

**TWILIGHT SEMINAR, SUPREME COURT OF NEW SOUTH WALES
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**THE COURT SUPPRESSION AND NON-PUBLICATION ORDERS ACT 2010
ONE YEAR ON - SOME LEGAL AND PRACTICAL ISSUES¹**

Justice Peter Johnson

- 1 The *Court Suppression and Non-Publication Orders Act 2010* (“CSNO Act”) commenced on 1 July 2011.
- 2 At the time of its introduction into Parliament, the CSNO Act was said to be the second stage of a two-stage process that would see all statutory provisions relating to access to court information eventually contained in a single statute.² The first stage of this process was the *Court Information Act 2010*, which has not commenced. In *Rinehart v Welker*,³ Young JA accepted that it was legitimate to look at the *Court Information Act 2010* (although it has not commenced), as an aid to construction of the CSNO Act, as the statute constituted part of the same legislative scheme.

Background to the CSNO Act

- 3 The CSNO Act and the *Court Information Act 2010* have their origins in a 2003 Report of the NSW Law Reform Commission (“NSWLRC”).⁴ Between 2004 and 2008, a consultation process was undertaken in New South Wales leading to the public release of a report by the Attorney General’s Department in July 2008.⁵

¹ This paper draws upon a 2011 article (“*The Court Suppression and Non-publication Orders Act 2010 Commences*” (2011) 23 *Judicial Officers’ Bulletin* 45) and seeks to provide a short overview of decisions concerning the construction and operation of the Act and related issues. The assistance of my former tipstaff, Sarah Khan, is gratefully acknowledged.

² Agreement in Principle Speech, *Court Suppression and Non-publication Orders Bill*, Legislative Assembly, *Debates*, 29 October 2010, p 27195.

³ [2011] NSWCA 403 at [146]-[151]. The other members of the Court (Bathurst CJ and McColl JA) did not express a view on this issue.

⁴ NSWLRC, “*Contempt by Publication*”, Report 100, 2003.

⁵ Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, Report on Access to Court Information, June 2008.

- 4 Meanwhile, in March 2008, the Standing Committee of Attorneys-General (“SCAG”) requested officers to examine the current use of suppression orders, including exploring the possibility of harmonisation across jurisdictions.⁶ Thereafter, the topic was considered by SCAG, culminating in the endorsement by Ministers in May 2010 of model provisions (in the form of the draft NSW CSNO Bill), and their agreement to consider implementing those provisions in their jurisdictions.⁷
- 5 New South Wales is the first jurisdiction in Australia to adopt the model provisions. The CSNO Act, as passed, follows broadly the model provisions endorsed by SCAG in May 2010.⁸
- 6 The use of suppression orders in different Australian jurisdictions has proved controversial, with critics suggesting that orders have been made too frequently, that differing legal bases for orders have produced uncertainty, that orders have been made without appropriate reasons to support them and that their scope, precision and duration have been unduly wide or uncertain.⁹
- 7 In *Rinehart v Welker*,¹⁰ the Court of Appeal referred to the origins of the CSNO Act. It was observed that although no other State or Territory had yet adopted the model provisions, the Commonwealth had introduced the *Access to Justice (Federal Jurisdiction) Amendment Bill 2011*, which had been referred to the Senate Legal and Constitutional Affairs Legislative Committee for report.¹¹ If enacted, the Commonwealth Bill will have the effect of inserting the model provisions (with some modifications) into the *Judiciary Act 1903 (Cth)*, the *Federal Court of Australia Act 1976 (Cth)*, the

⁶ Item 18e, SCAG Summary of Decisions, March 2008.

⁷ SCAG Communiqué, 7 May 2010, p 3; SCAG Summary of Decisions, 7 May 2010, p 9.

⁸ The principal difference between the model provisions and the CSNO Act is the definition of “news media organisation” in s.3 CSNO Act. See n 47 below.

⁹ A Kenyon, “Not Seeing Justice Done: Suppression Orders in Australian Law and Practice” (2006) 27 *Adelaide Law Review* 279.

¹⁰ [2011] NSWCA 403 at [5]-[6] (Bathurst CJ and McColl JA).

