RESTRAINING 'EXTRANEOUS' PREJUDICIAL PUBLICITY: VICTORIA AND NEW SOUTH WALES COMPARED

JASON BOSLAND*

This article explores the powers available to courts in Victoria and New South Wales to restrain the media publication of 'extraneous' prejudicial material – that is, material that is derived from sources extraneous to court proceedings rather than from the proceedings themselves. Three sources of power are explored: the power in equity to grant injunctions to restrain threatened sub judice contempt, the inherent jurisdiction of superior courts and, finally, statutory powers in New South Wales under the Court Suppression and Non-publications Orders Act 2010 (NSW) and in Victoria under the Open Courts Act 2013 (Vic). It argues that the approach of the Victorian courts is much broader in terms of the scope and application of orders, which potentially explains why orders restraining extraneous material are more commonly made in Victoria than in New South Wales. It further argues that the Victorian approach presents some significant consequences for publishers.

I INTRODUCTION

The right to a fair trial is ingrained in the common law.[1] It is also recognised as a fundamental human right,[2] and, in some jurisdictions, as an express constitutional guarantee.[3] According to the law, one of the ways that the right to

* Associate Professor, Melbourne Law School, University of Melbourne; Co-Director, Centre for Media and Communications Law (CMCL), University of Melbourne. The author wishes to thank the staff of Melbourne Law School's Law Research Service, especially Robin Gardner, Louis Ellis and Kirsten Bakker. Thanks also to Jonathan Gill and Vicki Huang for helpful advice, and to Tim Kyriakou, Claire Richardson and James Roberts for outstanding research assistance.

1 See, eg, *Hinch v A-G (Vic)* (1987) 164 CLR 15, 58 (Deane J).

2 See, eg, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 10; *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 6.

3 See, eg, *United States Constitution* amend VI; *Constitution of the Republic of South Africa Act 1996* (South Africa) ss 34, 35(3). Note that in Australia it is also arguable that the *Constitution* contains an implied the right to a fair trial: see *Dietrich v The Queen* (1992) 177 CLR 292, 326 (Deane J),

a fair trial may be placed in jeopardy is through the publication of prejudicial material. In most cases the concern is that exposure to certain information, especially through the media, will compromise the ability of a jury to reach an impartial verdict at trial;[4] in other cases, media publicity may be thought to prejudice proceedings by having a distorting effect on the testimony of witnesses,[5] or by placing improper pressure on litigants in relation to how they pursue or defend litigation in the courts.[6]

The publication of prejudicial information can be divided into two broad categories.[7] The first category is the publication of information *revealed during the course of judicial proceedings* – information that can be referred to as 'proceedings information'. A common example is the publication of a guilty plea or verdict heard in open court that could risk pre-judgment of a co-accused's guilt or innocence;[8] other examples include the publication of information regarding the admissibility of evidence or the competence of a witness discussed in court during voir dire (ie, a 'trial within a trial').[9] The second category is the publication of prejudicial information that is from a source *extraneous to judicial proceedings* – in other words, information that is *not* revealed during, or derived from, court proceedings but which, if published, has the potential to prejudicially affect proceedings.[10] Examples include statements alleging guilt or innocence,[11] prior convictions,[12] allegations of prior or subsequent criminal or disreputable conduct,[13] photographs of an accused,[14] interviews with witnesses,[15] and the dramatised re-enactment of an alleged crime for which an accused is being tried.[16]

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362 (Gaudron J); Janet Hope, 'A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System' (1996) 24 *Federal Law Review* 173.

4 Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 392–405.

5 Ibid 409–14.

6 Ibid 405–9.

7 *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 258–9 [33]–[39] (Warren CJ and Byrne AJA) ('*Mokbel*').

8 See, eg, *General Television Corporation Pty Ltd v DPP (Vic)* (2008) 19 VR 68, 75 [21] (Warren CJ, Vincent and Kellam JJA) ('*GTC v DPP*'); *Re a Former Officer of the Australian Security Intelligence Organisation* [1987] VR 875, 877 (Brooking J); *Friedrich v Herald & Weekly Times Ltd* [1990] VR 995, 1005–6 (Kaye, Fullagar and Ormiston JJ).

9 *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440, 450 (Lord Diplock) ('*Leveller*').

10 The distinction between material revealed in proceedings and extraneous information has been recognised by the courts in a number of cases: see, eg, *Mokbel* (2010) 30 VR 248, 258–9 [33]–[39] (Warren CJ and Byrne AJA); *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 62 [33], 66 [51] (Basten JA).

11 See, eg, *A-G (NSW) v Radio 2UE Sydney Pty Ltd* [1997] NSWSC 487.

12 See, eg, *A-G (NSW) v Willesee* [1980] 2 NSWLR 143, 149–50 (Moffitt P); *R v The Age Co Ltd* [2006] VSC 479; *R v Herald & Weekly Times Ltd* (2007) 19 VR 248, 270 [77] (Johnston J).

13 See, eg, *R v Johnson* [2016] VSC 699; *R v Australia Broadcasting Corporation* [1983] Tas R 161.

14 See, eg, *A-G (NSW) v Time Inc Magazine Company Pty Ltd* [1994] NSWCA 134 ('*Time Inc*'); *A-G (NSW) v Time Inc Magazine Company Pty Ltd* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Sheller and Cole JJA, 15 September 1994); *R v Australian Broadcasting Corporation* [1983] Tas R 161; *R v Pacini* [1956] VLR 544; *Bayley v The Queen* (2016) 260 A Crim R 1.

15 See, eg, *A-G (NSW) v Mirror Newspapers Ltd* [1980] 1 NSWLR 374.

16 See, eg, *GTC v DPP* (2008) 19 VR 68; *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835.

The distinction between these two categories of information, although not always straightforward,[17] is significant. This is because the law has traditionally dealt with each category in very different ways. At the heart of the distinction is that the right to publish proceedings information, even highly prejudicial proceedings information,[18] is generally protected by the longstanding common law principle of open justice[19] – in particular, the open justice rule that, subject to limited exceptions, nothing should be done to prevent members of the public, including the media, from publishing fair and accurate reports of what takes place in open court.[20] This right means that courts can only control the publication of proceedings information by adopting specific measures, usually by granting suppression or non-publication orders (called 'proceedings suppression orders').[21] In contrast, the courts have not traditionally sought to control extraneous information through the use of suppression orders. This is because the publication of prejudicial extraneous material, which is not derived from proceedings and is therefore not protected by the principle of open justice,[22] is subject to criminal liability under the common law of sub judice contempt. Sub judice contempt is committed where it is established to the criminal standard of proof that a publication has 'as a matter of practical reality, a tendency to interfere with the due course of justice' in particular proceedings pending before a court.[23] It follows that courts have traditionally left it to the threat of

17 There are conceptual difficulties with the distinction. For example, the image or photograph of an accused might be considered both 'proceedings' information and 'extraneous' information.

18 See, eg, *Hinch v A-G (Vic)* (1987) 164 CLR 15, 25 (Mason CJ), 43 (Wilson J).

19 For a general discussion of the principle of open justice, see Butler and Rodrick, above n 4, ch 5.

20 *Leveller* [1979] AC 440, 450 (Lord Diplock); *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 257–8 (Jordan CJ). The media's right to publish fair and accurate reports of proceedings has been described as 'an adjunct' to the open justice principle: see *R (On the Application of the DPP (Vic)) v The Herald & Weekly Times Ltd* (2007) 19 VR 248, 260 [38] (Johnston J).

21 *Mokbel* (2010) 30 VR 248, 258 [33] (Warren CJ and Byrne AJA). Note, in camera orders (order restricting public access to the courts) and pseudonym orders (order requiring that a party or witness be referred to in court by a pseudonym) may also be effective in restraining publicity. The one exception to the requirement to make such specific orders is in relation to proceedings information revealed during voir dire, the publication of which will automatically constitute contempt of court: see *Leveller* [1979] AC 440, 450 (Lord Diplock). Such contempt, as explained by the Privy Council in *Independent Publishing Company Ltd v A-G (UK) (Trinidad and Tobago)* [2005] 1 AC 190, 206 (Lord Brown), is committed on the basis that a publication revealing such details will have thwarted the object of an implied order made by the court 'directly affecting the conduct of the proceedings before it'. See also David Rolph, LexisNexis, *Criminal Contempt* (at 22 August 2017) [105-95], citing *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1, where Hunt J said that '[w]henever … matters are being heard in the absence of the jury, there is an implied direction to the news media not to publish a report of what takes place in court, notwithstanding that the proceedings are held in the presence of the public': at 19.

22 *Mokbel* (2010) 30 VR 248, 259 [36] (Warren CJ and Byrne AJA),

23 *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 697 (Samuels JA). See also *Hinch v A-G (Vic)* (1987) 164 CLR 15, 34 (Wilson J), 46 (Deane J). This is subject to various exceptions under the common law, including where the prejudicial material is contained in a 'bare fact' report or where the public interest in the subject matter justifies its publication.

post-publication liability for sub judice contempt to deter the publication of prejudicial extraneous material.[24]

Over the past decade or so, however, judges in Victoria have become significantly less confident in the capacity of sub judice contempt to prevent prejudicial publicity.[25] Consequently, consistent with the frequent use of proceedings suppression orders in Victoria,[26] it is now relatively common for Victorian judges to turn to the pre-emptive measure of specifically ordering that particular extraneous information is not to be published. There are a number of possible explanations for the shift towards the use of such orders. Perhaps the most significant is that prosecutions for sub judice contempt have become relatively rare. In recent years, the willingness of Attorneys-General and relevant prosecuting authorities to institute proceedings against the media for sub judice contempt has significantly declined.[27] Thus, according to the Honourable Justice King of the Supreme Court of Victoria, the lack of effective policing of sub judice contempt has 'ultimately led to the necessity of making … orders to prevent what would be contempts of court'.[28] The assumption appears to be that media outlets have become cavalier in publishing potentially contemptuous material in the knowledge that prosecution for contempt is unlikely.

In addition to perceived inadequacies with the enforcement of sub judice contempt, it is likely that changing media environments have also played a role. For example, judges may be concerned that the decline in traditional media revenue streams has resulted in fewer dedicated and experienced court reporters, creating a potential risk that the journalists reporting the courts will be less familiar with the constraints imposed by the sub judice contempt rule (and, indeed, other legal restraints on publication). Consequently, judges may see the granting of specific orders as a way of ensuring that journalists are clear as to what information can and cannot be published.[29] Similar concerns may exist regarding the distribution of prejudicial information by 'citizen journalists' and

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24 See, eg, *Leary v British Broadcasting Corporation* (Unreported, England and Wales Court of Appeal – Civil Division, Lord Donaldson MR, Gibson and Nicholls LJJ, 29 September 1989) ('*Leary v BBC*'). See also Butler and Rodrick, above n 4, 369–70.

25 Butler and Rodrick, above n 4, 434, quoting Justice Betty King, '"*Underbelly*"? A True Crime Story or Just Sex Drugs and Rock and Roll?' (Speech delivered at the Medico-Legal Society of Victoria, Melbourne Club, 13 November 2009) 12.

26 See, eg, Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008–12' (2013) 35 *Sydney Law Review* 671.

27 Butler and Rodrick, above n 4, 434; King, above n 25, 12. This is likely due to a combination of resource constraints and the fact that the position of Attorney-General has progressively become more political and less focused on the traditional responsibility of defending the judiciary: Sharon Rodrick, 'Achieving the Aims of Open Justice? The Relationship between the Courts, the Media and the Public' (2014) 19 *Deakin Law Review* 123, 142–4 (and sources cited therein).

28 King, above n 25, 13.

29 See, eg, comments by Bongiorno J quoted in Prue Innes, 'Report of the Review of Suppression Orders and the Media's Access to Court Documents and Information' (Report, Australia's Right to Know, 13 November 2008) 81–2. Note, it has been claimed by others that courts frequently make orders restraining publication in circumstances already covered by the law of sub judice contempt: see, eg, P D Cummins, 'Justice and the Media' (Speech delivered at the Melbourne Press Club, The Hotel Windsor, 17 August 2010) 5.

social media users.[30] Furthermore, new communication technologies and the perceived risks created by the publication of material online may also be seen as warranting a pre-emptive approach.[31] For example, given the infinitely accessible and effectively permanent nature of material once published online, courts may see the making of orders as necessary to prevent prejudicial information *entering* the digital sphere and, in turn, later being brought to the attention of potential jurors.[32]

Whatever the reasons, this article does not focus on the question of *why* Victorian courts are turning to prior restraints to control extraneous publicity. Instead, it is confined to the narrower task of examining the scope and application of the powers that are available to courts in Victoria and New South Wales to make orders preventing the media publication of prejudicial extraneous information. It is limited to examining these two jurisdictions because a detailed search of the case law in Australia indicates that such orders have only ever been made by courts in Victoria and, albeit to a much more limited extent, New South Wales. In examining the various powers, it makes the central argument that the Victorian courts have adopted an approach to the suppression of extraneous publicity that is considerably broader in scope and application compared to the approach in New South Wales. Importantly, this difference in approach has gone unnoted in both the case law and commentary, despite the fact that the Victorian approach imposes significantly greater burdens on publishers.

