IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S ECI 2019 01228

THE QUEEN (ON THE APPLICATION OF THE DIRECTOR OF PUBLIC PROSECUTIONS) — Applicant

v

THE HERALD AND WEEKLY TIMES PTY LTD & OTHERS (according to the attached Schedule) — Respondents

---

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	9–13, 16–17 November 2020; 4 December 2020; 28–29 January 2021; 1 February 2021 (liability hearing) 10–11, 16–17 February 2021 (penalty hearing)
DATE OF JUDGMENT:	4 June 2021
CASE MAY BE CITED AS:	The Queen v The Herald & Weekly Times Pty Ltd
MEDIUM NEUTRAL CITATION:	[2021] VSC 253

CONTEMPT OF COURT – Breach of suppression order contempt – High profile accused faced two trials – Suppression order made to protect accused's right to fair second trial – Suppression order prohibited publication of 'information derived from the trials' – Overseas news media organisations published information identifying accused and details of charges after jury's verdict in first trial – Multiple Australian news media outlets published information derived from the trial and encouraged searches to locate overseas publications identifying accused.

CONTEMPT OF COURT – Penalty – Applicable principles – Where pleas of guilty entered at trial – Where privilege maintained over legal advice – Where content, tone and subject matter of publications conveyed intention to frustrate purpose or efficacy of suppression order – Where respondents consent to costs order in favour of applicant – Where natural persons employed by respondents said to be were impacted by separate charges that were discontinued at trial.

APPEARANCES:	Counsel	Solicitors
For the applicant	Ms L De Ferrari SC with Ms R Kaye of counsel (for liability hearing) Ms R Kaye of counsel (for penalty hearing)	Ms Abbey Hogan, Solicitor for Public Prosecutions
For the first, fourth, fifth, seventh, ninth and twelfth respondents	Mr W T Houghton QC with Mr S Mukerjea and Mr M A McLay of counsel	Thomson Geer
For the fifteenth, twentieth, twenty-sixth, twenty-eighth, thirtieth and thirty-third respondents	Dr M Collins QC with Mr S Mukerjea and Mr M A McLay of counsel	Thomson Geer

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 On 22 March 2019, the Director of Public Prosecutions commenced this proceeding, seeking that various media organisations, editors, journalists and television/radio presenters be adjudged guilty of contempt of court. Those charges arose from the following reports published in the media between 12–14 December 2018, following a jury's verdict that Cardinal George Pell ('**Pell**') was guilty of child sex offences.

2 The reports that are the subject of this proceeding ('**impugned reports**') can conveniently be grouped by the relationship between the publishers:

(a) the first, fourth, fifth, seventh, ninth and twelfth respondents ('**News Corp respondents**'):

(i) the online article published on News.com.au on 13 December 2018 and titled 'It's the biggest story in Australia but news.com.au is not allowed to report the details, this is the reason why. NATION'S BIGGEST STORY' ('**News.com.au online article**'), which was automatically syndicated and published in identical form to:

(A) the website of the Herald Sun (heraldsun.com.au) ('**Herald Sun online article**');

(B) the website of the Geelong Advertiser (geelongadvertiser.com.au) ('**Geelong Advertiser online article**');

(C) the website of the Daily Telegraph (dailytelegraph.com.au) ('**Daily Telegraph online article**');

(D) the website of the Weekly Times (weeklytimesnow.com.au) ('**Weekly Times online article**'); and

(E) the website of Advertiser Newspapers (adelaidenow.com.au)

('**Advertiser online article**'),

(together, the '**News Corp online articles**').

(ii) the article published in the print edition of the Courier Mail newspaper on 13 December 2018 and titled 'Court censorship 2. Secret Scandal' ('**Courier Mail article**'); and

(iii) the article published in the print edition of the Daily Telegraph newspaper on 13 December 2018 and titled 'IT'S THE NATION'S BIGGEST STORY' ('**Daily Telegraph article**').