¹¹ In March 2012, the Senate Committee issued a report which recommended that the Senate pass the Bill.

Family Law Act 1976 (Cth) and the *Federal Magistrates Act 1999 (Cth)*.
The Bill remains before the Federal Parliament.

Scope of the CSNO Act

- 8 The CSNO Act does not purport to codify the law concerning court suppression and non-publication orders. The Act does not limit or otherwise affect any inherent jurisdiction or any powers that a court has, apart from the CSNO Act, to regulate its proceedings or to deal with contempt of court (s.4). Nor does the Act limit or otherwise affect the operation of a provision made by or under any other Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings (s.5).
- 9 The CSNO Act omits specific provisions from three statutes¹² but leaves unamended a range of provisions in other statutes concerning suppression and non-publication orders.¹³ According to the Agreement in Principle Speech, the Bill omitted the specified sections as they were “*considered to be superseded by the provisions of the [B]ill*”.¹⁴ It was said that the Government had “*been particularly careful not to dilute any protections currently afforded by other legislation, particularly as they relate to children, complainants and witnesses in sexual assault proceedings, and some witnesses in broader proceedings*”.¹⁵

¹² Schedule 2 CSNO Act omits s.72 *Civil Procedure Act 2005*, s.62 *Criminal Assets Recovery Act 1990* and ss.292 and 302(1)(c), (d) and (3) *Criminal Procedure Act 1986*.

¹³ A non-exhaustive list of the provisions left standing include s.180 *Adoption Act 2000*; s.8 *Child Protection (Offenders Prohibition Orders) Act 2004*; ss.15A–15G *Children (Criminal Proceedings) Act 1987*; ss.29 and 105 *Children and Young Persons (Care and Protection) Act 1998*; s.18 *Community Protection Act 1994*; ss.74–76 *Coroners Act 2009*; s.111 *Crimes (Appeal and Review) Act 2001*; s.45 *Crimes (Domestic and Personal Violence) Act 2007*; s.43 *Crimes (Forensic Procedures) Act 2000*; s.51B *Crimes (Sentencing Procedure) Act 1999*; s.578A *Crimes Act 1900*; ss.126E and 195 *Evidence Act 1995*; s.28 *Law Enforcement (Controlled Operations) Act 1997*; s.34 *Law Enforcement and National Security (Assumed Identities) Act 2010*; s.35 *Public Health Act 1991*; s.25 *Status of Children Act 1996*; s.101A(8) *Supreme Court Act 1970*; s.42(5) and (6) *Surveillance Devices Act 2007*; ss.26P and 27ZA *Terrorism (Police Powers) Act 2002*; ss.23, 26 and 31E *Witness Protection Act 1995* and s.65 *Young Offenders Act 1997*.

¹⁴ Above n 2.

¹⁵ Above n 2.

- 10 The CSNO Act applies to orders made by the Supreme Court, the Land and Environment Court, Industrial Court, District Court, Local Court and Children’s Court, or any other court or tribunal or a person or body, having power to act judicially as prescribed by the regulations (see definition of “court” in s.3). No regulations have been made to date under s.18 CSNO Act, so that the Act applies only at this time to the courts specified by the Act.

Open Justice (s.6)

- 11 Section 6 provides that in deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice. The Agreement in Principle Speech stated that the clear policy intention of the CSNO Act and the *Court Information Act 2010* “has been to promote access to court information to the public, including the media” and that it was the Government’s intention “to promote transparency and a greater understanding of the justice system” while, at the same time, ensuring “that the fair conduct of court proceedings, the administration of justice and the privacy and safety of participants in court proceedings are not unduly compromised”.¹⁶
- 12 The fundamental importance of the open justice principle has been stressed in decisions before and after the commencement of the CSNO Act.¹⁷
- 13 Civil litigation surrounding the Rinehart family has given rise to a series of decisions concerning the CSNO Act.¹⁸

¹⁶ Agreement in Principle Speech, above n 2.

¹⁷ *Hogan v Hinch* [2011] HCA 4; 235 CLR 506 at 530-535 [20]-[27]; *Rinehart v Welker* [2011] NSWCA 403 at [32]-[37], [79].

