JA acknowledged that, prima facie, s 7(a) in combination with s 8(1)(a) was capable of being read broadly.[37] However, absent a clear intention to that effect, Basten JA did not accept that the provisions expanded the powers of a superior court under the general law to prevent *sub judice* contempt.[38]

Constitutional validity

In *Fairfax v Ibrahim*,[39] the applicants claimed that the suppression order was inconsistent with Schedule 5 of the *Broadcasting Services Act 1992* (Cth) ("BSA"). Schedule 5 of the BSA sets up a regulatory system for addressing community concerns about objectionable online material. It prescribes a framework under which the Australian Communications and Media Authority (ACMA) may notify internet service providers of prohibited content so that the providers can deal with the content in accordance with procedures specified in an industry code or industry standard (for example, procedures for the filtering, by technical means, of such content).[40]

Clause 91, contained in Part 9 of Schedule 5, provides:

> "**91 Liability of internet content hosts and internet service providers under State and Territory laws etc**
>
> (1) A law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:
>
> > (a) subjects, or would have the effect (whether direct or indirect) of subjecting, an internet content host to liability (whether criminal or civil) in respect of hosting particular internet content in a case where the host was not aware of the nature of the internet content; or
> >
> > (b) requires, or would have the effect (whether direct or indirect) of requiring, an internet content host to monitor, make inquiries about, or keep records of, internet content hosted by the host; or
> >
> > (c) subjects, or would have the effect (whether direct or indirect) of subjecting, an internet service provider to liability (whether criminal or civil) in respect of carrying particular internet content in a case where the service provider was not aware of the nature of the internet content; or

[34] *Fairfax v Ibrahim* [2012] NSWCCA 125, [63].
[35] Ibid, [65].
[36] Ibid, [63].
[37] Ibid.
[38] Ibid.
[39] [2012] NSWCCA 125.
[40] See *Broadcasting Services Act 1992* (Cth), Sch 5, cl 2 – Simplified outline.

(d) requires, or would have the effect (whether direct or indirect) of requiring, an internet service provider to monitor, make inquiries about, or keep records of, internet content carried by the provider.

(2) The Minister may, by written instrument, exempt a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of subclause (1)."

Basten JA discussed the meaning of "internet content host" and "internet service provider" and noted a commentator's remark that the terms were "jargon without settled meaning".[41] Ultimately, Basten JA took a broad view, accepting that an internet content host "may include any party in control of a website to which material has been uploaded, whether or not the content was uploaded by the party itself".[42]

On the issue of constitutional validity, Basten JA found that:

> Assuming that the court was satisfied that the material did have the feared tendency, an order directed to that internet content host, relating to specified material of which it had been made aware, would not contravene the constitutional limits of the State law. The statute could validly support such an order.[43]

However, Basten JA held that an order addressed to the world at large, and which had the effect of imposing an obligation on an internet content host to remove content which it was not aware, or monitor content hosted on its web sites would be inconsistent with Schedule 5 of the BSA.[44] Therefore, if the Suppression Orders Act did empower a court to make such a broad suppression order, it would be invalid in accordance with section 109 of the Commonwealth Constitution, which provides that when "a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Accordingly, Basten JA concluded that, to the extent that the Suppression Orders Act permitted the Court to make an order:

- imposing an obligation on an internet content host to remove, or otherwise restrict access to, content, of the nature of which it was not aware; or
- requiring an internet content hose to inquire of, or monitor, the content hosted on its web sites, of the nature of which it was not otherwise aware,

such law would be inconsistent with Schedule 5 of the BSA and be invalid.[45]

It is worth noting here that sch 5 of the BSA was enacted to deal with objectionable material such as pornographic material. It is not likely that Parliament had the operation of suppression orders in mind

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[41] *Fairfax v Ibrahim* [2012] NSWCCA 125, [87]. See Niranjan Arasaratnam, 'Brave New (Online) World' (2000) 23 *Forum: Internet Content Control* UNSWLJ 205, 210.
[42] *Fairfax v Ibrahim* [2012] NSWCCA 125, [90].
[43] Ibid, [94].
[44] Ibid, [96].
[45] *Fairfax v Ibrahim* [2012] NSWCCA 125, [96], [102]. In discussing the responsibility of internet content hosts under the BSA, Basten JA observed that, according to the usual principles relating to *quia timet* injunctions against threatened contempt, "a party must have some basis for its fear that a particular breach of a statutory or common law right may occur"(at [93]). Basten JA also noted that other matters, such as a publisher's legal authority to remove the material identified on a particular web site, would need to be resolved (at [99]).

when enacting clause 91.[46] However, such an interpretation is open to the court based on the broad wording of clause 91.