(b) the fifteenth, twentieth, twenty-eighth, thirtieth and thirty-third respondents ('**Nine Entertainment respondents**'):

(i) the article published in the print edition of The Age newspaper on 12 December 2018 and titled 'Why media can't report on a high-profile case' ('**The Age article**');

(ii) the online article published on the website of The Age (theage.com.au) on 13 December 2018 and titled 'Why the media is unable to report on a case that has generated huge interest online' ('**The Age online article**');

(iii) the online article published on the website of The Age (theage.com.au) on 13 December 2018 and titled 'Rampant use of suppression orders has become absurd' ('**The Age online editorial**');

(iv) the article published in the print edition of the Sydney Morning Herald ('**SMH**') on 13 December 2018 and titled 'Why we can't report on a case of huge interest' ('**SMH article**');

(v) the online article published on the website of the Australian Financial Review ('**AFR**') (afr.com.au) on 13 December 2018 and titled 'How the case that can't be named is being reported around the world' ('**AFR online article 1**');

(vi) the online article published on the website of the AFR (afr.com.au) on 13 December 2018 and titled 'Judge slams 'flagrant' media over world's worst kept secret' ('**AFR online article 2**');

(vii) the article published in the print edition of the AFR newspaper on 14 December 2018 and titled 'Judge slams 'flagrant' media' ('**AFR article**');

(viii) the online article published on the website of Business Insider Australia (businessinsider.com.au) on 13 December 2018 and titled 'The Australian media wants to talk about a high-profile criminal conviction but can't – here's why' ('**Business Insider online article**');

(ix) the segment on the 2GB Breakfast radio program broadcast at 5:41am on 13 December 2018 ('**2GB Breakfast segment**');

(x) the segment on the Today Show television program broadcast at 5:32am on 13 December 2018 ('**5:32am Today Show segment**');

(xi) the segment on the Today Show television program broadcast at 6:00am on 13 December 2018 ('**6:00am Today Show segment**'); and

(xii) the segment on the Today Show television program broadcast at 7:02am on 13 December 2018 ('**7:02am Today Show segment**');

(c) the twenty-sixth respondent, the online article published on the website of Mamamia (mamamia.com.au) on 13 December 2018 and titled 'Why today, Australian media can't report on 'the nation's biggest story' ('**Mamamia online article**').

3 On 9 November 2020, the trial commenced.[1] Following the close of the applicant's case, the respondents made submissions of no case to answer on three grounds, one

[1] The intervening nineteen months having been the subject of numerous interlocutory disputes and pleading amendments, including the abandonment by the applicant of many charges initially brought and the discontinuance of the proceeding against several respondents.

of which was successful ('**No Case Ruling**').[2] While there is unavoidable repetition, these reasons assume that the reader is familiar with the No Case Ruling for particulars of the charges that proceeded to trial, and those in respect of which the applicant called evidence. Copies of the impugned reports are reproduced in Annexure 2 to the No Case Ruling.

Plea agreement

4 Following the No Case Ruling, some of the remaining respondents opened and partially completed their defence before the parties announced that they had resolved questions of liability by agreement ('**plea agreement**').

5 On 1 February 2021, by consent and implementing the plea agreement, I dismissed all remaining charges of *sub judice* contempt against all respondents, and all remaining charges against the natural person defendants (being individual journalists, editors and presenters). After they entered guilty pleas through their counsel, I further declared that the following respondents ('**guilty respondents**') were adjudged guilty of contempt in respect of the charges and publications identified below:[3]

Respondent	**Charges**
First Respondent The Herald & Weekly Times Pty Ltd ('**HWT**')	Breach of proceeding suppression order contempt in respect of: • the Herald Sun online article (Charge 1) • the Weekly Times online article (Charge 25)
Fourth Respondent News Life Media Pty Ltd ('**News Life Media**')	Breach of proceeding suppression order contempt in respect of the News.com.au online article (Charge 5)
Fifth Respondent Queensland Newspapers Pty Ltd ('**Queensland Newspapers**')	Breach of proceeding suppression order contempt in respect of the Courier Mail article (Charge 9)

2 *The Queen v The Herald & Weekly Times Pty Ltd (Ruling No 2)* [2020] VSC 800 ('**No Case Ruling**'). Only two grounds were ultimately pressed by the respondents and the subject of the ruling.