¹⁸ The decisions have extended from judgments of Judges sitting in the Equity Division, the Court of Appeal and the High Court of Australia, where a special leave application was refused: *Rinehart v Welker* [2012] HCA Trans 57 (9 March 2012). For a useful discussion of applications made under the CSNO Act in the context of the *Rinehart* litigation, see C Flax, “*Suppression Orders: Public Interest Outweighs Private Rights*”, Law Society Journal, June 2012, page 70.

- 14 In *Rinehart v Welker*,¹⁹ Bathurst CJ and McColl JA observed that the principle of legality favours a construction of legislation such as the CSNO Act which, consistently with the statutory scheme, has the least adverse impact upon the open justice principle and common law freedom of speech and, where constructional choices are open, so as to minimise the intrusion upon that principle. Their Honours observed that open justice ensured public confidence in the administration of justice, and that the concept of administration of justice is multi-faceted.²⁰
- 15 In *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (“*Fairfax Digital*”),²¹ Basten JA²² observed that the “*principle of legality*” approach mentioned in *Rinehart v Welker* may have a more limited application in circumstances where the proposed order does not impact upon the open justice principle because it does not prevent or restrict publication of court proceedings. Basten JA stated that “*common law freedom of speech*” is not to be disregarded, but it provides a lesser obstacle to an order designed to prevent prejudice to the proper administration of justice.
- 16 Bathurst CJ²³ in *Fairfax Digital* observed that the requirement imposed by s.6 should not impede a court from making an order when it is of the opinion that one of the grounds in s.8 is made out, and that the importance of s.6 will vary depending on the extent that any such order would interfere with the open justice principle.

¹⁹ [2011] NSWCA 403 at [26].

²⁰ Ibid at [32], [39].

²¹ [2012] NSWCCA 125 (Basten JA delivered the leading judgment, Bathurst CJ agreed with Basten JA with additional observations, and Whealy JA agreed with Basten JA and the additional remarks of the Chief Justice).

²² Ibid at [49].

²³ Ibid at [9].

Power to Make Orders (s.7) and Grounds for Making an Order (s.8)

- 17 Section 7 provides that a court may, by making a suppression order or non-publication order on grounds permitted by the Act, prohibit or restrict the publication or other disclosure of:
- (a) information tending to reveal the identity 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.
- 18 The terms “*information*”, “*non-publication order*”, “*party*”, “*proceedings*”, “*publish*” and “*suppression order*” are defined in s.3 CSNO Act. In *Rinehart v Welker*,²⁴ Young JA observed that “*information*” is “*a very wide term*”, although the information to be protected is spelt out in s.7. In *Fairfax Digital*,²⁵ Basten JA considered some of the definitions in s.3, noting that the definitions of “*suppression order*” and “*non-publication order*” are “*in terms which do little to clarify their operation*”.
- 19 The Agreement in Principle Speech noted that the power in s.7 is the “*legislative sanction that is required to bind all members of the public, not just those who are present at proceedings*”.²⁶ In *Hogan v Hinch*, French CJ²⁷ described as “*contentious*” the question whether a non-statutory order restricting the publication of proceedings in open court extended to the world at large.²⁸ In *Rinehart v Welker*,²⁹ Bathurst CJ and McColl JA

²⁴ [2011] NSWCA 403 at [133].

²⁵ [2012] NSWCCA 125 at [38]-[44].

²⁶ Above n 2.

²⁷ [2011] HCA 4; 243 CLR 506 at 532-533 [23].

²⁸ French CJ referred, in this respect, to NSWLRC Discussion Paper 43, “*Contempt*”, which led to the NSWLRC Report 100, above n 4, where reform in this area was recommended.

²⁹ [2011] NSWCA 403 at [25].

observed that, underlying the enactment of the CSNO Act was, in part, a concern to resolve the question whether, a court's inherent or implied power to make orders restricting the publication of any aspect of proceedings before it extended to bind the world at large.