Construction of statute: what is necessary?

According to s 8(1) of the Suppression Orders Act, the order must be necessary to prevent prejudice to the proper administration of justice. Basten JA held that as a matter of construction, that which is ineffective could not be described as "necessary".[47] Here, the form of order was ineffective for two reasons.

The broad language in which it was drafted meant that there was uncertainty as to who was subject to the order:

> First, to be effective they had to bind numerous parties who were not before the Court. Indeed, it is not possible to know, on the evidence, who those parties are. They will either include those in control of the content of web sites throughout the world which may contain the offending material, or those who operate search engines, or both categories.

The order was not directed to any person or persons and was "little more than a general statement of principles in relation to specific material".[48] Therefore, it raised serious questions as to whether a whole range of businesses, including search engines or Internet Service Providers who permit access to material without knowledge of the content, would be caught by the terms of the order.[49]

Secondly, Basten JA observed that the order exhibited a disproportionate overreach, presumably to overcome the lack of geographical limits applicable to online material (as opposed to newspapers or radio broadcasts).[50] His Honour stated that:

> the proper administration of justice with respect to a trial to take place in the District Court at Sydney could not conceivably justify an order preventing residents of Perth, Kununurra or Darwin from having access to such material. Indeed, the scope of the order is inherently suspect to the extent that it seeks to prevent the whole population of Australia having access to the offending material, at least for a period, in order to prevent possible access by a juror or member of the jury panel for a particular case.[51]

Although Basten JA did not pursue the matter, His Honour stated that "[w]hether a judge of the District Court had power to control the access of parties and citizens so broadly might itself raise a serious question for consideration."[52]

In summary, once a court is convinced that the material will prejudice the administration of justice and it is necessary to make the order to compel removal of the material, in terms of form the order must:

- refer to specified material; and
- apply to specified parties.

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[46] See Brian Fitzgerald et al, *Internet and E-commerce Law, Business and Policy* (Lawbook Co.: Sydney, 2011) 196.
[47] *Fairfax v Ibrahim* [2012] NSWCCA 125, [78].
[48] Ibid, [72].
[49] Ibid, [72] & [78].
[50] *Fairfax v Ibrahim* [2012] NSWCCA 125, [74].
[51] Ibid, [74].
[52] Ibid, [75].

Basten JA held that the trial judge's order, which was "generic in effect, refers to no specific material, nor to any identified web site or controller", was invalid because it was not necessary and therefore went beyond the power conferred by s 8.[53] Here there was no suggestion by the parties that the order could be severed in part so as to leave a valid order.[54]

Practical considerations for online material

In *Fairfax v Ibrahim*,[55] Basten JA found that it was "not necessary for present purposes to consider the extent to which a pre-emptive order could be made in respect of a proposed publication or in respect of identified material which is available for public access and under the control of a specific individual."[56] Nevertheless, Basten JA's judgment provides insight into a court's reasoning where such a suppression order is sought. Factors relating to the operation of the internet are of particular relevance for our purposes.

The matters outlined by Basten JA reflect an understanding of the practical limitations inherent to the regulation of internet communications. His Honour was unwilling to issue a broad order and assume that it would be adhered to by any party who came under its ambit. This may be contrasted with the order issued in the case of *R v Debs*[57] by the NSW Supreme Court in 2011. RS Hulme J in that case made an order in general terms that "there be no publication" of a specific list of information (e.g. the accused's murder of certain persons, specified convictions and prison sentences).[58] In issuing the order, His Honour stated that:

> Thus, as I apprehend the operation of the Act, a non-publication order made in unqualified terms would immediately bind not only the media organisations listed above but also organisations such as the owners of Wikipedia, Google and the other search engines but they would commit no offence until notified of the order and guilty of conduct otherwise constituting contempt of court or a breach of s 16(1).