It is necessary to establish at the outset that there are three independent sources of power that courts in Victoria and New South Wales, depending on the court in question, can potentially rely upon. First, and most conventionally, superior courts can rely upon their equitable jurisdiction to grant quia timet injunctions to restrain threatened sub judice contempt.[33] The use of such injunctions to control prejudicial publicity is well-settled and is the jurisdictional basis favoured in England and, at least up until the introduction of an alternative power under the *Court Suppression and Non-publication Orders Act 2010* (NSW) ('*CSNPO Act*'), in New South Wales. Second, it has recently been recognised in Victoria that the inherent jurisdiction of superior courts under the

30 For an analysis of the issues raised by social media and the distribution of prejudicial information, see Jane Johnston et al, 'Juries and Social Media' (Report, Victorian Department of Justice, January 2013). See also Rachel Hews and Nicholas Suzor, '"Scum of the Earth": An Analysis of Prejudicial Twitter Conversations during the Baden-Clay Murder Trial' (2017) 40 *University of New South Wales Law Journal* 1604.

31 Butler and Rodrick, above n 4, 370.

32 It is important to note, however, that orders restraining publication are often said to be – and on numerous occasions have proven to be – futile in controlling the dissemination of information in the digital age: see Roxanne Burd, 'Is There a Case for Suppression Orders in an Online World?' (2012) 17 *Media and Arts Law Review* 107, 114–15; Jacqueline Mowbray and David Rolph, '"It's a Jungle Out There": The Legal Implications of *Underbelly*' (2009) 28(1) *Communications Law Bulletin* 10 (discussing *GTC v DPP* (2008) 19 VR 68). For a discussion of the features of the internet causing difficulties, see *Mokbel* (2010) 30 VR 248, 268–70 [74]–[84] (Warren CJ and Byrne AJA); *R v B* [2009] 1 NZLR 293, 305 (Baragwanath J), 310–11 (William Young P and Robertson J).

33 This power is not available to inferior courts, unless expressly conferred by statute: see *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 332 (Samuels AP).

common law provides the power to suppress the publication of extraneous prejudicial publicity. This is the same source of power that has long been recognised as available to superior courts to make proceedings suppression orders;[34] however, to distinguish such orders from their proceedings counterparts, orders restraining the publication of extraneous information are called 'general' suppression orders in Victoria.[35] Third, and finally, express statutory powers to suppress the publication of extraneous material exist in both New South Wales and Victoria. In New South Wales, such power is available to all courts under the *CSNPO Act*,[36] while in Victoria, the County and Magistrates' courts have dedicated powers under the *Open Courts Act 2013* (Vic) ('*OC Act*').

Parts II and III of this article examine the scope of the powers available in New South Wales. Part II begins by considering the power in equity to grant quia timet injunctions to restrain the commission of threatened contempt. It is shown that such relief is rare and exceptional and will only be granted where there is evidence that a *particular publisher*, unless restrained, is intending to publish a *particular publication* that is likely to constitute contempt. Given its narrow scope of application, it has only been successfully deployed against the media in a handful of available cases in New South Wales. Part III then considers the power under the *CSNPO Act*. Despite being expressed in broad terms, it is argued that the power has been given an interpretation in recent cases that is, in effect, commensurate in scope with the narrow power available in equity.

Part IV contrasts the approach in New South Wales with the interpretation of the powers of suppression in Victoria. It argues that the newly-recognised power to grant general suppression orders under the inherent jurisdiction has been given an extremely broad scope of application – certainly much broader than the power to grant quia timet injunctions in equity. In particular, the case law and practice of the Victorian Supreme Court (including the Court of Appeal) demonstrate that orders are often made as 'general precautionary orders'. Such orders, rather than being directed towards particular publishers in relation to particular anticipated publications, broadly purport to restrain *any person* with knowledge of an order from publishing certain specified material or categories of material (for example, an accused's prior convictions). It is also demonstrated in Part IV that the Supreme Court adopts a much more flexible approach to the making of general precautionary orders compared to orders directed at particular publishers. Part IV further explains that general precautionary orders have been made by the County and Magistrates' courts pursuant to their dedicated statutory powers, despite the fact that the County Court's power under the *OC Act* is expressed in arguably narrower terms.

Finally, Part V considers the consequences that the granting of general precautionary orders in Victoria can potentially pose for publishers. It argues that

34 See, eg, *Hogan v Hinch* (2011) 243 CLR 506, 534 (French CJ); *Grassby v The Queen* (1989) 168 CLR 1, 15–17 (Dawson J).

35 *Mokbel* (2010) 30 VR 248, 259 [36] (Warren CJ and Byrne AJA); *Herald & Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299, 306 (The Court) ('*HWT v A*').

36 Note, statutory powers, in similar terms to the power in the *CSNPO Act*, also exist at the federal level: *Access to Justice (Federal Jurisdiction) Amendment Act 2012* (Cth).

such orders extend beyond restraining threatened sub judice contempt; this, in turn, raises questions about the relationship between the inherent jurisdiction to grant general suppression orders and the law of sub judice contempt. It also argues that general precautionary orders, as currently made by the Victorian courts, require the removal of pre-existing internet content. Consequently, for reasons that are explained, such orders cannot be considered a proper exercise of either the inherent jurisdiction or the statutory powers under the *OC Act*.

II QUIA TIMET INJUNCTIONS TO RESTRAIN CONTEMPTUOUS MEDIA PUBLICATIONS

It is logical to begin by examining the most established source of power: the power of superior courts to restrain a threatened contempt of court by injunctive relief granted in equity. The earliest reported case against the media is the well-known 1973 House of Lords decision in *Attorney-General v Times Newspapers Ltd*,[37] where an injunction was upheld restraining *The Sunday Times* from publishing a newspaper article that was said to prejudge litigation pending against the English manufacturer and distributor of the drug thalidomide.[38] While the House of Lords did not provide guidance on when the power to grant an injunction to restrain an anticipated contemptuous publication could be exercised, the view consistently expressed in subsequent cases has been that equitable relief will only be deployed in the rarest of circumstances.[39]

The judicial reluctance to grant such injunctions can be explained on two grounds. First, due to concerns about freedom of speech, courts have always favoured imposing post-publication sanctions over pre-publication restraints.[40] Second, the cautious approach arises from equity's traditional reluctance to come to the aid of the criminal law.[41] Indeed, it is 'wise and settled practice' that equity

37 [1974] AC 273. Prior to this, cases mainly concerned threatened contempt in the form of the anticipated breach of an existing court order (see, eg, *Hubbard v Woodfield* (1913) 57 Sol Jo 729) or where one party to an action threatened to publish material adverse to the other party's case (see, eg, *Coleman v West Hartlepool Railway Co* (1860) 8 WR 734; *Brook v Evans* (1860) 29 LJ Ch 616, where Turner LJ said: 'There is no doubt that the Court has power to grant an injunction in a case of this description' but found that an injunction was not justified on the facts: at 617; *Mackett v Herne Bay Commissioners* (1876) 24 WR 845; *Kitcat v Sharp* (1882) 52 LJ Ch 134).

38 *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 299–301 (Lord Reid), 307 (Lord Morris), 310–13 (Lord Diplock), 314–17 (Lord Simon), 322–5 (Lord Cross).

39 See, eg, *Lewis v British Broadcasting Corporation* (Unreported, England and Wales Court of Appeal – Civil Division, Lord Denning MR, Lawton and Lane LJJ, 23 March 1979) 3; *A-G (UK) v British Broadcasting Corporation* [1981] AC 303, 311–12 (Lord Denning MR); *Ex parte HTV Cymru (Wales) Ltd* [2002] EMLR 184, 200 [35] (Aikens J); *A-G (UK) v Random House Group Ltd* [2010] EMLR 223, 240 [16] (Tugendhat J).

40 See, eg, *A-G (UK) v British Broadcasting Corporation* [1981] AC 303, 362 (Lord Scarman). See also William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, 151–2, quoted in Patricia Londono et al (eds), *Arlidge, Eady and Smith on Contempt* (Sweet & Maxwell, 5th ed, 2017) 449.

41 *Pickering v Liverpool Daily Post & Echo Newspapers plc* [1991] 2 AC 370, 381 (Lord Donaldson); *A-G (UK) v Random House Group Ltd* [2010] EMLR 223, 246 (Tugendhat J). For a discussion of injunctions

will only intervene by way of injunction to assist the criminal law in cases where the penalties imposed have proven to be an inadequate deterrent.[42] Accordingly, in England, courts will only act to restrain a threatened sub judice contempt where satisfied to the criminal standard of proof[43] that: (1) a particular publication by a particular person or entity would, unless restrained, take place,[44] and (2) if it were to take place, it would *manifestly* constitute a contempt of court.[45] Such demanding requirements mean that quia timet injunctions to restrain contemptuous publications will not be granted on a 'speculative basis'; rather, 'solid evidence' must be presented as to what the precise content of the particular publication will be.[46] Furthermore, given their impact on freedom of speech, applications for injunctions in this context are treated by the English courts as applications for final rather than interim relief and therefore will not be granted on the more flexible standards usually applicable to interim injunctions.[47]

In Australia, the available case law demonstrates that it is almost exclusively the Supreme Court of New South Wales that has entertained applications for quia timet injunctions to restrain threatened prejudicial publications.[48] Such applications, being civil in nature,[49] are commenced by summons against particular media defendants in either the Common Law or Equity divisions of the

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and the criminal law, see David Feldman, 'Injunctions and the Criminal Law' (1979) 42 *Modern Law Review* 369.

42 *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370, 382 (Lord Donaldson).

43 *A-G (UK) v Random House Group Ltd* [2010] EMLR 223, 249 (Tugendhat J); *Ex parte HTV Cymru (Wales) Ltd* [2002] EMLR 184, 196 [24]–[25] (Aikens J); *Coe v Central Television plc* [1994] EMLR 433, 440 (Glidewell LJ). However, the application of the criminal standard of proof was doubted in *Chief Constable of Greater Manchester Police v Channel 5 Broadcast Ltd* [2005] EWCA Civ 739, [7] (Auld LJ).

44 *A-G (UK) v Random House Group Ltd* [2010] EMLR 223, 249 (Tugendhat J); *Ex parte HTV Cymru (Wales) Ltd* [2002] EMLR 184, 196 [24]–[25] (Aikens J).

45 *A-G (UK) v British Broadcasting Corporation* [1981] AC 303, 311 (Lord Denning MR). See also *A-G (UK) v News Group Newspapers Ltd* [1987] QB 1, 13 (Donaldson MR). Cf *Muir v British Broadcasting Corporation* 1997 SLT 425, 427 (The Court) (where it was held that Scotland's High Court of Justiciary has the power under the *nobile officium* to restrain the publication of prejudicial material even where it would not, if published, constitute contempt of court).

46 *Leary v BBC* (Unreported, England and Wales Court of Appeal – Civil Division, Lord Donaldson MR, Gibson and Nicholls LJJ, 29 September 1989) 9–10 (Lord Donaldson MR).

47 See *A-G (UK) v Random House Group Ltd* [2010] EMLR 223, 247 (where Tugendhat J jettisoned the usual test for interim injunctions in England, as set out by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, on the basis, inter alia, that the question will usually never be determined at a full trial). In other cases it has been held that the rule in *Bonnard v Perryman* [1891] 2 Ch 269 – the longstanding rule limiting the availability of interim injunctions in libel cases – applies to applications for injunctions to restrain anticipated contempt by publication: see *A-G (UK) v British Broadcasting Corporation* [1981] AC 303, 311 (Lord Denning MR); *A-G (UK) v News Group Newspapers* [1987] QB 1, 14 (Donaldson MR). The application of the rule in *Bonnard v Perryman* in the context of restraining contempt by publication has been expressly rejected in New South Wales (although not expressly in the context of media publication): see *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554, 557 (Hunt J); *Y v W* (2007) 70 NSWLR 377, 379 (Spigelman CJ).

48 Cf *Re South Australia Telecasters Ltd* (1998) 23 Fam LR 692 (Nicholson J) (injunction granted to restrain an anticipated scandalising contempt of court).

49 *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173, 182–3 (Kirby P).

Supreme Court.[50] For the same reasons given by the English courts, such injunctions have been held to be both rare and exceptional.[51] However, there are three aspects in which the approach adopted in New South Wales is, at least in principle, slightly less burdensome than in England.