20 Section 8 specifies five grounds for making an order. The order must specify the ground or grounds on which the order is made:

“8 Grounds for making an order

- (1) *A court may make a suppression order or non-publication order on one or more of the following grounds:*
 - (a) *the order is necessary to prevent prejudice to the proper administration of justice,*
 - (b) *the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,*
 - (c) *the order is necessary to protect the safety of any person,*
 - (d) *the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),*
 - (e) *it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.*
- (2) *A suppression order or non-publication order must specify the ground or grounds on which the order is made.”*

21 The Agreement in Principle Speech observed with respect to s.8 that the courts “*must maintain their discretionary power to weigh relevant interests in the particular case before them*” and that “*these grounds will greatly assist our courts in balancing this often-difficult determination*”. The Parliamentary Secretary observed that the administration of justice ground (s.8(1)(a)) was specifically recommended by the NSWLRC while the

security ground (s.8(1)(b)) *“is common in relevant Commonwealth legislation”*.³⁰

22 In *Rinehart v Welker*,³¹ Bathurst CJ and McColl JA observed that the *“concept of the administration of justice is multi-faceted”* and considered the meaning of the term, as did Young JA.³² In *Fairfax Digital*,³³ Basten JA examined the concept of *“the proper administration of justice”* in s.8(1)(a).

23 The express reference to interests *“in relation to national or international security”* in s.8(1)(b) enacts a statutory ground with respect to New South Wales law.³⁴

24 In the Agreement in Principle Speech, the Parliamentary Secretary observed that the public interest ground (s.8(1)(e)) was *“intended to cover those situations that do not fit easily”* within other specific grounds, and that it was *“intended that these other reasons should only outweigh the public interest in open justice where it does so ‘significantly’”*.³⁵

25 In *Fairfax Digital*, Basten JA³⁶ noted that s.7 has the potential to deal with two quite separate categories of information, with the open justice statement in s.6 being apposite to the second category:

- (a) information the publication of which could give rise to a charge of contempt of court under the sub judice principle - that is publication of material that has a tendency to influence the conduct or outcome of particular legal proceedings;

³⁰ Agreement in Principle Speech, above n 2.

³¹ [2011] NSWCA 403 at [39]-[40].

³² Ibid at [86]-[101].

³³ [2012] NSWCCA 125 at [46]-[51].

³⁴ The relationship at common law between national security and the administration of justice, in the context of a screening order to protect a witness in a criminal trial for a State offence, was considered in *BUSB v R* [2011] NSWCCA 39; 248 FLR 368.

³⁵ Agreement in Principle Speech, above n 2.

³⁶ Ibid at [33]-[34].

- (b) information revealed in the course of proceedings, non-publication of which may be necessary for one of a number of reasons, but the consequence of which will be a degree of interference with the principle that proceedings should be conducted in open court.
- 26 In *Fairfax Digital*, Basten JA³⁷ observed that the primary purpose of all the grounds in s.8(1) (except s.8(1)(a)), is to permit a court to protect witnesses and parties in proceedings from disclosure of information about them to the general public, with only s.8(1)(a) appearing to extend to the protection of a jury from inflammatory or irrelevant material while the proceedings are on foot.
- 27 The meaning of the term “*necessary*” (used repeatedly in s.8(1)) has been considered in a number of decisions. In *Rinehart v Welker*, Bathurst CJ and McColl JA noted that the word was adopted as the test for making an order on the recommendation of the NSWLRC. Their Honours stated that the word “*necessary*” is a strong word and that s.6 reinforces the legislative intention that CSNO Act orders should only be made in exceptional circumstances, and that “*necessary*” did not mean convenient, reasonable or sensible.³⁸
- 28 The meaning to be given to “*necessary*” arose again in *Fairfax Digital*. Basten JA³⁹ said that the word “*necessary*” can have shades of meaning, with the meaning depending on context. His Honour noted that the word was used in each paragraph in s.8(1) to describe the connection between the proposed order and an identified purpose, and that the term may not take the same place on the variable scale of meaning in each case.

³⁷ Ibid at [36].

³⁸ [2011] NSWCA 403 at [27]-[31]. Bathurst CJ and McColl JA noted at [27] that the concept of exceptional circumstances at common law was illustrated by the statement of Spigelman CJ in *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 324; 61 NSWLR 344 at 354 [21] that from time to time courts make orders that some aspect of court proceedings not be the subject of publication, but that any “*such order must, in the light of the principle of open justice, be regarded as exceptional*”. Young JA considered the term “*necessary*” at [102]-[107].