RS Hulme J's statement is indicative of the reasoning behind such broad orders. It exhibits an attempt to bind large intermediaries, which are often seen as more affective targets in relation to the regulation of online content.[59] These broadly worded orders, however, fail to take practical considerations into account and do not set out procedures or guidelines for parties to adhere to.[60] In contrast, Basten JA in *Fairfax v Ibrahim* elaborated on the meaning of "necessary" and linked the concept to a number of practical factors.[61] His Honour held that the meaning of "necessary" depends on the context in which it is used, and is subject to certain variables:

> In s 8(1), it is used in relation to an order of the court, or, in practical terms, a proposed order, because it identifies a standard as to which the court must be satisfied before making an order. In each paragraph of that provision, the word "necessary" is used to describe the connection

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[53] Ibid, [101] & [80].
[54] Ibid, [101].
[55] [2012] NSWCCA 125.
[56] Ibid.
[57] [2011] NSWSC 1248.
[58] Ibid, [52].
[59] See e.g. *Roadshow Films Pty Ltd v iiNet Ltd* [2012] HCA 16.
[60] Basten JA notes that:
> "The assumption that there is no offence committed under s 16 unless the person has had the order brought to their attention is no doubt correct. However, it invites consideration as to how an internet content host or search engine operator in another country can properly be given notice of the order or be the subject of enforcement proceedings." (*Fairfax v Ibrahim* [2012] NSWCCA 125, [70])

[61] *Fairfax v Ibrahim* [2012] NSWCCA 125, [45] & [46].

> between the proposed order and an identified purpose. It may not take the same place on the variable scale of meaning in each case. In paragraph (a), the purpose of the order will be "to prevent prejudice to the proper administration of justice". That language will, in its turn, have a colour which will depend upon the circumstances. The prejudice may be a possibility or a certainty; its effect, if it eventuates, may be minor or it may cause a trial to miscarry. Similarly, prevention will involve matters of degree: the proposed order may diminish a risk of prejudice or it may obviate the risk entirely. All of these variables may affect what is considered "necessary" in particular circumstances.[62]

In particular, Basten JA's judgment suggests that the variables or aspects that should be addressed by parties applying for a suppression order include:

- The jury's adherence to orders;
- Alternative methods of restricting access e.g. limiting access to certain jurisdictions;
- The presence of offending parties resident in or operating from NSW; and
- The use of a notice and takedown procedure.

Jury's adherence to orders

In terms of the jury's likely adherence to orders, Basten JA stated that:

> the test of necessity will not readily be satisfied without proper consideration as to whether a jury is likely to abide by the directions it will be given to decide a matter only by reference to the material called in evidence and without carrying out any investigations themselves. Circumstances may differ. A juror might be thought to be more likely to look for offending material, despite a direction, if such material is of recent origin and if he or she has some recollection of its existence, than in other circumstances. This is a matter for consideration by each judge asked to make such an order.[63]

His Honour held that "a view must be formed that potential jurors ... may be disinclined to accept directions, backed by criminal sanctions, not to seek access to such material."[64] Therefore, "absent some basis for considering that a specific order is necessary in support of the general law [principles of *sub judice* contempt], there would be no basis for such an order."[65]

Method of limiting access

In the course of the appeal hearing, a computer forensics expert was called upon to explain how the internet operated. The expert prepared a report on how material was uploaded on web servers, how

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[62] Ibid, [46].

[63] *Fairfax v Ibrahim* [2012] NSWCCA 125, [77]. See also *R v Perish* [2011] NSWSC 1102 where Price J dismissed an application to vacate orders limited to identifying specific articles and the web sites from which they were to be removed. The challenge was based on the futility of the order. After identifying the directions that His Honour proposed to give to jurors at the trial, Price J stated at [55] that:

> Although I accept that the jury will abide by my directions I consider that I should do all that I can to assist them in making their task easier. Notwithstanding the age of the articles, their immediate accessibility on the applicants' websites by keying in the names of the accused causes, in my opinion, a real risk of prejudice to the accuseds' right to a fair trial.

[64] *Fairfax v Ibrahim* [2012] NSWCCA 125, [100].

[65] Ibid. See a report commissioned by the Victorian Department of Justice which recommended specific "don't research" jury directions and jury training to overcome the challenges raised by social media: J Johnston, P Keyzer, G Holland, M Pearson, S Rodrick & A Wallace, *Juries and Social Media* (April 2013), 24-25, available at http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/juries%20and%20social%20media%20-%20final.pdf (accessed on 8 July 2013).

material could be published and republished on the internet and how the major search engines operated.[66] Here, the evidence was tendered by the applicants to suggest that the suppression order would be ineffective,[67] and the parties appear to have assumed that the only practical means of preventing access to material on web sites was to remove the material.[68]

However, Basten JA noted that:

> There may be various means of prohibiting or restricting access to such material. A person controlling a server may be able to restrict access to those who have registered with the operator of the server, and possibly paid a fee for access. In other circumstances (such as Facebook) the person who uploads material may be able to control access to his or her material.[69]

His Honour further stated that:

> As a matter of principle, to make the orders effective, material must either be removed from any web site globally to which access can be had from New South Wales or there must be an ability to prevent access by people living in New South Wales. The evidence did not disclose that either of these was a realistic possibility. Certainly the orders made no attempt to identify any such possibility.[70]

His Honour's recognition of the deficiency in the evidence can be linked back to the necessity requirement; in particular, the variable nature of what is necessary in the circumstances. An order to remove material from the internet has the effect of suppressing access to information by the world at large. As opposed to restricting access to the material in a particular state, territory or country, it is a relatively drastic measure.

Country specific blocking of content is not impossible. Twitter, for instance, has introduced a featured called "country withheld content".[71] This tool has been utilised to block access to hate speech on Twitter in certain countries.[72] Facebook has also implemented automatic filtering of certain comments, allegedly to combat spamming on the platform.[73] The technical capabilities of these platforms should be investigated and addressed by any party seeking to prohibit access to certain content.

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[66] See ibid, [25].
[67] Ibid.
[68] Ibid, [44].
[69] Ibid.
[70] *Fairfax v Ibrahim* [2012] NSWCCA 125, [79].
[71] See Twitter Help Centre, "Country withheld content" at http://support.twitter.com/groups/56-policies-violations/topics/236-twitter-rules-policies/articles/20169222-country-withheld-content# (accessed on 16 April 2013). See also 'Tweets still must flow', *Twitter Blog*, 26 January 2012, available at http://blog.twitter.com/2012/01/tweets-still-must-flow.html (accessed on 16 April 2013).
[72] Deborah Cole, 'Twitter blocks German neo-Nazi account', *The Australian*, 19 October 2012, available at http://www.theaustralian.com.au/australian-it/twitter-blocks-german-neo-nazi-account/story-e6frgakx-1226499032212 (accessed on 4 April 2013). See also Emily Greenhouse, 'Twitter's Speech Problem: Hashtags and Hate', *The New Yorker*, 25 January 2013, available at http://www.newyorker.com/online/blogs/newsdesk/2013/01/french-anti-semites-and-the-american-cloud.html (accessed on 4 April 2013).
[73] See Josh Constine, 'Facebook Says Today's Comment Limitations Are Due to Spam Filter, Not Censorship', *TechCrunch*, 5 May 2012, available at http://techcrunch.com/2012/05/05/facebook-comment-limitations-are-a-spam-filter-not-censorship/ (accessed on 16 April 2013).

Parties resident in or operating from the jurisdiction

Basten JA raised the significance of identifying offending parties which were resident in or operating from NSW for the practical purpose of enforcing the order.[74] In terms of the source of offending material, His Honour observed that information and discussion about criminal matters are more likely to originate from local sources, stating "it is arguable that most of the offending material, being of more topical than national let alone international interest, will be found on servers within the country, and even perhaps within New South Wales."[75] However, His Honour also noted that this statement "may underestimate the likelihood that such material is also available from other sources. Given the efficiency of modern search engines, limiting the number of sources, without removing them all, is likely to be ineffective."[76] Therefore, while orders may be enforceable against local users, republication overseas brings into question (amongst other things) the enforceability of orders against multinational intermediaries (e.g. a search engine with the ability to block an item from search results).

It is notable that most major search engines and social media platforms have representatives and offices in Australia.[77] One may argue that these local representatives merely play a role in furthering certain objectives of the company (e.g. marketing, policy, customer relations), and have limited influence on the publication or filtering of content on the platform more broadly. Nevertheless, their presence in the jurisdiction provides prosecutors or parties with an avenue to notify the company of concerns. It enables prosecutors or interested parties to engage with these large intermediaries, and perhaps encourage cooperation with prosecutors. A cooperative relationship is likely to encourage the development of a practice which complies with sensible requests or orders that are not unnecessarily broad or uncertain.