First, an applicant in New South Wales is only required to establish to the *civil standard of proof*, rather than the criminal standard applicable in England, that a proposed publication, if published, is *likely to* constitute a contempt of court.[52] Second, such injunctions can be, and usually are, sought on an interlocutory basis.[53] In such cases the general principles applicable to the court's discretion to grant relief set out in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* will apply.[54] Thus, before the discretion to grant an interlocutory injunction is exercised, it must be shown that the proposed publication, if it were to go ahead, would prima facie constitute a sub judice contempt and, if so, that the balance of convenience favours the granting of relief.[55]

Third, it has been held that even an application for final relief in New South Wales need only be accompanied by evidence as to what the contents of the proposed publication are *likely* to be (rather than, for example, direct evidence of a draft publication) and that such publication by the defendant is *likely* to go

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50 See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 6.4(2)(e). Note, applications may be made by either the Attorney-General or a defendant in criminal proceedings where they fear a particular apprehended publication will prejudice their right to a fair trial. For a brief summary of the principles applied in New South Wales, see New South Wales Law Reform Commission, *Contempt by Publication*, Report No 100 (2003) 334–8. See also Butler and Rodrick, above n 4, 457–8.

51 See, eg, *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 733, 735 (Glass JA), 738–9 (Mahoney JA); *Time Inc* [1994] NSWCA 134; *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 103 (Kirby P); *R v Baladjam [No 44]* [2008] NSWSC 1463, [13] (Whealy J); *Doe v John Fairfax Publications Pty Ltd* (1995) 125 FLR 372, 384 (Spender AJ) ('*Doe v Fairfax*'); *Kamm v Channel Seven Sydney Pty Ltd* [2005] NSWSC 699, [9] (Campbell J); *R v Baladjam* (2008) 270 ALR 92, where Whealy J said: 'It is the undoubted position that, if there be a power to issue a quia timet injunction to restrain a threatened contempt of court in the present matter, it is of course not generally favoured by the law but, rather, is a power to be exercised sparingly': at 100 [38]. See also *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, where Mason J described the use of equity to enforce the criminal law as being of 'comparatively modern use' and confined to circumstances where 'an offence is frequently repeated': at 49–50.

52 *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716, 726 (Young J); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 733, 735 (Glass JA); *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990); *Doe v Fairfax* (1995) 125 FLR 372, 387 (Spender AJ); *Kamm v Channel Seven Sydney Pty Ltd* [2005] NSWSC 699, [13] (Campbell J proceeded on the assumption that the civil standard applied without deciding the matter). This is despite the criminal standard of proof applying to prosecutions for contempt: see, eg, *Witham v Holloway* (1995) 183 CLR 525, 534 (Brennan, Deane, Toohey and Gaudron JJ), 545 (McHugh J).

53 See, eg, *Time Inc* [1994] NSWCA 134; *R v Baladjam [No 45]* [2008] NSWSC 1464, [10] (Whealy J); *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990); *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554, 557 (Hunt J).

54 (1968) 118 CLR 618, 622–3 (Kitto, Taylor, Menzies and Owen JJ). See, eg, *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990); *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554, 557 (Hunt J).

55 See, eg, *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990); *Commercial Bank of Australia Ltd v Preston* [1981] 2 NSWLR 554, 557 (Hunt J).

ahead.[56] Importantly, both of these matters may be satisfied by way of inference drawn from evidence of the defendant's past conduct and the general newsworthiness of the potential subject matter.[57] It therefore appears that injunctive relief in this context can be granted in New South Wales on a more 'speculative' basis than in England. It should be noted, however, that there is only one case – *Doe v John Fairfax Publications Pty Ltd* – where the New South Wales Supreme Court has granted an injunction to restrain a threatened contempt in the absence of direct evidence of the contents of the proposed publication being provided to the court.[58] Furthermore, the absence of such evidence was central to the decision to refuse an application for an interlocutory injunction in the later case of *Kamm v Channel Seven Sydney*.[59]

As with post-publication liability for contempt,[60] a range of factors are relevant to determining whether the proposed publication, if published, would have a 'real and substantial tendency' of causing prejudice to pending proceedings and therefore constitute sub judice contempt. Importantly, where the anticipated publication is said to threaten the impartiality of a jury, the court will start from the presumption that jurors will approach their role based on the evidence before the court and will readily follow directions given by the trial judge to disregard extrinsic material that they may have seen or heard.[61] It is against this presumption that the risk of the proposed publication is assessed by reference to the following: the inherent content of the matter;[62] the nature of the proceedings and the issues likely to arise;[63] the extent of publication and likely audience;[64] the status of the publisher;[65] and, finally, the lapse of time between the publication and the trial.[66] The existence of other prejudicial publicity may

56 *Doe v Fairfax* (1995) 125 FLR 372, 391–2 (Spender AJ).
57 Ibid 391 (Spender AJ).
58 Ibid 391–2 (Spender AJ).
59 [2005] NSWSC 699, [10] (Campbell J).
60 For a detailed treatment of the principles governing the law of sub judice contempt in Australia, see Butler and Rodrick, above n 4, ch 6.
61 *R v Baladjam* (2008) 270 ALR 92, 103 [60]–[61] (Whealy J); *R v Baladjam [No 44]* [2008] NSWSC 1463, [14]–[15] (Whealy J); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 733, 736 (Glass JA); *Doe v Fairfax* (1995) 125 FLR 372, 385 (Spender AJ).
62 *Doe v Fairfax* (1995) 125 FLR 372, 385 (Spender AJ); *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, 6 July 1990, Hunt J); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716, 728–9 (Young J); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 733, 738 (Mahoney JA).
63 *Marsden v Amalgamated Television Services Pty Ltd* [1996] NSWCA 341; *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990). Cf *Time Inc* [1994] NSWCA 134 (Kirby P); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716, 729 (Young J).
64 *Doe v Fairfax* (1995) 125 FLR 372, 385 (Spender AJ); *Time Inc* [1994] NSWCA 134 (Kirby P); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 733, 735 (Glass JA).
65 *Doe v Fairfax* (1995) 125 FLR 372, 385 (Spender AJ).
66 *R v Baladjam [No 44]* [2008] NSWSC 1463, [14] (Whealy J); *R v Baladjam* (2008) 270 ALR 92, 101–2 (Whealy J); *Kamm v Channel Seven Sydney Pty Ltd* [2005] NSWSC 699, [16] (Campbell J); *Doe v Fairfax* (1995) 125 FLR 372, 385 (Spender AJ); *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716, 730 (Young J); *Waterhouse v Australian Broadcasting Corporation*

also be a relevant factor.[67] Where a proposed publication is judged to have the requisite tendency to pose a serious threat to proceedings, an injunction may nevertheless be refused on the basis of the well-known '*Bread Manufacturers* principle'[68] – that is, that the public interest in freedom of expression in allowing the publication to go ahead outweighs the public interest in protecting the administration of justice by restraining it.[69] However, consistent with the heavy prima facie weight given to the administration of justice in applying the *Bread Manufacturers* principle,[70] based on the available case law no quia timet injunction to restrain a threatened contempt has ever been successfully refused on such public interest grounds.

In line with judicial statements that injunctive relief in this context is rare, there are only nine publicly available judgments in New South Wales where relief has been sought to restrain the commission of contempt by media publication.[71] Of these nine applications, only four were successful.[72] In the unsuccessful applications, the determining factor was most often the lack of proximity between the proposed publication and the anticipated date of the trial threatened to be prejudiced.[73] Thus, it was held in those cases that no contempt

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(1986) 6 NSWLR 733, 735 (Glass JA); *Waterhouse v Australian Broadcasting Corporation* (1986) 68 ALR 75, 75 (Gibbs CJ, Wilson and Dawson JJ);

67 *Kamm v Channel Seven Sydney Pty Ltd* [2005] NSWSC 699, [14] (Campbell J); *Doe v Fairfax* (1995) 125 FLR 372, 385 (Spender AJ); *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990) ('I am satisfied that any influence of the proposed programme here will become merged in the existing effect of the earlier separate publications'); *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 733, 735–6 (Glass JA).

68 Based on the seminal case of *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242.

69 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 41 (Wilson J), 57 (Deane J), 66–8 (Toohey J), 85 (Gaudron J).

70 Ibid 41–2 (Wilson J).

71 A number of cases were excluded. *X v Amalgamated Television Services Pty Ltd [No 2]* (1987) 9 NSWLR 575 was excluded on the basis that the forum in question, an administrative tribunal, was not protected by the law of contempt. The case of *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 was also excluded on the basis that, while raising some important matters of principle, the injunction was a nullity because it was made by an inferior court which was found to lack the power to issue injunctions restraining the media from committing contempt by publication. Finally, there is a widely reported example of the New South Wales Supreme Court granting an injunction in 1995 to prevent the Australian Broadcasting Corporation from broadcasting the television series *Blue Murder*, a dramatisation of underworld criminal activity in the 1970s and 1980s: see Mowbray and Rolph, above n 32, 11. Unfortunately, the author was not able to locate public reasons for the decision.

72 See, eg, *Doe v Fairfax* (1995) 125 FLR 372; *Time Inc* [1994] NSWCA 134; *R v Baladjam [No 44]* [2008] NSWSC 1463 (a high profile criminal trial of the applicants on terrorism-related charges was just about to commence before a jury in the Supreme Court); *R v Baladjam [No 45]* [2008] NSWSC 1464.

73 See, eg, *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716, 730 (Young J); *A-G (NSW) v TCN Channel Nine Pty Ltd* (Unreported, Supreme Court of New South Wales, Hunt J, 6 July 1990) (where a *60 Minutes* television program was proposed for broadcast nine to 12 months prior to a civil trial commencing); *R v Baladjam* (2008) 270 ALR 92, 101–2 (Whealy J) (where the newspaper articles in question would be published many months before the trial of the accused on terrorism related offences); *Kamm v Channel Seven Sydney Pty Ltd* [2005] NSWSC 699, [16] (Campbell J) (where a jury trial in an aggravated indecent and sexual assault criminal case was unlikely to commence for at least five or so months); *Marsden v Amalgamated Television Services Pty Ltd* [1996] NSWCA 341 (where the applicant was unable to establish that the contents of the proposed broadcast would have the relevant tendency to interfere with defamation proceedings).

would be committed by publication because any possible prejudicial effect on a jury will have 'faded' by the time of the relevant trial.

However, while the proximity of the proposed publication to trial will, in most instances, be of utmost significance, it is important to note that publication was restrained in two of the four successful cases despite the trial being temporally distant. In one case, *Time Inc*,[74] the injunction prevented the further distribution of a magazine that revealed the identifying facial features of Ivan Milat, who had been charged with the notorious 'backpacker murders'. The publication of the photograph in the media before trial was thought to have the potential to interfere with the identity evidence of witnesses, identity being a 'serious matter for trial'.[75] It has long been recognised that this type of potential interference is not contingent on the proximity of the publication to the anticipated timing of the trial.[76] In the second case, *Doe v Fairfax*, it was found that the delay between publication and the expected trial did not negate the risk of prejudice due to the highly prejudicial nature of the content of the predicted newspaper article (direct statements of guilt as opposed to allegations), the standing of the newspaper and its audience reach, and the likelihood that the material would be presented as coming from a reliable and authentic source (police telephone intercepts).[77]

III NEW SOUTH WALES: READING DOWN THE *COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010* (NSW)

Alongside the Supreme Court's power to grant quia timet injunctions to restrain threatened contempt just described, all courts in New South Wales[78] also have a statutory power under the *CSNPO Act* to grant suppression or non-publication orders to restrain the publication or disclosure of extraneous prejudicial material (referred to as 'extraneous suppression orders' in this

74 [1994] NSWCA 134.

75 Ibid. It should be noted that Time Inc Magazine Co was subsequently found guilty of contempt at trial: *A-G (NSW) v Time Inc Magazine Company Pty Ltd* (Unreported, New South Wales Court of Appeal, Gleeson CJ, Sheller and Cole JJA, 15 September 1994).

76 See, eg, *R v Daily Mirror; Ex parte Smith* [1927] 1 KB 845; *A-G (NSW) v Mirror Newspapers Ltd* (1961) 62 SR (NSW) 421; *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368; *A-G (NZ) v Noonan* [1956] NZLR 1021; *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596; *A-G (UK) v Associate Newspapers Ltd* [2011] 1 WLR 2097. *Bayley v The Queen* (2016) 260 A Crim R 1 is a recent example where the publication of an accused's image interfered with the reliability of a witness' evidence and resulted in a rape conviction being overturned.

77 (1995) 125 FLR 372, 395 (Spender AJ). This injunction was subsequently upheld on appeal: *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81.

78 Courts to which the *CSNPO Act* apply is established by reference to the definition of 'court' in section 3 as (a) 'the Supreme Court, Land and Environment Court, District Court, Local Court or Children's Court' or (b) 'any other court or tribunal, or a person or body having power to act judicially, prescribed by the regulations as a court for the purposes of this Act'.

article).[79] As we shall see, this power has been given a narrow interpretation by the New South Wales Court of Criminal Appeal in the case of *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim*.[80]

Section 7 of the *CSNPO Act*, which came into force on 1 July 2011, provides:

> 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.