³⁹ [2012] NSWCCA 125 at [45]-[46].

- 29 Bathurst CJ⁴⁰ in *Fairfax Digital* agreed that what is necessary will depend on the particular grounds in s.8 relied upon and the factual circumstances said to give rise to the order. Although it was not sufficient that the orders are merely reasonable or sensible, the Chief Justice agreed that the word “*necessary*” should not be given a narrow construction.
- 30 In *Welker v Rinehart (No. 6)*,⁴¹ Ball J considered (and declined) to make an order upon the ground that it was necessary to protect the safety of any person (s.8(1)(c)). Ball J⁴² applied what was said in *Rinehart v Welker* concerning the meaning of “*necessary*”, according the same meaning to the term in s.8(1)(c) as that given to s.8(1)(a).
- 31 In *Ashton v Pratt*,⁴³ Brereton J declined to make an order (sought under s.8(1)(a), (c) and (e)), observing that the test of necessity in s.8 required a high degree of certainty (in the same way as at common law).
- 32 In *Da Silva v R (No. 2)*,⁴⁴ a non-publication order was made (upon the ground in s.8(1)(a)) concerning evidence of a “*reward*” application for witness testimony, given the impact of any publication upon future investigations.
- 33 In *X v Sydney Children’s Hospitals Specialty Network*,⁴⁵ Adamson J made a non-publication order (and a pseudonym order) (upon the grounds in s.8(1)(a), (c) and (e)) with respect to the name of a child plaintiff in medical negligence proceedings.

⁴⁰ Ibid at [8].

⁴¹ [2012] NSWSC 160.

⁴² Ibid at [46]-[50].

⁴³ [2011] NSWSC 1092 at [11].

⁴⁴ [2012] NSWCCA 106.

⁴⁵ [2011] NSWSC 1272.

Procedure for Making an Order (s.9)

- 34 Section 9 provides that a court may make a suppression order or non-publication order on its own initiative or on the application of a party to the proceedings concerned, or any other person considered by the court to have a sufficient interest in the making of the order.
- 35 Section 9(2) gives a statutory right to appear to a group of persons or entities, including the applicant for the order, a party to the proceedings concerned, the Government (or an agency of the Government) of the Commonwealth or of a State or Territory and a news media organisation. In *Rinehart v Welker*,⁴⁶ Bathurst CJ and McColl JA observed that s.9(2)(d) now enshrined the standing of media interests, at least insofar as a “*news media or organisation*” is concerned.
- 36 A broad definition of “*news media organisation*” is contained in s.3, encompassing a commercial enterprise that engages in the business of broadcasting or publishing news or a public broadcasting service that engages in the dissemination of news through a public news medium.⁴⁷
- 37 In addition, any other person who, in the court’s opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made is entitled to appear. Section 9(2)(e) was inserted on the recommendation of the NSWLRC in its 2003 Report.⁴⁸

Interim Orders (s.10)

- 38 Section 10(1) provides for a court to make an interim suppression order or non-publication order, without determining the merits of the application, which will have effect, subject to revocation by the court, until the

⁴⁶ [2011] NSWCA 403 at [33].

⁴⁷ Section 3 CSNO Act utilises the definition of “*news media organisation*” in s.10(5) *Court Information Act 2010*. This definition differs from that of “*news publisher*” contained in cl.3 of the model provisions.

application is determined. If an interim order is made, the court must determine the application itself as a matter of urgency (s.10(2)). The NSWLRC recommended that provision be made for interim orders.⁴⁹

- 39 In *Welker v Rinehart (No. 5)*,⁵⁰ Ball J observed that s.10 had been included in the CSNO Act to cater for the prospect that it was not possible to hear argument in relation to whether a suppression or non-publication order should be made, in which case there is power to make an interim order that should last only as long as is necessary in order for the court to hear the argument on the merits.

Geographical Application (s.11) and Duration of Orders (s.12)

- 40 Section 11(1) CSNO Act provides that a suppression order or non-publication order applies only to the disclosure or the publication of information in a place where the order applies, as specified in the order.