3 The impugned reports are identified in these reasons by adopting the definitions used in the statement of claim. The charges are identified by number in accordance with the applicant's aide memoire (see [AID.500.006.0001]).

Seventh Respondent The Geelong Advertiser Pty Ltd ('**The Geelong Advertiser**')	Breach of proceeding suppression order contempt in respect of the Geelong Advertiser online article (Charge 13)
Ninth Respondent Nationwide News Pty Ltd ('**Nationwide News**')	Breach of proceeding suppression order contempt in respect of: • the Daily Telegraph article (Charge 17) • the Daily Telegraph online article (Charge 21)
Twelfth Respondent Advertiser Newspapers Pty Ltd ('**Advertiser Newspapers**')	Breach of proceeding suppression order contempt in respect of the Advertiser online article (Charge 29)
Fifteenth Respondent The Age Company Pty Ltd ('**The Age Company**')	Breach of proceeding suppression order contempt in respect of: • The Age article (Charge 33) • The Age online article (Charge 41) • The Age editorial (Charge 47)
Twentieth Respondent Fairfax Media Publications Pty Ltd ('**Fairfax Media Publications'**)	Breach of proceeding suppression order contempt in respect of: • the SMH article (Charge 49) • the AFR online article 1 (Charge 53) • the AFR online article 2 (Charge 59) • the AFR article (Charge 65)
Twenty-sixth Respondent Mamamia.com.au Pty Ltd ('**Mamamia**')	Breach of proceeding suppression order contempt in respect of the Mamamia online article (Charge 71)
Twenty-eighth Respondent Allure Media Pty Ltd ('**Allure Media**')	Breach of proceeding suppression order contempt in respect of the Business Insider online article (Charge 75)
Thirtieth Respondent Radio 2GB Sydney Pty Ltd ('**Radio 2GB Sydney**')	Breach of proceeding suppression order contempt in respect of the 2GB Breakfast segment (Charge 79)
Thirty-third Respondent General Television Corporation Pty Ltd ('**GTC**')	Breach of proceeding suppression order contempt in respect of: • the 5:32am Today Show segment (Charge 83)

- the 6:00am Today Show segment (Charge 85)
- the 7:02am Today Show segment (Charge 87)

6 Having regard to the essential elements of the offence of contempt by breach of a proceeding suppression order,[4] each of the above respondents accepted, by that plea of guilty, that:

(a) the respondent published the report the subject of the relevant charge;

(b) the publication of the report frustrated the effect of the proceeding suppression order because it contained material that was contrary to or that infringed the terms of the order; and

(c) when the report was published, the respondent's knowledge of the terms and effect of the order was such that a reasonable person with that knowledge would have understood that the publication of the report would have the tendency to frustrate the efficacy of the order.

7 It was not contentious that the court should sentence the respondents by reference to the extent that the breaches had a tendency to frustrate the purpose or efficacy of the proceeding suppression order, and not simply on the basis of breaches of the terms of the suppression order simpliciter. However, and in that context, there was a debate between the parties as to precisely what was admitted by the plea.

8 The guilty respondents submitted that the applicant should be held to her pleaded case and that they be sentenced on the basis that they admitted to frustrating the purpose or efficacy of the suppression order to the extent that they each may have encouraged readers of the impugned reports to conduct their own searches in order to find one or more of the 35 overseas publications identified by the applicant, and not by the content of the articles themselves. I will explain my reasons for rejecting this submission in due course.

---

4 No Case Ruling, [81] (n 2); *R v Hinch* [2013] VSC 520, [52] ('***Hinch***').

Relief sought

9 The applicant sought the following orders in respect of each of the guilty respondents on each of the charges identified in paragraph 5 above:

(a) a declaration that they be adjudged guilty of contempt of court on the basis that the publication of each of the impugned reports breached the proceeding suppression order of the Honourable Chief Judge Kidd made on 25 June 2018 ('**suppression order**');

(b) a fine, with the recording of a conviction; and

(c) costs.