According to the Court in *Ibrahim*, in addition to restraining proceedings information, this power includes the power to restrain the publication of extraneous prejudicial information. This is because the language of section 7 extends to the suppression or non-publication of information '"otherwise concerning" any party or witness or person associated with a party or witness',[81] combined with the fact that the grounds for making such orders include where 'necessary to prevent prejudice to the proper administration of justice' under section 8(1)(a).

However, despite the apparent 'breadth' of the language used in section 7(a),[82] it was held in *Ibrahim* that the use of the power to make extraneous suppression orders does not extend beyond the power already available to a 'superior court under the general law to prevent sub judice contempt'.[83] Thus, the Court said an extraneous suppression order under the *CSNPO Act* should be in a form which would be 'appropriate in the inherent jurisdiction of the Supreme Court, *to prevent an apprehended breach of the sub judice principle*'.[84] Despite the Court's reference to the 'inherent jurisdiction', it is clear that the principles to be applied are effectively the same as those applied in the quia timet injunction cases discussed above in Part II. Indeed, as we shall see, one of the reasons why the order in *Ibrahim* was held to be an invalid exercise of the power in the *CSNPO Act* was because it went beyond such principles.

The order at issue in *Ibrahim* was made by the District Court to protect against prejudice to the trials of Rodney Atkinson, Fadi Ibrahim and Michael Ibrahim on conspiracy to murder charges and was 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

79 Under the *CSNPO Act* a distinction is drawn between 'suppression' and 'non-publication' orders. The former prohibits any disclosure of the specified information (whether by publication or otherwise), whereas the latter is limited to prohibiting publication, defined in section 3 to mean the dissemination of or provision of access to members of the public.

80 (2012) 83 NSWLR 52 ('*Ibrahim*').

81 Ibid 62–3 (Basten JA).

82 Ibid 63 (Basten JA).

83 Ibid 70 (Basten JA).

84 Ibid 78 (Basten JA) (emphasis added).

> 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.[85]

Focusing on the fact that the order required unnamed internet publishers and intermediaries to 'take-down' or disable access to existing internet content, it was argued by the media interests who appealed the order that it was not 'necessary' within the meaning of the *CSNPO Act* and that, without evidence that all internet content could successfully be removed, it was futile.[86]

In relation to the form of the order, the Court held that an extraneous suppression order made under the *CSNPO Act*, like the power to grant quia timet injunctions in equity, must be directed towards *particular publishers* in relation to *particular publications*.[87] The Court said:

> there are problems with the form of the order. First, it is not directed to any person or persons and, indeed, is little more than a general statement of principle in relation to specific material.[88]

Thus, the Court concluded that the impugned order, which was expressed in general precautionary terms by being directed towards the non-publication of particular information rather than an anticipated publication by a particular publisher, was invalid on the basis that it was 'generic in effect' and that it referred 'to no specific material, nor to any identified website or controller'.[89] It appears from *Ibrahim*, therefore, that general precautionary orders cannot be made pursuant to the *CSNPO Act*.[90] It is in this respect that the approach to the statutory power in New South Wales is much narrower than the approach adopted in Victoria (as discussed below in Part IV), where general precautionary orders are frequently made under the inherent jurisdiction and under the *OC Act*.

The Court in *Ibrahim* said that it was not necessary to consider the scope of the power to make pre-emptive orders in relation to a particular '*proposed publication* or in respect of *identified material* which is available for public access and under the control of a *specific individual*'.[91] Nevertheless, in line with the view that the power is limited to restraining a particular threatened sub judice

85 Ibid 57 (Basten JA).

86 Ibid 71 (Basten JA). The *CSNPO Act* was also challenged on constitutional grounds, the discussion of which is beyond the scope of this article: at 73–8 (Basten JA).

87 See Brian Fitzgerald and Cheryl Foong, 'Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications' (2013) 37 *Australian Bar Review* 175, 183–4; Butler and Rodrick, above n 4, 262.

88 *Ibrahim* (2012) 83 NSWLR 52, 71 [72] (Basten JA).

89 Ibid 78 [101] (Basten JA).

90 Cf *R v Debs* [2011] NSWSC 1248, where Hulme J made a general precautionary order in relation to an accused's prior convictions, among other matters. Following *Ibrahim*, it is the author's view that such an order could no longer be validly made under the *CSNPO Act*.

91 (2012) 83 NSWLR 52, 78 [101] (Basten JA) (emphasis added).

contempt, it was held that before an order restraining the publication of extraneous prejudicial material can be considered necessary, 'the general law principles of sub judice contempt must be thought, in particular circumstances, to be inadequate in themselves' to prevent a publication from going ahead.[92] This reflects the aforementioned requirement in equity that an injunction will only be granted where the criminal law is found to be insufficient to deter publication.[93] The need to show the inadequacy of sub judice contempt has since been followed in the case of *Australian Broadcasting Corporation v Local Court of New South Wales*.[94] In this case, an application was made for an order under the *CSNPO Act* to restrain the Australian Broadcasting Corporation from publishing a confidential draft report by the Department of Family and Community Services on the grounds that the order was necessary to protect the murder trial of a mother in relation to the death of her child. Adamson J refused the order on the basis that there was no evidence to reveal that publication of the report would constitute contempt; and, even if it did, she was not persuaded that the law of contempt itself would not be sufficient to prevent publication.[95]

For completeness, it is important to set out some additional principles recognised by the Court in *Ibrahim* that limit when extraneous suppression orders can be made under the *CSNPO Act*. First, the Court examined the application of the necessity test in relation to the removal of, or the disabling of access to, pre-existing extraneous content on the internet (often referred to as 'take-down' orders). As a preliminary issue, the Court held that, for the purposes of the *CSNPO Act*, internet content is 'published' as a 'continuing act … for so long as the material is *available* on the web'.[96] This means that an order requiring the removal of existing webpages falls within the scope of the power in section 7 to make 'non-publication' orders. However, it was held that an order will only satisfy the statutory criterion of necessity if it can be shown that it will be effective.[97] Thus, '[a]s a matter of construction, that which is ineffective cannot be described as "necessary"'.[98] The Court held that a take-down order is not *likely* to be considered effective unless it is possible to achieve the removal of *all* sources of offending material, although an order will not necessarily be ineffective if some material remains accessible.[99] It appears that an order's

92 Ibid 78 [99] (Basten JA).

93 See above n 42 and accompanying text.

94 (2014) 239 A Crim R 232.

95 Ibid 246–7 [57] (Adamson J).

96 *Ibrahim* (2012) 83 NSWLR 52, 65 [43] (Basten JA) (emphasis added). This is because 'publication' is indirectly defined as a derivative of the verb 'publish' in section 3 to mean 'disseminate or provide access to the public', including 'by means of the Internet': at 64 [39] (Basten JA).

97 Ibid 72 [78] (Basten JA).

98 Ibid.

99 Ibid 72 [74] (Basten JA). See, most recently, *Nationwide News Pty Ltd v Qaumi* (2016) 93 NSWLR 384, where it was held that an order requiring the removal of one article had 'some' effect in reducing the prejudicial information available to the public on the internet but was not sufficient to be considered effective: at 402 [89]–[90] (The Court). See also *AW v The Queen* [2016] NSWCCA 227, [17] (Payne JA). But see *R v Perish* [2011] NSWSC 1102, where Price J said that 'the inability of a court to remove

effectiveness will ultimately depend on the prominence and accessibility of any material that is likely to remain after the order has been complied with. The Court held that, for the order at issue in *Ibrahim* to be effective, 'material must either be removed from any website 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'.[100] On the facts, it was not clear that this could be achieved by the order. To do so, it would need to bind a range of parties who were not before the Court – for example, controllers of websites throughout the world and search engine operators. However, based on the evidence available, it was not possible to know who those parties might be and, even if it were possible to know, enforcement of the order against entities not resident within New South Wales 'would be impracticable, if not impossible'.[101]

Besides the effectiveness of an order, the Court also held that, in applying the necessity test to take-down orders designed to protect potential jurors from prejudice, regard must be given to the likelihood that jurors will follow the directions of a trial judge to decide the matter based on the evidence presented in court and that they will comply with their legal obligations not to conduct independent research.[102] It was said that whether jurors are likely to abide by such directions and obligations is ultimately a matter for the trial judge in any given case.[103] However, the Court pointed out that jurors might be thought to have a greater impulse to search for material where it is 'of recent origin and if he or she has some recollection of its existence'.[104] On the facts in *Ibrahim*, there was no basis for suggesting that this was the case. The Court also held that the necessity test 'will not usually be satisfied' in relation to take-down orders unless a request has been made to those with control over the material to remove it and, after having a reasonable opportunity to do so, they have failed, or have indicated an unwillingness to do so.[105] The Court did not specify whether this 'usual' requirement also applies to orders sought in relation to material that is *anticipated* for publication rather than material already available to the public; however, there is no obvious or logical reason to think that it does not.

Finally, the Court made some more general comments about the standard of necessity under the *CSNPO Act* as it applies to the making of extraneous suppression orders. It acknowledged that the term could have a variety of meanings depending on the context in which it is used.[106] It may mean, for example, that 'one thing is convenient, or useful' to another; or it may have the more stringent meaning of requiring that one thing is 'essential to another'.[107] In

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all offending material does not necessarily lead to a conclusion that the provision of the relief sought would be futile': at [44].

100 *Ibrahim* (2012) 83 NSWLR 52, 73 [79] (Basten JA).

101 Ibid 73 [78] (Basten JA).

102 Ibid 72 [77] (Basten JA). See also *AW v The Queen* [2016] NSWCCA 227, [15] (Payne JA).

103 *Ibrahim* (2012) 83 NSWLR 52, 72 [77] (Basten JA).

104 Ibid.

105 Ibid 78 [98] (Basten JA).

106 Ibid 56 [8] (Bathurst CJ), 65 [46] (Basten JA).

107 Ibid 65 [45] (Basten JA), citing *McCulloch v Maryland*, 17 US (4 Wheat) 316, 414 (1819). See also *Thomas v Mowbray* (2007) 233 CLR 307, 353 [101] (Gummow and Crennan JJ).

the proceedings suppression order context, the requirement of necessity – which is the test under the common law[108] and usually under various statutory powers[109] – is given a strict interpretation.[110] Due to the impact of proceedings suppression orders on the fundamental principle of open justice, a court must be satisfied that 'nothing short' of an order can be deployed to avoid prejudice to the administration of justice.[111] It was recognised in *Ibrahim*, however, that while extraneous suppression orders impact on freedom of speech, they have no impact on the principle of open justice. Given that freedom of speech is considered a 'lesser obstacle' to the making of an order than the open justice principle,[112] the Court indicated that the necessity test for the making of extraneous suppression orders is not the strict test applicable to proceedings suppression orders. Instead, it said that an extraneous suppression order 'may well be considered necessary so long as it is reasonably appropriate and adapted to achieve its perceived purpose'.[113] This appears to suggest that an order may satisfy the necessity test where it merely has the *capacity* to prevent prejudice, even if it is only one of several effective options available to the court. However, such an understanding of the necessity test in this context is difficult to reconcile with the requirement that the law of sub judice contempt itself must be proven to be inadequate in preventing publication before an order can be deemed necessary.[114] In any event, given the strict hurdles recognised in *Ibrahim*, it is fair to assume that any supposed flexibility in applying the necessity test to the making of extraneous orders under the *CSNPO Act* is likely to be more theoretical than real.

IV VICTORIA: BROAD APPROACH UNDER THE COMMON LAW AND *OPEN COURTS ACT 2013* (VIC)

Having considered the powers available in New South Wales, this Part turns to examine the powers in Victoria. In contrast to New South Wales, there are no publicly available cases where injunctions have been granted in equity against the media to restrain threatened contemptuous publications. Instead, since 2004 the Supreme Court of Victoria has relied upon its inherent jurisdiction to make 'general suppression orders',[115] while the County and Magistrates' courts have dedicated statutory powers under the *OC Act*.

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108 See, eg, *Scott v Scott* [1913] AC 417, 437–8 (Viscount Haldane LC).

109 Cf statutory, subject matter specific powers to make suppression orders: see, eg, *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 75; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 184; *Public Health and Wellbeing Act 2008* (Vic) s 133.

110 See, eg, *Rinehart v Welker* (2011) 93 NSWLR 311, 320–3 (Bathurst CJ and McColl JA); *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2004] VSC 194, [15]–[17] (Whelan J).

111 *Scott v Scott* [1913] AC 417, 438 (Viscount Haldane LC).