- 41 However, a suppression order or non-publication order is not limited to application in New South Wales and can be made to apply anywhere in the Commonwealth (s.11(2)). An order is not to be made to apply outside New South Wales unless the court is satisfied that this is necessary for achieving the purpose for which the order is made (s.11(3)).

- 42 In the Agreement in Principle Speech, the Parliamentary Secretary stated that *“a broader application of suppression and non-publication orders is necessary especially in an age of internet news, where a restriction imposed in one jurisdiction only will not prevent that information from being disseminated via a news publication across the worldwide web from a source located outside that jurisdiction”*.⁵¹

⁴⁸ NSWLRC Report 100, above n 4, paragraphs 10.21–10.24.

⁴⁹ NSWLRC Report, above n 4, paragraphs 10.25–10.27.

⁵⁰ [2012] NSWSC 45 at [11].

⁵¹ Agreement in Principle Speech, above n 2.

- 43 A suppression order or non-publication order operates for the period decided by the court and specified in the order (s.12(1)). In deciding the period for which an order is to operate, the court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made (s.12(2)). The period for which an order operates may be specified by reference to a fixed or ascertainable period, or by reference to the occurrence of a specified future event (s.12(3)).
- 44 In the Agreement in Principle Speech, the Parliamentary Secretary observed that the SCAG Working Group considered that a provision such as s.12 was necessary for the purposes of certainty and compliance, and that the NSW Attorney General Department's Report on Access to Court Information⁵² had recommended that restrictions imposed by any order should cease to have effect after 75 years in relation to criminal, adoption and care proceedings, and after 30 years in relation to civil proceedings. However, after consultation, it was concluded for the purposes of the model provisions that, while orders should not be open ended, fixed duration periods may not fit the circumstances of each case or be consistent with similar legislation, and thus the more flexible formulation contained in s.12 was adopted.⁵³
- 45 The necessity for a court to consider the geographical application and duration of orders made under the CSNO Act has given rise to orders which apply throughout the Commonwealth⁵⁴ and which operate until specified times.⁵⁵

⁵² Above n 5.

⁵³ Agreement in Principle Speech, above n 2.

⁵⁴ *X v Sydney Children's Hospital Speciality Networks* [2011] NSWSC 1272 at [16]; *Da Silva v R (No. 2)* [2012] NSWCCA 106.

⁵⁵ *R v Debs* [2011] NSWSC 1248 at [50]; *X v Sydney Children's Hospitals Speciality Network* [2011] NSWSC 1272 at [17]; *TX Australia Pty Ltd v Broadcast Australia Pty Ltd* [2012] NSWSC 4 at [127].

Orders Concerning Material on Internet

- 46 The challenges of the internet in the area of criminal jury trials have been acknowledged. In 2004, Spigelman CJ observed (in the context of a murder trial that had attracted great publicity), that the “*accessibility of information on the internet has been enhanced by contemporary search engines to such a degree that special measures are now called for*”. The Chief Justice observed that in “*addition to strong warnings to the jury, it may be advisable for the Crown to conduct searches in advance of a trial and request Australian based websites to remove references to an accused for the period of a trial*”.⁵⁶
- 47 In 2008, the Chief Justice and the Chief Judge of the District Court promulgated Practice Notes⁵⁷ applicable to criminal jury trials in the Supreme and District Courts, which provide a mechanism for removal of judgments which detail specifics of the proceedings or related proceedings from the internet, for the duration of the trial or another appropriate period.
- 48 The question whether an order may be made under the CSNO Act requiring removal of material from the internet (in the context of a criminal jury trial) was examined in *Fairfax Digital*, where it was observed⁵⁸ that judges conducting criminal trials in the Supreme Court had thought it appropriate to make suppression orders in relation to material available on the internet.⁵⁹

⁵⁶ *R v Burrell* [2004] NSWCCA 185 at [39]. See, generally, R Burd, “*Is there a Case for Suppression Orders in an Online World?*” (2012) 17 Media and Arts Law Review 107. For a recent example of steps taken by a trial judge in the United Kingdom to require removal of material from the internet and electronic media before a high profile jury trial, see *R v Simon Harwood* (Fulford J, Southwark Crown Court, 20 July 2012) at www.judiciary.gov.uk.