Notice and takedown procedure

In *Fairfax v Ibrahim*,[78] Basten JA set out a notice and takedown procedure that could be undertaken by the Director of Public Prosecutions:

> In relation to material on the internet, it would, no doubt, be a relatively simple task for the Director of Public Prosecutions, in respect of a particular forthcoming trial, to conduct an internet search and identify web sites containing material to which the public had access and which might tend to prejudice the fairness of the forthcoming trial. (Such a course was suggested nine years ago by Spigelman CJ in *John Fairfax Publications Ltd* at [65].)[79] The particular internet content host could then be made aware by the Director of the material and asked to remove it. If it did not act within a reasonable time as requested, it would be open to the Director to seek an order from the court in respect of that material.[80]

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[74] *Fairfax v Ibrahim* [2012] NSWCCA 125, [78].
[75] *Fairfax v Ibrahim* [2012] NSWCCA 125, [74].
[76] Ibid.
[77] See e.g. Google Australia (http://www.google.com.au/intl/en/about/company/facts/locations/) (accessed on 8 July 2013) and Facebook Australia (http://www.facebook.com/FacebookAU/info) (accessed on 8 July 2013). Twitter will reportedly open an Australian office in the near future: Miles Godfrey, 'Twitter to open Australian offices 'imminently'', *Sydney Morning Herald*, 11 January 2013, available at http://www.smh.com.au/technology/technology-news/twitter-to-open-australian-offices-imminently-20130111-2ck3w.html (accessed on 4 April 2013).
[78] [2012] NSWCCA 125.
[79] *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324.
[80] *Fairfax v Ibrahim* [2012] NSWCCA 125, [94]. See also *R v Burrell* [2004] NSWCCA 185, [39] per Spiegelman CJ.

Basten JA again ties this approach in with the requirement that an order be necessary to prevent prejudice to the proper administration of justice in s 8(1), stating that:

> the test of necessity will not usually be satisfied unless a request has been made to the parties thought to be in breach to remove the offending material and who, after a reasonable opportunity, have failed, or have indicated they do not intend, to take that step.[81]

The significance of notice and takedown

The notice and takedown procedure prescribed in this case accords with the role of courts as adjudicators. By requiring applicants seeking an order to point to particular material under the control of specific parties, courts are able to ascertain whether the material is likely to prejudice proceedings and decide whether a suppression order is necessary, rather than issue a broad statement of principle against the publication of certain information.

Importantly, the NSW Court of Criminal Appeal's decision considers the legislative provisions in the context of online communications, and affords serious consideration to the practical matters that impact on the effectiveness of an order. In terms of the regulation of internet content and communications, the implementation of notice and takedown procedure is not novel. It has been used in the regulation copyright infringement, with specific legislative safe harbour provisions introduced in relation to the liability of internet intermediaries,[82] and for the regulation of objectionable online material under the BSA. The court's approach in *Fairfax v Ibrahim* reflects an understanding of internet-based technologies and this established method of regulation. It adopts a measured approach which is not disproportionate to the mischief it is intending to curb. Therefore, instead of attempting to shut down all online information on a particular matter (be it on news websites, blogs or social media) the court will consider whether specific material is prejudicial, and the steps taken by the applicant, before issuing the order.

This approach is reasonable because not all publications or all types of discussion in the vast online environment are likely to influence jury deliberations.[83] Compare for example the comments or statements of individuals scattered throughout Facebook, with a dedicated Facebook page on a particular topic which has thousands of followers. Facebook hate pages established in relation to Adrian Earnest Bayley, an alleged rapist and murderer in Victoria, are illustrations of the latter.[84] Such dedicated pages which have aggregated a critical mass of followers are more likely to be sensationalised

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[81] *Fairfax v Ibrahim* [2012] NSWCCA 125, [98].

[82] Part 11 of Sch 9 of the *US Free Trade Agreement Implementation Act 2004* (Cth) deals with the liability of Content Service Providers (CSPs) for acts of copyright infringement carried out using their facilities or services. The notice and takedown procedure applicable under the Act is set out in Part 3A of the *Copyright Regulations 1969* (Cth). Under reg 20C, a CSP must appoint a designated representative to receive notices for the CSP pursuant to the notice and take-down procedure.

[83] The objective of a suppression order is not necessarily to remove all offending content. In *R v Perish* [2011] NSWSC 1102, Price J held at [44] that:

> The inability of a court to remove all offending material does not necessarily lead to a conclusion that the provision of the relief sought would be futile. In General Television ... the Victorian Court of Appeal (Warren CJ, Vincent and Kellam JJA) recast an internet order so that it was specifically directed at the applicant in that case and the website within its control notwithstanding that there was a deal of material which would otherwise be available on the internet.

See *Fairfax v Ibrahim* [2012] NSWCCA 125, [66].