112 See *Ibrahim* (2012) 83 NSWLR 52, 66 [49] (Basten JA).

113 Ibid 66–7 [51] (Basten JA).

114 See above nn 92–5 and accompanying text.

115 See, eg, *DPP (Vic) v Williams* (2004) 10 VR 348; *R v Lam [No 1]* [2004] VSC 264; *DPP (Vic) v Williams* [2004] VSC 360 ('*Re Roberta Williams*'); *Herald & Weekly Times v Williams* [2005] VSC 316 ('*Re Carl Williams*'); *HWT v A* (2005) 160 A Crim R 299; *GTC v DPP* (2008) 19 VR 68; *Mokbel* (2010)

Although the inherent jurisdiction provides a separate source of power from the power in equity,[116] general suppression orders granted in the inherent jurisdiction have been repeatedly described by the Court of Appeal as being 'akin to',[117] and as having the 'same objective'[118] as, a quia timet injunction to restrain a threatened contempt. It is perhaps surprising therefore to find that the number of general suppression orders made by the Supreme Court of Victoria has far surpassed the four quia timet injunctions reported in the case law in New South Wales.[119] Indeed, research conducted by this author (with Ashleigh Bagnall) in 2013 revealed that the Supreme Court of Victoria (including the Court of Appeal) made 29 general suppression orders during the five year period between 2008 and 2012 alone.[120] Consistent with the 'culture of suppression' that is often

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30 VR 248; *Nationwide News Pty Ltd v Farquharson* (2010) 28 VR 473 ('*Nationwide News*'). The source of the inherent jurisdiction arises simply by virtue of the description of a court as a superior court of record of unlimited jurisdiction: see, eg, *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J). The *Constitution Act 1975* (Vic) ss 76, 85(1) establish the Supreme Court of Victoria as a superior court of record of unlimited jurisdiction.

116 It should be noted, however, that the case law has evinced a certain 'degree of confusion' as to the precise distinction between general suppression orders and the more conventional injunctive relief granted in equity: Butler and Rodrick, above n 4, 263. This is most evident in the Court of Appeal's decision in *Mokbel* (2010) 30 VR 248, where it was said that a general suppression is made by exercising the power to grant a quia timet injunction and then, in a footnote, 'reserve[d] for another day' whether another jurisdictional basis for the order may arise 'from a more general inherent power of the court to protect its own process': at 261 n 32 (Warren CJ and Byrne AJA). Remarkably, the Court of Appeal in *Mokbel* then proceeded to directly contradict itself by asserting that 'the court in making a suppression order in its *inherent jurisdiction* is exercising a general power *to protect its own process* notwithstanding that it is *akin* to that of restraining a threatened contempt': at 263 [55] (Warren CJ and Byrne AJA) (emphasis added). See also conflicting statements in *GTC v DPP* (2008) 19 VR 68, 75 [21] (Warren CJ, Vincent and Kellam JJA) (exercise of inherent jurisdiction 'will be by way of an *injunction to restrain an apprehended contempt*') (emphasis added), 76 [28] (Warren CJ, Vincent and Kellam JJA) (suppression order made in the inherent jurisdiction may be '*akin to* an injunction to restrain a threatened contempt') (emphasis added).

117 See, eg, *HWT v A* (2005) 160 A Crim R 299, 306 [33] (The Court); *GTC v DPP* (2008) 19 VR 68, 76 (Warren CJ, Vincent and Kellam JJA); *Mokbel* (2010) 30 VR 248, 263 (Warren CJ and Byrne AJA).

118 *HWT v A* (2005) 160 A Crim R 299, 306 [33] (The Court).

119 It is important to note that with the exception of one case in New South Wales (*R v Perish* [2011] NSWSC 1102, [38] (Price J) (where a 'take down' order required the removal of specific internet articles containing prejudicial extraneous material), there is no evidence from the available case law that the inherent jurisdiction has been used in any other Australian jurisdiction to restrain the publication of prejudicial extraneous information. See, however, the reference to such power in *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 333 (Samuels AP). See also *X v Amalgamated TV Services Pty Ltd [No 2]* (1987) 9 NSWLR 575 (where Kirby P held in dissent that the inherent power to supervise and correct a tribunal extended to protecting the process of that tribunal by preventing the publication of extrinsic matter: at 586–9); *R v Kamitsis* [2015] NTSC 48 (where Mildren AJ recognised the power but found that the necessity test had not been met: at [20]). It should also be noted that orders in New Zealand are made under the inherent jurisdiction; however such orders are referred to as injunctions to restrain threatened contempt: see, eg, *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1; *R v Chignell* (1990) 6 CRNZ 476; *Burns v Howling at the Moon Magazines Ltd* [2002] 1 NZLR 381 (where Robertson J referred extensively to English quia timet injunction cases); *Beckett v TV3 Network Services Ltd* (2000) 6 HRNZ 84; *Bouwer v Allied Press Ltd* (2001) 19 CRNZ 119.

120 Bosland and Bagnall, above n 26, 681–3. A number of caveats should be noted regarding this comparison. First, it may be that additional quia timet injunctions were made but public reasons were not issued by the Supreme Court of New South Wales. Second, a recent study has shown that between 1 December 2013 and 30 November 2015, the Supreme Court of Victoria made only one general

claimed to exist in Victoria,[121] one likely reason for such disparity between New South Wales and Victoria is that the power to make general suppression orders in Victoria, as discussed in this Part, has been interpreted and applied much more broadly than the power to grant quia timet injunctions in equity. Furthermore, as we shall see, unlike the approach in New South Wales under the *CSNPO Act*, this same broad interpretation has also been applied to the statutory powers conferred upon the County and Magistrates' courts in the *OC Act*.

A Recognition of 'General' Suppression Orders under the Inherent Jurisdiction

The inherent jurisdiction is commonly understood as referring to the range of powers – known as inherent powers[122] – that a superior court of unlimited jurisdiction can exercise whenever it is considered necessary 'to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction'.[123] Relevant to the current discussion, such powers include the power to punish for contempt[124] and, as mentioned in Part I, the power to grant proceedings suppression orders.[125] While the collection of inherent powers is incapable of 'exhaustive enumeration',[126] the recognition of the power to make general suppression orders restraining the publication of extraneous prejudicial information is undoubtedly a novel addition to the established panoply of powers.[127]

Reflecting the underlying foundation of the inherent jurisdiction, the test adopted by the Victorian Court of Appeal is one of 'necessity'.[128] Thus, a

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suppression order: Jason Bosland, 'Two Years of Suppression under the *Open Courts Act 2013* (Vic)' (2017) 39 *Sydney Law Review* 25, 40. However, due to limitations in accessing orders for the purposes of that study, the dataset used in examining Supreme Court orders was likely to have been incomplete.

121 See, eg, Innes, above n 29, 38–9, 86.

122 Note, in this context 'inherent jurisdiction' and 'inherent powers' are often used interchangeably: see, eg, *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 17–18 [38] (French CJ, Kiefel, Bell, Gageler and Gordon JJ); *NH v DPP (SA)* (2016) 260 CLR 546, 580 [67] (French CJ, Kiefel and Bell JJ). However, there are convincing arguments that they are technically distinct: see, eg, *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, 263–4 [5]–[6] (Gleeson CJ, Gummow, Hayne and Crennan JJ).

123 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, 623 (Deane J). In his seminal article on the topic, Sir Jack Jacob defined the inherent jurisdiction as the 'residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them': see I H Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23, 51. See also Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 *Australian Law Journal* 449, 449.

124 *R v Forbes*; *Ex parte Bevan* (1972) 127 CLR 1, 7 (Menzies J); *Grassby v The Queen* (1989) 168 CLR 1, 15–16 (Dawson J).

125 See, eg, *Hogan v Hinch* (2011) 243 CLR 506, 534 (French CJ).

126 Mason, above n 123, 449. Keith Mason has identified four specific roles performed by the inherent jurisdiction: (1) 'ensuring convenience and fairness in legal proceedings'; (2) 'preventing steps being taken that would render judicial proceedings inefficacious'; (3) 'preventing abuse of process'; and (4) 'acting in aid of superior courts and in aid or control of inferior courts and tribunals': at 449–56.

127 See Fiona Rotstein, 'Chewing the Fat of a Soft Underbelly' (2010) 15 *Media and Arts Law Review* 83.

128 *HWT v A* (2005) 160 A Crim R 299, 304–6 (The Court).

superior court can only make a general suppression order where it is considered necessary, in all the circumstances of the case, to prevent the 'publication of matters which have a significant risk of causing serious prejudice to the fair trial of an accused'.[129] As with quia timet injunctions and extraneous orders made under the *CSNPO Act*, all of the usual factors relevant to sub judice contempt are applicable to determining the risk of prejudice posed by the publication of the information sought to be suppressed, including, where relevant, the longstanding assumption that jurors are able to decide cases based on the evidence presented in court and can effectively disregard extraneous influences.[130] It is only when the general confidence in the corporate integrity of juries would be 'put … to the test' that a suppression order will be considered necessary.[131]

It is important to note that since 1 December 2013, the decision whether to grant a general suppression order under the inherent jurisdiction has been subject to the 'presumption of disclosure' introduced in the *OC Act*.[132] Thus, section 4 of the *OC Act* relevantly provides:

> To strengthen and promote the … free communication of information, there is a presumption in favour of disclosure of information to which a court or tribunal must have regard in determining whether to make a suppression order.

It is likely that the need to establish a significant risk of serious prejudice to, or substantial interference with, proceedings before an order can be issued is adequate to satisfy this presumption.[133] In addition, once the necessity of an order has been established, the interests of society in protecting the administration of justice must be 'balanced' against society's 'competing interests of freedom of expression' in accordance with the *Bread Manufacturers* principle referred to in Part II.[134] However, to date, as with the quia timet injunction cases discussed earlier, there are no reported instances where general suppression orders have been refused on free speech grounds.[135]

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129 *GTC v DPP* (2008) 19 VR 68, 76 [28] (Warren CJ, Vincent and Kellam JJA). Alternative but essentially equivalent formulations have been offered: *Nationwide News* (2010) 28 VR 473, 474 [6] (Maxwell P) ('a real and substantial risk of prejudice to the fair trial of the accused and an interference in the course of justice in this case'); *Mokbel* (2010) 30 VR 248, 266 [68] (Warren CJ and Byrne AJA) ('the court has inherent power to restrain the apprehended publication of material which would, if published, produce a real risk that the material would interfere substantially with the administration of justice in a pending proceeding').

130 See, eg, *GTC v DPP* (2008) 19 VR 68, 84 (Warren CJ, Vincent and Kellam JJA); *Mokbel* (2010) 30 VR 248, 266 (Warren CJ and Byrne AJA); *Nationwide News* (2010) 28 VR 473, 477 (Maxwell P); *Dupas v Channel Seven Melbourne Pty Ltd* (2012) 226 A Crim R 53, 55–57 [7] (Kyrou J) ('*Dupas*').

131 *Mokbel* (2010) 30 VR 248, 267 [73] (Warren CJ and Byrne AJA).

132 This is because the presumption applies to suppression orders made under the *OC Act* and under the inherent jurisdiction: see *OC Act* s 3 (definition of 'suppression order').

133 In the only general suppression order case where a public decision has been rendered by the Supreme Court since the introduction of the *OC Act*, Dixon J acknowledged the relevance of section 4 and simply applied the necessity test in accordance with previous authorities: see *Madafferi v The Age Company Pty Ltd [No 2]* [2016] VSC 103, [56], [62] ('*Madafferi*').

134 *GTC v DPP* (2008) 19 VR 68, 81 [41] (Warren CJ, Vincent and Kellam JJA); *HWT v A* (2005) 160 A Crim R 299, 307 (The Court).

135 In *DPP (Vic) v Williams* (2004) 10 VR 348, Cummins J refused an order suppressing certain extraneous information partly on the basis that it would impede debate on matters of public interest, particularly the 'proper functioning of the state as to matters concerning drug dealing, underworld killings and police

The leading case on general suppression orders in Victoria is *Mokbel*.[136] Consistent with the approach adopted in *Ibrahim*, it was held by the majority (Warren CJ and Byrne AJA; Buchanan JA dissenting) that the likely futility of an order will be an important factor in judging necessity, particularly in relation to the suppression of existing online content. Thus, where a proposed general suppression order requires the removal of specific material that has already been made available online, it will not satisfy the necessity test if the material will remain available from a cached website or from servers located in jurisdictions beyond the reach of the order.[137] Furthermore, along with the assumption that jurors will follow the directions of a trial judge, it is also assumed that jurors will comply with their legal obligation under the *Juries Act 2000* (Vic) not to actively seek out material relevant to a case.[138] These assumptions mean that material which is only likely to be accessed by jurors through searching the internet will not be considered to pose a risk of serious prejudice to the administration of justice and, hence, its removal will not be considered necessary.[139] Conversely, an order requiring the removal of online content that jurors could *inadvertently* encounter – for example, when reading their daily news or checking social media – will be much more likely to satisfy the necessity test.[140]

In relation to the interests at stake, the majority in *Mokbel* held, as in *Ibrahim*, that general suppression orders do not engage the 'high principle' of open justice; rather, the 'countervailing interest' is freedom of speech.[141] This suggests that the test for obtaining a general suppression order is less

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corruption': at 353 [24]. However, his Honour had already determined that the order was not necessary because there was no real and substantial risk of prejudice.