⁵⁷ Practice Note SC CL 9 “*Supreme Court Common Law Division - Removal of Judgments from the Internet*”; District Court Practice Note (Crime) No. 8 “*Removal of Judgments from the Internet*”.
⁵⁸ [2012] NSWCCA 125 at [66]-[68].

⁵⁹ *R v Perish* [2011] NSWSC 1102 (Price J) and *R v Debs* [2011] NSWSC 1248 (RS Hulme J).

- 49 Basten JA⁶⁰ concluded in *Fairfax Digital* that the orders made in the District Court were ineffective, and thus not necessary, so that the ground in s.8(1)(a) was not satisfied.
- 50 A constitutional challenge, based upon suggested inconsistency with provisions in the *Broadcasting Services Act 1992 (Cth)*, was also considered by the Court.⁶¹ Basten JA concluded that the CSNO Act could not validly support an order addressed “to the world at large” covering material on internet sites of which the hosts were unaware. To the extent that the CSNO Act permitted a court to make such an order, it would be inconsistent with the *Broadcasting Services Act 1992 (Cth)*.⁶² If, however, the court was satisfied material had the tendency to prejudice the fairness of a coming trial, an order directed to an internet content host, relating to specified material of which it had been made aware, would not contravene the constitutional limits of the Act.⁶³

Contents of an Order under CSNO Act

- 51 The operation of the various provisions of the CSNO Act means that an order must specify:
- (a) the ground or grounds under s.8 on which the order is made (s.8(2));
 - (b) the information to which the order applies, with sufficient particularity to ensure that it is limited to achieving the purpose for which it was made (s.9(5));
 - (c) any exception or conditions to which the order is subject (s.9(4));

⁶⁰ [2012] NSWCCA 125 at [71]-[80].

⁶¹ *Ibid* at [81]-[96].

⁶² *Ibid* at [95]-[96].

⁶³ *Ibid* at [94].

- (d) the place to which the order applies - whether New South Wales only or elsewhere in the Commonwealth as well (s.11(1));
- (e) the duration of the order, by reference to time or the occurrence of a specified future event (s.12)(1) and (3)).

Review (s.13) and Appeal (s.14)

- 52 Section 13(1) provides that the court that made a suppression order or non-publication order may review the order on the court's own initiative or on the application of a person who is entitled to apply for the review. Persons who are entitled to apply for and to appear and be heard by the court on the review of an order are the applicant for the order, a party to the proceedings in connection with which the order was made, the Government (or an agency of the Government) of the Commonwealth or of a State or Territory, a news media organisation and any other person who, in the court's opinion, has a sufficient interest in the question of whether the relevant orders should continue to operate (s.13(2)).
- 53 On a review, the court may confirm, vary or revoke the order and may in addition make any other order that the court may make under the CSNO Act (s.13(3)).
- 54 A s.7 order is an interlocutory order, and there is nothing in the CSNO Act which prevents a further application for a suppression order.⁶⁴ However, the ordinary constraints on the relitigation of an interlocutory application operate.⁶⁵
- 55 Section 14 makes provision for an appeal, by leave, to lie against a decision to make, or not to make, a suppression order or non-publication order, or a decision on review. The "*appellate court*" for the purposes of s.14, is the court to which appeals lie against final judgments or orders of

⁶⁴ *Welker & Ors v Rinehart & Anor (No. 6)* [2012] NSWSC 160 at [17].

the original court or, if there is no such court, the Supreme Court (s.14(2)). As the CSNO Act applies to a range of courts in both civil and criminal proceedings, the avenue of appeal from a court will depend upon the applicable statutory scheme for appeals against final judgments or orders of that court.