10 The News Corp respondents submitted that the appropriate disposition of the charges was:

(a) the entry of a conviction and the imposition of a fine towards the middle of the range against News Life Media in relation to charge 5, arising from the publication of the News.com.au online article;

(b) the discharge of HWT, The Geelong Advertiser, Nationwide News and Advertiser Newspapers without conviction or penalty in relation to charges 1, 13, 21, 25 and 29, arising from the remaining News Corp online articles;

(c) the discharge of Queensland Newspapers without conviction or penalty in relation to charge 9, arising from the publication of the Courier Mail article; and

(d) the imposition of a modest fine (at the low end of the range) without conviction against Nationwide News in relation to charge 17, arising from the publication of the Daily Telegraph article.

11 The Nine Entertainment respondents and Mamamia submitted that the appropriate disposition of the charges in respect of the impugned reports for which they were responsible was:

(a) the entry of a conviction and the imposition of a single fine, towards the middle

of the range, against The Age Company in relation to charges 33, 41 and 47, arising from the publication of The Age article, The Age online article and The Age online editorial;

(b) no conviction be entered or fine imposed against Fairfax Media Publications in relation to charge 49, arising from the publication of the SMH article;

(c) the entry of a conviction and the imposition of a modest fine (at the low end of the range) against Fairfax Media Publications in relation to charges 53, 59 and 65, arising from the publication of the AFR online article 1, the AFR online article 2 and the AFR article;

(d) the imposition of a modest fine (at the low end of the range) without conviction against Mamamia in relation to charge 71, arising from the publication of the Mamamia online article;

(e) the imposition of a modest fine (at the low end of the range) without conviction against Allure Media in relation to charge 75, arising from the publication of the Business Insider online article;

(f) the imposition of a modest fine (at the low end of the range) without conviction against Radio 2GB Sydney in relation to Charge 79, arising from the broadcast of the 2GB Breakfast segment; and

(g) the imposition of a modest fine (at the low end of the range) without conviction against GTC in relation to Charges 83, 85 and 87, arising from the broadcast of the 5:32am Today Show segment, the 6:00am Today Show segment and the 7:02am Today Show segment.

Findings of facts

12 My factual findings for the assessment of penalty are based upon the evidence admitted both at trial and on the plea hearing from the following persons:

(a) Ms Kirsten Aaskov, Ms Lauren Myers, Ms Lillian Pham and Mr Rowan Slattery, each a solicitor employed by the Office of Public Prosecutions;

(b) Mr Edward Gardiner, a media manager at the County Court of Victoria;

(c) Ms Marlia Saunders, a senior litigation counsel at News Corp Australia;

(d) Mr Alex Lavelle, the Editor of The Age during the relevant period;

(e) Mr Mark Coultan, a senior news editor at the AFR;

(f) Mr Simon Thomsen, a journalist employed by Allure Media during the relevant period;

(g) Ms Rachel Launders, the General Counsel and Group Company Secretary of Nine Entertainment;

(h) Mr Jason Lavigne, the Chief Executive Officer and co-founder of Mamamia;

(i) Mr Darren Wick, the Director of News and Current Affairs for Australia of Nine Entertainment; and

(j) Mr Gregory Byrnes, the Head of Content for Nine Radio Operations Pty Ltd, an entity within Nine Entertainment.

13 Although all the charges were tried in a single hearing, it was not a joint trial. The evidence admitted against one respondent is not taken to be admitted against all respondents. Rather, throughout the trial, the particular respondent against whom evidence was tendered was identified.

14 In light of the common issues of fact that relate to the cases against each respondent, particularly those who are charged with involvement in multiple publications, it is convenient to summarise the applicant's evidence as it is relevant to the whole of the proceeding, rather than for each individual respondent. However, as will become apparent, when making findings relating to individual respondents that rely on the applicant's evidence, I have had careful regard to the evidence led and specific documents tendered against each respondent and have not relied on the evidence in broad spectrum when inappropriate to do so.