136 (2010) 30 VR 248.

137 Ibid 268–72 (Warren CJ and Byrne AJA). It should be noted that it is likely that superior courts can make general suppression orders with extraterritorial effect given their status as courts of 'unlimited jurisdiction', although there is no authority precisely on the point. Certainly, superior courts have the power to grant *in personam* orders in equity to restrain conduct outside of the jurisdiction: see, eg, *X v Twitter Inc* (2017) 95 NSWLR 301, 306 [21] (Pembroke J). Furthermore, the High Court has held that Mareva or 'freezing' orders, which are made pursuant to a superior court's inherent jurisdiction, can be granted with extraterritorial effect: see *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, 11 (French CJ, Kiefel, Bell, Gageler and Gordon JJ). However, in *Ibrahim* (2012) 83 NSWLR 52, the New South Wales Court of Criminal Appeal was sceptical that an order with extraterritorial effect, which is permissible under the *CSNPO Act*, could ever be justified as necessary, but did not finally decide the point: at 72 (Basten JA). Furthermore, difficulties with the enforcement of orders outside of the jurisdiction may mean that the necessity test will not be met: at 73 [78] (Basten JA).

138 *Juries Act 2000* (Vic) s 78A.

139 *Mokbel* (2010) 30 VR 248, 272 [94] (Warren CJ and Byrne AJA). Cf *R v Harwood* (Unreported, Southwark Crown Court, Fulford J, 20 July 2012) [37]; *R v Perish* [2011] NSWSC 1102, [53]–[54] (Price J); *R v Debs* [2011] NSWSC 1248, [30]–[35] (Hulme J). See also Isaac Frawley Buckley, 'In Defence of "Take-down" Orders: Analysing the Alleged Futility of the Court-Ordered Removal of Archived Online Prejudicial Publicity' (2014) 23 *Journal of Judicial Administration* 203 (where it is argued that orders should not be refused on this basis because the assumption that jurors will comply with their legal obligations is highly questionable and jurors might be exposed to such material other than by searching).

140 *Mokbel* (2010) 30 VR 248, 272 [94] (Warren and Byrne AJA).

141 Ibid 259 [36] (Warren CJ and Byrne AJA).

burdensome than the test for obtaining a proceedings suppression order.[142] However, it is difficult to discern from the cases precisely *how*, in doctrinal terms, the threshold is lower. In *Mokbel*, the majority simply explained that the countervailing interest in freedom of speech 'will assume a greater or lesser importance depending upon the subject matter of the information': on one end of the spectrum, the information may 'concern the performance of the functions of those in the highest office; and at the other no more than salacious gossip about personal shortcomings of the less lofty'.[143] Yet, it is far from clear that focusing on the countervailing weight to be given to particular speech can be said to impose a lower threshold. Indeed, the requirement that the court consider freedom of speech may, in fact, set a *higher* burden than the one applied in the proceedings suppression order context. This is because it has been held by the High Court that the application of the necessity test when making a proceedings suppression order does not involve a balancing of interests, nor does it involve a judicial discretion.[144] Consequently, unlike a general suppression order, provided a proceedings suppression order is found to be necessary it cannot be refused on free speech grounds, no matter how important the anticipated speech may be. This suggests that the lower threshold for the making of general suppression orders must instead, as held in *Ibrahim*, relate to the *standard* of necessity to be applied rather than to the balancing of interests. However, there is no reference in *Mokbel* or in cases that have followed as to what the exact standard of necessity is, or how it is less strict or more flexible than the requirement of necessity applied in the proceedings suppression order context. What *is* clear, on the other hand, is that the Supreme Court of Victoria has adopted an extremely broad approach when it comes to the scope and application of general suppression orders made under its inherent jurisdiction. This broad approach is explored in the remainder of this Part.

B Scope of the Inherent Jurisdiction: General Precautionary Orders

Many of the available cases on general suppression orders in Victoria have involved, like the New South Wales cases on quia timet injunctions, threats by *particular publishers* in relation to *particular imminent publications*.[145] In *GTC v*

142 See Butler and Rodrick, above n 4, 261–2.

143 (2010) 30 VR 248, 259 [36] (Warren CJ and Byrne AJA).

144 *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 664 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ); *R v Tait* (1979) 24 ALR 473, 487 (Brennan, Deane and Gallop JJ); *Herald & Weekly Times Ltd v Magistrates' Court of Victoria* [2004] VSC 194, [17] (Whelan J). See also *Scott v Scott* [1913] AC 417, 435 (Viscount Haldane LC). Some courts, however, continue to treat the making of proceedings suppression orders as involving both a discretion and a balancing of interests, despite the High Court's clear decision to the contrary in *Hogan v Australian Crime Commission* (2010) 240 CLR 651, 644 (French CJ, Gummow, Hayne, Heydon and Kiefel JJ): for two recent examples, see *PQR v Secretary, Department of Justice and Regulation [No 1]* [2017] VSC 513, [42] (Bell J) and *Wilson v Bauer Media Pty Ltd [No 5]* [2017] VSC 355, [9], [12], [16] (Dixon J).

145 *Dupas* (2012) 226 A Crim R 53 (television program); *Nationwide News* (2010) 28 VR 473 (newspaper article); *GTC v DPP* (2008) 19 VR 68 (television program); *R v A* [2008] VSC 73 (television program); *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533 (television program); *R v Rich [No 7]* [2008] VSC 437 (internet articles); *R v Lam [No 1]* [2004] VSC 264 (television program).

DPP,[146] for example, the Court of Appeal upheld a general suppression order that prevented a 'docudrama' series called *Underbelly* from being broadcast or otherwise distributed in Victoria. The broadcasting of the program was restrained because it contained a re-enactment of the murder for which an accused was about to stand trial.[147] Similarly, in the case of *Nationwide News Pty Ltd v Farquharson*,[148] the Court of Appeal dismissed an application for leave to appeal a general suppression order made by Lasry J restraining *The Australian* newspaper from publishing an article focusing on the South Australian trial of Aliya Zilic for the murder of his three-year-old child, Imran Zilic. The article was found to pose a serious risk of prejudice to the fair trial of Robert Farquharson on charges of murder in Victoria due to apparent similarities between the two cases and the assertion in the article that the defence of insanity is misused by defendants who face trial for killing their children (even though Farquharson himself did not plead insanity).[149]

It appears from the case law that where an application for a general suppression order is directed towards a particular media organisation, the court will approach the evidentiary requirements in much the same way as in the quia timet injunction cases discussed in Part II.[150] Thus, it was held by the majority of the Court of Appeal in *Mokbel* that before such an order can be made there must be evidence that the particular publisher is contemplating publication, along with evidence as to what the contents of the proposed publication will be.[151] In the absence of such evidence, 'the court must rely upon the awareness of the media

146 (2008) 19 VR 68. See also *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533.

147 The order made by the trial judge, King J, was directed at the world at large. The Court of Appeal held that this went beyond what was necessary in the circumstances and narrowed the order to specifically restrain GTC from broadcasting the series in Victoria: *GTC v DPP* (2008) 19 VR 68, 87 [65] (Warren CJ, Vincent and Kellam JJA).

148 (2010) 28 VR 473.

149 A number of further notable orders have been granted where public reasons have not been issued. One example is an order by King J restraining Channel Seven Melbourne from broadcasting a television program called *Crime Mums* until the completion of the murder trial of Evangelos Goussis; another is an order made by the Court of Appeal restraining Channel Seven Melbourne from broadcasting a television program called *Beyond the Darklands: Peter Dupas* until the determination of Peter Dupas's application for leave to appeal against his conviction for the murder of Mersina Halvagis.

150 It is important to point out that despite the evidentiary similarities with applications for quia timet injunctions in such cases, it has nevertheless been held that applications for general suppression orders in terms that restrain particular publishers are not subject to the same procedural requirements as applications for injunctions. That is, applications for general suppression orders need not follow the 'usual inter partes process' for seeking civil relief. While the power being exercised is said to be 'akin to an injunction to restrain a threatened contempt', the Court of Appeal explained in *GTC v DPP* that this 'does not mean that the civil process of the issue of a summons supported by affidavits followed by application made to a Practice Court judge is required': at 76 [28] (Warren CJ, Vincent and Kellam JJA). Thus, general suppression orders can be made upon the application of a party during the course of proceedings. Furthermore, given the protective nature of the jurisdiction being exercised, it was held in *GTC v DPP* that they may even be granted on the Court's own motion: at 76 (Warren CJ, Vincent and Kellam JJA).

151 (2010) 30 VR 248, 273 [95] (Warren CJ and Byrne AJA). See also *R v Rich [No 1]* [2008] VSC 119, where an order directed at particular publishers was refused on the basis that there was no evidence 'that any event was about to occur which would be likely to generate the kind of publicity that might threaten the fair trial of the accused': at [19] (Lasry J).

of their obligations and of their responsibility for putting up material which might amount to a contempt'.[152] It was for this reason that the majority in *Mokbel* quashed an order that prevented two news organisations from publishing any *future* internet articles (as well as requiring the removal of existing articles) 'containing reference to Antonios Mokbel':[153] there was no evidence that those organisations had any intention to publish new material relating to Mokbel in breach of the sub judice rule, let alone evidence as to what the contents of such publications might be.

However, unlike the power to make orders under the *CSNPO Act* in New South Wales, the power to make general suppression orders in Victoria has not been confined to restraining particular publishers from publishing particular publications. Instead, it is evident from both the case law and the practice of the Victorian Supreme Court that the inherent jurisdiction has frequently been used to make general precautionary orders – orders that, as explained above, purport to restrain *any* person or organisation with notice from publishing specified information or specified categories of information. Such orders have often been made to prevent, for example, the publication of prior convictions, details of an accused's past criminal behaviour, and the image or photograph of an accused. In some extreme cases, general precautionary orders have even been made to restrain the publication of any *unspecified* material that might have the consequence of reflecting adversely upon an accused.[154]

The power to make general suppression orders in terms that are not directed at any particular publisher has been expressly confirmed by the Victorian Court of Appeal on at least two occasions. In *HWT v A*, the Court of Appeal said that a general suppression order will not be 'invalid or inutile simply because it is not in terms directed to anyone in particular'.[155] This statement was later endorsed by the Court of Appeal in *GTC v DPP*.[156] While the Court of Appeal in both cases accepted that the inherent jurisdiction can only be used to *directly* bind those who are present in court and not the 'world at large', it was held that an order that is not directed at any person in particular will nevertheless *indirectly* bind any person or organisation who receives notice of the order.[157] Thus, publishing in breach of an order's terms after notice 'will be a contempt because the person involved has intentionally interfered with the proper administration of justice and not because he [or she] was bound by the order itself'.[158]

152 *Mokbel* (2010) 30 VR 248, 273 [95] (Warren CJ and Byrne AJA).
153 Ibid 272 [94] (Warren CJ and Byrne AJA).
154 See, eg, the order at issue in *R v Hinch* [2013] VSC 520.
155 (2005) 160 A Crim R 299, 305 [28] (The Court).
156 (2008) 19 VR 68, 77 [29] (Warren CJ, Vincent and Kellam JJA).
157 *HWT v A* (2005) 160 A Crim R 299, 305 [28] (The Court), citing *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477 (McHugh JA).
158 *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 477 (McHugh JA). See also *HWT v A* (2005) 160 A Crim R 299, 305 [28] (The Court); *GTC v DPP* (2008) 19 VR 68, 77 (Warren CJ, Vincent and Kellan JJA). To be found in contempt, it must be shown that the person or entity received notice of the order and that such notice would have led a reasonable person to refrain from publishing the material that was published: see, eg, *R v Hinch* [2013] VSC 520, [73] (Kaye J); *PQR v Secretary, Department of Justice and Regulation [No 1]* [2017] VSC 513, [106] (Bell J).