[84] Lachlan Hastings, 'Facebook finally shuts down Jill Meagher suspect pages after police request', *Herald Sun*, 3 October 2012, available at http://www.heraldsun.com.au/news/we-will-never-forget-say-jill-meaghers-family/story-e6frf7jo-1226487337000 (accessed on 4 April 2013).

and publicised widely. In contrast, jurors are arguably less likely to be influenced by comments scattered throughout Facebook which may or may not come to their attention.

Under the notice and takedown procedure set out by the court, prosecutors and interested parties have primary responsibility to monitor publications or discussions, and must point to specific items (e.g. a blog post or Facebook page) which they propose should be subject to an order. Internet users and internet content hosts do not have a general obligation to make themselves aware of suppression orders, and internet content hosts are not required to monitor discussions on their platforms without a specific order against them. Therefore, the notice and takedown procedure distributes responsibility to prevent prejudice to the administration of justice among the various parties.

In addition, the procedure requires the parties to explore their options and take steps to resolve the matter before going to the court to seek an order. It ensures the necessity of resorting to a court order, and is a sensible approach which provides certainty for parties in criminal proceedings, internet users and internet intermediaries.

Contempt and the court's inherent jurisdiction

The decision in *Fairfax v Ibrahim* not only clarifies the limitations of statutory suppression orders, but also highlights the ongoing role of the superior courts' inherent powers to safeguard the administration of justice. Basten JA referred to the Victorian Court of Appeal decision in *General Television v Director of Public Prosecutions*,[85] which held that:

> the fact that the above order is directed against the applicant only should not be misunderstood. It should not be treated by persons other than the named applicant as giving them carte blanche to publish any part of Underbelly howsoever the same may have been obtained by them. Obviously, any person with knowledge of the order who saw fit to publish Underbelly in Victoria prior to the verdict in the matter of *R v [A]* would run a grave risk of being found to have committed a contempt of court.

Similarly, in *John Fairfax & Sons Ltd v Police Tribunal of NSW*,[86] McHugh JA explained that the conduct would be contempt, not because the person was bound by the order itself, but because the person has intentionally interfered with the proper administration of justice:

> conduct outside the courtroom which deliberately frustrates the effect of an order made to enable a court to act effectively within its jurisdiction may constitute a contempt of court. But the conduct will be a contempt because the person involved has intentionally interfered with the proper administration of justice and not because he was bound by the order itself.

These principles were accepted by Basten JA in *Fairfax v Ibrahim*.[87] Accordingly, Basten JA noted that "any continued or further publication of material having a tendency to interfere with the administration of justice in respect of the forthcoming trial of the second, third and fourth respondents may, despite the discharge of the orders referred to above, constitute a contempt of court."[88]

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[85] [2008] VSCA 49; 19 VR 68, [68] (Warren CJ, Vincent and Kellam JJA). Quoted in *Fairfax v Ibrahim* [2012] NSWCCA 125, [57].
[86] (1986) 5 NSWLR 465 at 477 per McHugh JA (Glass JA agreeing). See also *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 451-452 per Lord Diplock.
[87] [2012] NSWCCA 125, [57] – [60].
[88] *Fairfax v Ibrahim* [2012] NSWCCA 125, [105].

Conclusion

The NSW Court of Criminal Appeal decision of *Fairfax v Ibrahim* provides guidance on the operation of the Suppression Orders Act in relation to suppression orders in advance of or during a trial. In accordance with established principles, the party seeking the order must point to specific material online, and show that the material presents a threat to the administration of justice. The Act does not extend the powers of courts to prohibit discussion on certain matters by issuing broad orders which bind the world at large.

Importantly, the court sets out a notice and takedown procedure which provides a level of certainty for internet users and internet intermediaries. It ensures that users and intermediaries are given reasonable time to comply with requests before being subject to a court order. It is a multidimensional approach, which explains how the statute can work within its limits, supplemented by a superior court's inherent powers to prevent *sub judice* contempt.

More broadly, the decision shows that our courts are not out of touch with internet technologies, and that they understand the need for some flexibility when it comes to internet regulation. The NSW Court of Criminal Appeal did not attempt to shut down the flow of information on the internet but was willing to take targeted action against particular threats to the administration of justice. By dealing with specific instances and actors in acute situations, parties may be able to get effective remedies through the courts. A suppression order issued by the courts is but one way to prevent prejudice to the administration of justice. Ultimately, it is the shared responsibility of internet intermediaries, internet users, prosecutors, parties to trial, jurors and the courts to maintain an environment whereby the administration of justice and the freedom of speech can be reconciled.