- 56 A statutory entitlement to appear and be heard on an appeal extends, once again, to the applicant, a party, the Government, a news media organisation and any other person who, in the appellate court's opinion, has a sufficient interest in the decision that is the subject of appeal (s.14(3)).
- 57 The appellate court may confirm, vary or revoke the order or decision subject to the appeal, and may make any order or decision under the Act that could have been made in the first instance (s.14(4)). An appeal under s.14 is to be by way of rehearing and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of a decision may be given on the appeal (s.14(5)).
- 58 In *Fairfax Digital*,⁶⁶ Basten JA held that the word "review" in s.14(6) should be construed as referring to an alternative to a statutory appeal, and not to the exercise by the Supreme Court of its supervisory jurisdiction.
- 59 The construction and operation of ss.13 and 14 were considered in *Fairfax Digital*.⁶⁷ The hearing of an appeal (by leave) under s.14 is a hearing de novo. Problems which could arise from this construction can be controlled by the imposition of conditions on leave to appeal. Although the question of leave will depend upon each case, it is likely that in cases involving a reconsideration of an order on fresh or different evidence, leave will

⁶⁵ Ibid at [18]-[22]; *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 at 663 [29].

⁶⁶ [2012] NSWCCA 125 at [20].

⁶⁷ Ibid at [5]-[7], [15]-[27].

commonly be refused and the applicant left to exercise his or her right of review under s.13.⁶⁸

- 60 If the District Court makes an interlocutory order under the CSNO Act in criminal proceedings on indictment, the Court of Criminal Appeal is the “*appellate court*” under s.14(2) and an appeal lies (by leave) to that Court.⁶⁹

Exception for Court Officials

- 61 Section 15 provides an exception for court officials. A suppression order does not prevent a person from disclosing information if the disclosure is not by publication, and is in the course of performing functions or duties or exercising powers in a public official capacity:

- (a) in connection with the conduct of proceedings or the recovery or enforcement of any penalty imposed in proceedings, or
- (b) in compliance with any procedure adopted by a court for informing a news media organisation of the existence and content of a suppression order or non-publication order made by the court.

Contravention of Order (s.16)

- 62 Section 16 creates a statutory offence if a person engages in conduct that constitutes a contravention of a suppression or non-publication order and is reckless as to whether the conduct constitutes a contravention of the

⁶⁸ Ibid at [6]-[7], [21]-[24].

⁶⁹ Ibid at [16]-[17]. Given the acceptance that the Court of Criminal Appeal had statutory appellate jurisdiction, proceedings in the Court of Appeal for judicial review were unnecessary and were dismissed: *Fairfax Digital Australia & New Zealand Pty Ltd v District Court of NSW* [2012] NSWCA 172.

order (s.16(1)). The word “reckless”, which is not defined in the CSNO Act, has various uses as a criterion of legal liability.⁷⁰

63 In *Fairfax Digital*,⁷¹ it was accepted that an offence under s.16 could not be committed unless the accused person has had the order brought to their attention.

64 Conduct which would constitute a contravention of a suppression order or non-publication order may also be capable of constituting contempt other than in the face of, or in the hearing of, the court. Subsections 16(2) and (3) make clear that such conduct may be prosecuted by way of a s.16(1) offence or as contempt of court, but that an offender is not liable to double punishment.⁷²

65 Proceedings for an offence under s.16 are to be dealt with either summarily before the Local Court⁷³ or summarily before the Supreme Court in its summary jurisdiction.⁷⁴

⁷⁰ Section 4A *Crimes Act 1900*; *Pollard v Commonwealth Director of Public Prosecutions* (1992) 28 NSWLR 659 at 669ff; *Banditt v The Queen* (2005) 224 CLR 262 at [1]–[8], [36]; *Blackwell v R* [2011] NSWCCA 93; 208 A Crim R 392 at 406-410 [66]–[85].

⁷¹ [2012] NSWCCA 125 at [69]–[70].

⁷² Section 16(4) CSNO Act. As to proceedings for contempt other than in the face or hearing of the court, see Pt 55, rr.5–14, Supreme Court Rules 1970; s.203 *District Court Act 1973*; s.24(4)–(5) *Local Court Act 2007*.

⁷³ Section 17(1)(a) CSNO Act; ss.170–218 *Criminal Procedure Act 1986*.

⁷⁴ Section 17(1)(b) CSNO Act; ss.245–257G *Criminal Procedure Act 1986*.