A number of examples of making general precautionary orders can be gleaned from the case law. For example, in *Re Roberta Williams*, Cummins J made an order preventing any report of the arrest of Roberta Williams (the wife of the now late underworld figure Carl Williams) and the laying of dishonesty charges against her.[159] In *Re Carl Williams*, King J granted a similar order preventing the publication of 'any reference to the antecedents, current charges, pending charges or any reference which reflects adversely upon the character or credit' of certain underworld figures, two of whom were facing murder and drug trafficking trials.[160] This order was upheld on appeal but its terms were substantially narrowed.[161] The aspects of the order upheld by the Court of Appeal included a blanket prohibition on the publication of one defendant's prior convictions. The Court of Appeal also tacitly approved the making of general precautionary orders in *Mokbel* when it refused leave to appeal an order that operated as a general restraint on the publication of a range of matters to do with the defendant, including his prior convictions and prior criminal history.[162] It is important to note, however, that the available case law represents only a fraction of the general precautionary orders made by the Supreme Court. In practice the number is much greater. In fact, the vast majority of general suppression orders made by the Supreme Court are general precautionary orders, with 20 – or roughly two-thirds – of the 29 general suppression orders examined in the empirical study referred to earlier in this Part[163] being expressed in general precautionary terms.[164]

Notwithstanding the prevalence of general precautionary orders, it has gone completely unacknowledged in the case law that such orders far exceed what could be the subject of a quia timet injunction granted in equity, let alone what consequences such orders may pose for publishers (discussed in Part V). This is surprising given that it is evident from the available case law that general precautionary orders are treated as subject to different evidentiary requirements compared to orders directed at restraining particular publishers. Indeed, it appears from both *Re Roberta Williams* and *Re Carl Williams* that the approach is more flexible. Thus, in neither of these cases did there appear to be any specific evidence before the court that the suppressed information was about to be published, let alone evidence of the form such publication might take. Instead, in *Re Roberta Williams*, Cummins J's reasons for the order simply expressed an expectation – perhaps quite rightly given the notoriety of Roberta Williams and the media interest in her – that publicity of the arrest would 'not be

159 [2004] VSC 360.

160 [2005] VSC 316, [24] (King J).

161 It found that the order granted by King J was too wide to meet the necessity test and that the reference to content which 'reflects adversely upon the character or credit' of the accused was too vague and imprecise for intending publishers: *HWT v A* (2005) 160 A Crim R 299, 308 (The Court).

162 (2010) 30 VR 248, 261–4 (Warren CJ and Byrne AJA). Note, this order was different from the order discussed above which required two news organisations to take down and refrain from publishing internet articles that referred to Mokbel.

163 See above n 120 and accompanying text.

164 Copies of these orders are on file with the author.

insubstantial';[165] similarly, in *Re Carl Williams*, it appears that King J anticipated publicity based on previous media publications and the ongoing public interest in the defendants and their roles more generally in Melbourne's criminal underworld.[166] However, what is perhaps more important is that in neither case was the deterrent effect of sub judice contempt specifically mentioned as a factor relevant to whether or not prejudicial publicity was likely to take place. Instead, in both cases it appears that the primary focus was on whether publication of the information, in the event that it was published, would be likely to present a serious risk of prejudice to the proceedings in question.

The more flexible approach to the making of general precautionary orders compared to orders directed at particular publishers is also evident in the Court of Appeal's reasoning in *Mokbel*. As mentioned above, an order specifically directed at two media organisations to prevent the future publication of internet articles concerning Mokbel (along with the removal of pre-existing articles) was quashed by the Court of Appeal on the basis that there was no evidence that the media organisations in question intended to publish such material and, in the absence of such evidence, it was said that reliance must be placed on the fact that sub judice contempt would deter such publication.[167] In contrast, a significantly different approach appears to have been adopted in relation to the general precautionary order that was also at issue in that case. This order prevented the publication of, inter alia, Mokbel's prior convictions and previous criminal activity. Importantly, the Court of Appeal refused to grant leave to appeal the making of the order and did not engage in an examination of the primary judge's decision. Nevertheless, in setting out the principles that are to be applied, the Court of Appeal made no mention of the relevance of the deterrent effect of sub judice contempt to the question of necessity.[168] This is despite the fact that the operation of sub judice contempt must be crucial to the question of whether the media generally, as constrained by the latter order, would be likely to publish the sort of material that was restrained.

It is difficult to identify any reason why a more flexible approach should be applied to the making of general precautionary orders. If the law accepts the assumption, as indicated in *Mokbel*, that media organisations will comply with the law of sub judice contempt when making orders directed at particular media organisations unless there is evidence to the contrary, the same assumption should be applied equally to the making of general precautionary orders. Thus, it is this author's view that, in order to maintain consistency in the law, such orders should only be considered necessary where a court expressly finds, in the particular circumstances of the case and based on cogent evidence, that the media in general (rather than particular organisations) are likely to disregard the usual constraints imposed by sub judice contempt. For the same reason, the adoption of

165 [2004] VSC 360, [10].
166 [2005] VSC 316, [21].
167 *Mokbel* (2010) 30 VR 248, 272–3 [95] (Warren CJ and Byrne AJA).
168 Ibid.

a reverse assumption of non-compliance, as King J's comments set out in the Introduction of this article would appear to suggest,[169] must also be rejected.

C Statutory Powers of the County and Magistrates' Courts: 'Broad' Suppression Orders

Before moving to consider the consequences of general precautionary orders, it is necessary to highlight that the County and Magistrates' courts are also in the practice of making such orders. Dedicated statutory powers contained in Part 4 of the *OC Act* expressly permit the County and Magistrates' courts to make orders restraining the publication of extraneous material (referred to as 'broad' suppression orders) and are in substantially the same terms as statutory powers that existed prior to the introduction of the *OC Act* in 2013.[170] Section 26 provides the Magistrates' Court with a broadly expressed power to make 'an order prohibiting the publication of any specified material, or any material of a specified kind, relevant to a proceeding that is pending in the Court' in circumstances where such an order is necessary to 'prevent a real and substantial risk of prejudice to the proper administration of justice'. Section 25(1), on the other hand, provides the County Court with the same power as the Supreme Court to grant 'an injunction in a criminal proceeding restraining a person from publishing any material … to ensure the fair and proper conduct of the proceeding'. According to section 25(2), the County Court's power in section 25(1) can be exercised by 'making an order … on such terms and conditions as the Court thinks just'.

The Magistrates' Court's statutory power under the *OC Act* clearly authorises the making of general precautionary orders. This is because section 26 provides that the Magistrates' Court can make a broad suppression order in relation to 'any material of a *specified kind*',[171] which would appear to contemplate restraining categories of information such as prior convictions and the like. The scope of the County Court's power, however, is much less certain. There are two related reasons why the County Court's power under section 25 is likely to be properly construed as more limited. First, the noun 'injunction' rather than 'order' is used in section 25(1) to describe the power. Therefore, on its face it is arguable that the power is limited to granting injunctions that could be granted in equity to restrain identified anticipated contemptuous publications. It has been held by the High Court that the statutory use of the term 'injunction' derives its 'content from the provisions of the particular statute' in which it appears.[172] It can therefore be argued that the juxtaposition of the term 'injunction' in section 25 with the term 'order' in section 26 suggests that these terms differ in meaning, with the former reflecting the more limited remedial power in equity.

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169 See above n 25 and accompanying text.

170 See *Magistrates' Court Act 1989* (Vic) s 126(2)(d); *County Court Act 1958* (Vic) s 36A(3).

171 *OC Act* s 26(1) (emphasis added).

172 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, 394 [29] (Gaudron, McHugh, Gummow and Callinan JJ).

Second, it has been held by the High Court that where constructional choices are open, as they clearly are in this instance, the principle of legality will favour the interpretation of a statutory power of suppression that has the least adverse impact on freedom of speech.[173] Such an interpretive approach is also required under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[174] Accordingly, this suggests that the term 'injunction' in section 25 should be interpreted as being commensurate in scope with the narrow power in equity to grant injunctions to restrain particular threatened publications by particular publishers rather than as capable of supporting the making of wider-reaching and much more speech-restrictive general precautionary orders. It is important to point out that if such reasoning were accepted, general precautionary orders made by the County Court under section 25 of the *OC Act* would be considered beyond the scope of the Court's power and therefore null and void ab initio.[175]

V CONSEQUENCES OF GENERAL PRECAUTIONARY ORDERS

The breadth of general precautionary orders made by the Victorian courts presents potentially significant consequences for publishers. Two consequences are examined in this Part. First, not only do general precautionary orders extend well beyond what could be the subject of quia timet injunctions in equity in terms of scope and application, they also have the potential to restrain publications that would not constitute sub judice contempt. This, in turn, raises broader questions about the precise relationship between the power to make general suppression orders under the inherent jurisdiction and the law of sub judice contempt. Second, the case law demonstrates that general precautionary orders operate, at least in principle, as de facto take-down orders. It is argued that this is problematic because such operation has the effect of circumventing the restrictive approach that has been held by the Victorian Court of Appeal to apply to the making of express take-down orders.

A Beyond Sub Judice Contempt?

The potential for general precautionary orders to restrain the publication of material that would not constitute sub judice contempt arises because the necessity of such an order is judged largely in the abstract. That is, in the absence of evidence of a particular anticipated publication by a particular publisher, there

173 *Hogan v Hinch* (2011) 243 CLR 506, 526, 535 (French CJ).

174 Ibid. Note, freedom of expression is protected under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(2). This means that Victorian legislation, where possible, must be interpreted compatibly with freedom of expression: at s 32(1).

175 See, eg, *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 473 (Mahoney JA); *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 357 (McHugh JA), 344 (Hope JA agreeing); *Herald & Weekly Times Pty Ltd v Victoria* (2006) 25 VAR 124, 137 [33] (Chernov, Nettle and Ashley JJA); *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435, 445 [28] (Gaudron, Gummow and Callinan JJ).

is no consideration of the *circumstances of publication* that would normally be relevant to judging prejudicial tendency for the purposes of contempt or for the purposes of an order to restrain a particular contempt – for example, the content, mode and manner of the publication, the size and location of the likely audience, and the identity of the publisher. Instead, it seems that the assessment is entirely based on the inherent nature of the information and, where relevant, the temporal proximity of any potential publication of that information to the proceedings in question. As a consequence, general suppression orders made in general precautionary terms can potentially suppress publications that would not, given the circumstances of publication, have the relevant tendency to prejudice particular proceedings.

Furthermore, because the publication of the information is assessed in the abstract, it appears that there is only limited scope for considering arguments regarding the public's countervailing interest in freedom of speech. Indeed, in *Re Roberta Williams*, no mention was made by Cummins J of the potential public interest in the media publishing the fact of Roberta Williams's arrest. In *Re Carl Williams*, King J acknowledged the need to resolve the conflict between the protection of the administration of justice and the public's interest in journalistic comment, but did not appear to give weight to the freedom of speech side of the scales or attempt any considered balancing of interests.[176] Her Honour simply said that previous publicity given to various related matters was 'gratuitous', 'pejorative', 'sensationalised' and 'unnecessary'.[177] The abstract nature of the analysis creates the possibility that general suppression orders can be made to restrain publications that would, in the absence of an order, be justified under the *Bread Manufacturers* principle.

It follows that general precautionary orders have the potential to criminalise publications that would not otherwise be criminal under the law of sub judice contempt. This is aptly illustrated by the Victorian case of *R v Hinch*.[178] In 2013, Adrian Bayley entered a plea of guilty in the Supreme Court of Victoria to one count each of rape and murder. At the hearing, Nettle JA granted a general suppression order in general precautionary terms that prevented the publication of Bayley's prior convictions, sentences or previous criminal cases, along with 'any other matter reasonably likely to reflect adversely upon Bayley's character'.[179] The order was made to prevent prejudice to three forthcoming rape

176 [2005] VSC 316, [17].

177 Ibid [21].

178 [2013] VSC 520.

179 Ibid [10] (Kaye J). Note, somewhat incongruously, in *HWT v A* (2005) 160 A Crim R 299, Maxwell P and Nettle JA rejected a similarly worded order preventing the publication of material that would reflect 'adversely upon the character or credit' of the accused on the basis that such terms were 'too imprecise, with intending publishers left in a state of uncertainty about what might or might not' fall within the scope of the order: at 308. See also *Madafferi* [2016] VSC 103, where Dixon J held that an order preventing 'any publication of information that suggests that the plaintiff is or may be responsible for the murder of Mr Joseph Acquaro' did not comply with the *OC Act* s 13 because it was 'vague and insufficiently targeted': at [59]. Section 13(1)(c) of the *OC Act* requires that suppression orders, including general suppression orders made in the inherent jurisdiction, be expressed with 'sufficient particularity'

trials faced by Bayley. Derryn Hinch, the well-known broadcaster and current Senator, was charged with contempt for breaching the suppression order as a result of failing to remove an article about Bayley published on his website shortly prior to Nettle JA's order being made. He was also charged with committing sub judice contempt due to the alleged potential for the same article to prejudice the pending rape proceedings. At trial, Hinch was found not guilty on the sub judice contempt charge due to the limited readership of his website, the delay between publication and trial (estimated to be in excess of 12 months), and the presence of pre-existing publications about Bayley.[180] Despite this conclusion, Hinch was nevertheless found guilty on the separate charge of contempt for breaching the suppression order. Importantly, it was held by Kaye J that neither the actual tendency of a publication (or lack thereof) to cause prejudice to a trial,[181] nor arguments based on the *Bread Manufacturers* principle, were relevant to contempt based on the interference with a court order.[182] Rather, all that is required to establish liability for breaching a suppression order is the alleged contemnor's awareness of the order and the frustration of the effect of the order by the publication of material in breach of its terms.[183]

The apparent power to make general suppression orders to restrain publications that may not constitute sub judice contempt leads to important questions regarding the relationship between general suppression orders and the law of contempt. Some of the authorities suggest that the power to grant general suppression orders is *derived from*, *or is an adjunct to*, a superior court's power to punish for sub judice contempt. For example, as mentioned earlier, it was held by the New South Wales Court of Criminal Appeal in *Ibrahim*, in the context of interpreting the scope of the *CSNPO Act*, that '[a]n order under the [*CSNPO Act*] should be in a form which would be appropriate in the *inherent jurisdiction* of the Supreme Court, *to prevent an apprehended breach of the sub judice principle*'.[184] This is consistent with recent High Court obiter dictum that a superior court's power to punish for contempt '*includes*' the power to restrain a threatened contempt.[185] It is also consistent with the Victorian Court of Appeal's statement in *Mokbel* that:

> the court has inherent power to restrain the apprehended publication of material which would, if published, produce a real risk that the material would interfere substantially with the administration of justice in a pending proceeding, and thereby constitute a contempt of court.[186]

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so as to ensure that 'it is readily apparent from the terms of the order what information is subject to the order'.

180 *R v Hinch* [2013] VSC 520, [101]–[105] (Kaye J).

181 Ibid [72].

182 Ibid [90].

183 Ibid [52]–[62] (Kaye J).

184 (2012) 83 NSWLR 52, 78 [98] (Basten JA) (emphasis added).

185 See *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 259 [150] (Crennan J); *X7 v Australian Crime Commission* (2013) 248 CLR 92, 117 (French CJ and Crennan J) (emphasis added).

186 *Mokbel* (2010) 30 VR 248, 266 [68] (Warren CJ and Byrne AJA) (emphasis added) (citations omitted). See also *Madafferi* [2016] VSC 103, where Dixon J, in reference to the inherent power to make general suppression orders, said that '[c]ourts have power to restrain publication of extrinsic material so as to

If this understanding of the basis of the power is correct, it follows as a matter of logic that the Victorian Supreme Court has been applying the power too broadly by making general precautionary orders – orders that, as we have seen, are not necessarily limited, at least not in their effect, to restraining a threatened sub judice contempt.

An alternative explanation of the power – and one that *is* consistent with the making of general precautionary orders – is that it exists independently of the law of sub judice contempt. This broader understanding of the power was adopted by Kyrou J in the case of *Dupas*.[187] Referring to the Victorian Court of Appeal's observation in *GTC v DPP* that the inherent power to suppress is 'not circumscribed narrowly',[188] Kyrou J expressed the view that the power to make general suppression orders is not 'constrained by the principles that define the commission of a contempt of court'.[189] This approach appears to locate the power as being an extension of, or at least similar to, the power to make proceedings suppression orders, which, despite having a common origin in the Supreme Court's inherent jurisdiction, is clearly an inherent power that is distinct from the power to punish for contempt.

If accepted, one consequence of this broader conception of the power is the possibility that general suppression orders could be made in relation to proceedings that are not yet sub judice. Indeed, this was the context in which Kyrou J considered the power in *Dupas*.[190] Peter Dupas, an infamous convicted murderer, sought an order preventing Channel Seven from broadcasting segments of a miniseries that depicted him confessing to his cellmate that he had committed the murder for which he had been convicted. The Court of Appeal had earlier heard an appeal against his conviction and had reserved its decision. The concern was that broadcasting the segment would deprive Dupas of a fair retrial in the event that the Court of Appeal allowed his appeal. Channel Seven argued that the order should not be granted because the Court's jurisdiction is confined to protecting only pending proceedings,[191] relying upon the High Court's decision in *James v Robinson* that sub judice contempt can only be committed where proceedings are 'sub judice' or 'pending'[192] and not where proceedings are merely imminent.[193] Although Kyrou J decided the case on other grounds, his Honour expressed the view that because general suppression orders are not

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avoid … an apprehended contempt': at [47]; *R v Kamitsis* [2015] NTSC 48, where Mildren AJ said: 'This Court, in its inherent jurisdiction, can restrain the publication of any material, if an order is necessary to prevent a threatened contempt of Court': at [20].

187 (2012) 226 A Crim R 53.

188 Ibid 57 [10], citing *GTC v DPP* (2008) 19 VR 68, 76 [28] (Warren CJ, Vincent and Kellam JJA). See also *HWT v A* (2005) 160 A Crim R 299, 306 (The Court).

189 *Dupas* (2012) 226 A Crim R 53, 57 [10].

190 Ibid.

191 Ibid 57 [8]–[9] (Kyrou J).

192 *James v Robinson* (1963) 109 CLR 593, 607, 615 (Kitto, Taylor, Menzies and Owen JJ).

193 Ibid.

confined by the law of sub judice contempt, *James v Robinson* was not determinative.[194]

Assuming the correctness of the broad view of the power, there is no clear answer as to whether a general suppression order could legitimately extend to the protection of proceedings that are not yet sub judice.[195] Indeed, the issue is both complex and beyond the scope of this article. However, it will suffice to say that the inherent jurisdiction more broadly is not *necessarily* limited to protecting the administration of justice in proceedings already pending before the courts,[196] and even in the proceedings suppression order context the authorities are divided on this aspect of the scope of the power, although the preponderance of authority would favour a limited application.[197] In any event, it almost goes without saying that circumstances giving rise to the need to make a general suppression order in relation to future proceedings are likely to be especially rare. Certainly, the facts in *Dupas* involved an extremely unusual collocation of circumstances and, even then, a general suppression order was not considered to be warranted due to the length of time between the broadcast and any potential retrial.[198]

B De Facto Take-Down Orders

The second consequence of general precautionary orders is that they operate as de facto take-down orders in relation to pre-existing internet content. For example, an order prohibiting the publication of a person's prior convictions will not only prohibit new content from being posted online, it will also *require the removal* of any existing references to the person's prior convictions, even in the absence of an express take-down clause. This is because, as held in *R v Hinch*, 'publication' of material for the purposes of contravening a suppression order occurs on a continuous basis for as long as the material remains accessible to the public,[199] irrespective of when it was originally posted or whether the material has in fact been accessed by any person.[200] Thus, pre-existing online content is published in this context from the time that an order is made up until the time that it is removed. A publisher can therefore be found guilty of contempt if it is

194 *Dupas* (2012) 226 A Crim R 53, 57 [10].

195 The most convincing justification in *James v Robinson* (1963) 109 CLR 593 for adopting the time limits was that extending the sub judice rule to imminent proceedings would create too much uncertainty for intending publishers: at 607 (Kitto, Taylor, Menzies and Owen JJ). This concern, however, has no relevance to the making of general suppression orders because an order itself will be designed to avoid any uncertainty as to what can and cannot be published, and when.

196 For example, in *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* (2015) 258 CLR 1, Keane and Nettle JJ held that a superior court's power to make freezing orders in its inherent jurisdiction 'is not confined to the protection of a pending action or an immediately justiciable cause of action': at 24.

197 For a discussion of the authorities, see Jason Bosland, 'WikiLeaks and the Not-So-Super Injunction: The Suppression Order in *DPP (Cth) v Brady*' (2016) 21 *Media and Arts Law Review* 34, 55–6.

198 *Dupas* (2012) 226 A Crim R 53, 58 [15], 59 [21] (Kyrou J).

199 See *R v Hinch* [2013] VSC 520, [53] (Kaye J), relying upon *Mokbel* (2010) 30 VR 248, 265 [65] (where Warren CJ and Byrne AJA defined publication in the same way for the purposes of sub judice contempt). See also *HM Advocate v Beggs [No 2]* 2002 SLT 139. Note, in relation to orders made by the County and Magistrates' courts, this conception of publication is expressly provided for in the *OC Act* s 3, where publication is defined as including the provision of access to information.

200 *Mokbel* (2010) 30 VR 248, 265 [65] (Warren CJ and Byrne AJA).

proven beyond reasonable doubt that they received 'sufficient knowledge of the terms and effect of the order'[201] and subsequently failed to remove the material within a reasonable period of time. Importantly, as the above discussion of *R v Hinch* explains, for contempt to be established it need not be proven that the continued availability of the material has any tendency to cause prejudice to the relevant court proceedings;[202] rather, all that must be shown is the frustration of the effect of the order by the publication (ie, continued availability) of material falling within its scope.[203]

It is clear that the take-down effect of general precautionary orders poses significant burdens on publishers to search for and remove material from their online archives in response to an order being made. The requirement to remove historical material may also, so it has been claimed, raise significant ethical issues regarding the role of the media and journalism in providing a permanent record of events.[204] However, more important from a strictly legal perspective is the fact that the take-down effect of general precautionary orders is inconsistent with and, indeed, circumvents, important principles established in *Mokbel* regarding the making of express take-down orders. As discussed above, the majority decision of the Victorian Court of Appeal in *Mokbel* held that take-down orders directed at particular media organisations to remove historical or archived internet material will not satisfy the necessity test.[205] This is due to the fact that such material is not considered to pose any risk to the administration of justice given the assumption that jurors will abide by both judicial directions and legal prohibitions under the *Juries Act 2000* (Vic) not to search for such content.[206] Yet, as explained, the effect of general suppression orders is to require the removal of such historical content, even where its continued accessibility does not pose a significant risk to the administration of justice. This creates a clear inconsistency with the majority's decision in *Mokbel*. Consequently, it must be concluded that general precautionary orders that have such a take-down effect are incapable of satisfying the necessity test and therefore cannot be considered a proper exercise of either the Supreme Court's power to make general suppression orders under the inherent jurisdiction or the County and Magistrates' courts' statutory powers to make broad suppression orders under the *OC Act*.

It is important to note, however, that the fact that general precautionary orders fail the necessity test does not mean that they have no effect on the media or any other publisher who receives notice of them. This is due to the fact that orders made by the Supreme Court, even where made without power, must be followed until they are set aside.[207] The position in relation to orders made by the

201 *R v Hinch* [2013] VSC 520, [52] (Kaye J).
202 Ibid [72] (Kaye J).
203 Ibid.
204 See, eg, *R v Canadian Broadcasting Corporation* [2017] ABQB 329, [13] (Clackson J).
205 (2010) 30 VR 248, 268–72 [74]–[94] (Warren CJ and Byrne AJA). Discussed above nn 137–9 and accompanying text.
206 Ibid.
207 See, eg, *New South Wales v Kable* (2013) 252 CLR 118, 132–6 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 140–1 (Gageler J).

County and Magistrates' courts is less clear and will depend on whether general precautionary orders that fail the necessity test because of their take-down effect are made *without power* or simply as a result of an *improper exercise of power*. If the former, they will be null and void and therefore unenforceable; if the latter, they must be followed until set aside.[208] Given the potential for general precautionary orders to be enforced, even when improperly made, it is unacceptable for the Victorian courts to continue the current practice of making orders in a form that so clearly falls short of the necessity test. The simplest and most obvious way to avoid general precautionary orders having such 'unnecessary' take-down effect, and therefore being made in error, is to include an express public domain exception or 'carve-out'. Such an exception, which would simply need to provide that the order does not apply to content that was first made publicly available prior to the order being made, should be adopted by all Victorian courts as a matter of course whenever general precautionary orders are made.

V CONCLUSION

This article has examined in detail the various powers available to courts in New South Wales and Victoria to make orders restraining the publication of extraneous prejudicial information. It has demonstrated that the approach in Victoria in terms of scope and application is much broader than the approach in New South Wales. In New South Wales, the powers to grant injunctions in equity and extraneous suppression orders under the *CSNPO Act* are restricted to the making of orders restraining the publication of particular contemptuous publications by particular publishers. In contrast, the inherent jurisdiction and dedicated powers under the *OC Act* in Victoria have been interpreted to allow the making of general precautionary orders – orders that purport to restrain any person with knowledge of an order from publishing particular categories of information that are thought to threaten the fair and proper administration of justice. It has been argued that not only have the Victorian courts adopted a flexible approach to making general precautionary orders compared to orders directed at particular publishers, but that such orders present significant consequences for the media. Specifically, general precautionary orders have the potential to criminalise media publications that would not otherwise constitute sub judice contempt and that such orders, in conflict with the Victorian Court of Appeal's decision in *Mokbel*, have the effect of requiring the removal of historical and archived internet material.

208 See, eg, *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, 473 (Mahoney JA); *A-G (NSW) v Mayas Pty Ltd* (1988) 14 NSWLR 342, 357 (McHugh JA), 344 (Hope JA).