15 Although I am repeating part of my findings on the No Case Ruling, to assist in clearly following the submissions and findings at this penalty stage, I now restate the main background facts.

The Pell trials

Two trials

16 Pell was committed to stand trial on 1 May 2018, with the charges on which he was committed to be heard sequentially in two separate trials; the second trial in time to commence very soon after the first had concluded. Each trial was to proceed before the Chief Judge of the County Court sitting with a jury. The members of each jury were to be drawn from eligible members of the community in the greater Melbourne area. At all material times, both within and well beyond that geographical area, there was intense media and public interest in the prosecutions.

17 The first trial in time was of the charges of child sexual abuse alleged to have taken place at St Patrick's Cathedral and was referred to as the '**cathedral trial**'. The second trial, in which Pell faced further charges alleging child sexual abuse said to have occurred at a swimming pool in Ballarat, was referred to as the '**swimmers trial**'.

The suppression order

18 On 25 June 2018, Chief Judge Kidd made the suppression order under s 17 of the *Open Courts Act 2013* (Vic) on the application of the prosecutor.

19 The order stated the following:

> THE COURT ORDERS THAT:
>
> (1) Publication is prohibited of any report of the whole or any part of these trials, and any information derived from these trials and any court documents associated with these trials, save that publication is permitted that the accused is facing for historical child sexual offences in the County Court of Victoria.
>
> (2) The prohibition on publication applies within all States and Territories of Australia and on any website or other electronic or broadcast format accessible within Australia.
>
> (3) For the purpose of this order, 'publication' has the meaning attributed to it by s 3 of the Open Courts Act 2013, that is to say, it means the

dissemination or provision of access to the public by any means including, publication in a book, newspaper, magazine or other written publication, or broadcast by radio or television; or public exhibition; or broadcast or written communication.

(4) This order will expire upon commencement of the second trial in time, save that publication of any report of the whole or any part of the first trial in time and any information derived from and any court documents associated with it will be prohibited until verdict in the second trial in time.

(5) For the avoidance of doubt, publication is prohibited of the following information:

a) number of complainants in either or both trials;

b) the number of charges, save for the fact that there are "charges";

c) the nature of the charges, save for the fact that they are charges of "historical child sexual offences"; and

d) the fact of multiple trials.

20 The Chief Judge made the suppression order for the purpose of preventing a real and substantial risk of prejudice to the proper administration of justice. Chief Judge Kidd recorded that the terms of the suppression order were necessary to prevent a real and substantial risk of prejudice to the proper administration of justice, pursuant to s 18(1)(a) of the *Open Courts Act*. As required under s 11, the court gave notice to relevant news media organisations concerning the application, and counsel and a solicitor from Macpherson Kelley[5] appeared before the court for a number of them.

21 The media representatives did not oppose a suppression order in respect of publication of any report of the whole or any part of the trials, or any information derived from the trials in any form. The contest was whether the order ought to apply throughout the whole of Australia. Several media organisations contended that the order should be limited in geographical reach to Victoria. The prosecution and defence submitted that it was appropriate that an Australia-wide order be made.

22 Chief Judge Kidd ruled, publishing his reasons ('**Suppression Order Ruling**'),[6] that it was necessary for the suppression order to apply beyond Victoria to Australia as a

---

5 The media law team at Macpherson Kelley, who subsequently moved to Thomson Geer, has acted for all respondents throughout this proceeding.

6 *DPP (Vic) v Pell (Suppression Order)* [2018] VCC 905 ('**Suppression Order Ruling**').

whole and ordered accordingly. There was no appeal.

23 On 25 June 2018, the County Court notified by email various media organisations, lawyers acting for media organisations and individual journalists (amongst others) of the suppression order, providing them with a copy.

The cathedral trial and jury verdict

24 On 7 November 2018, the cathedral trial commenced before Chief Judge Kidd and a jury. The first jury was discharged after being unable to agree on a verdict and a second jury was empanelled. On 6 December 2018, the jury retired to consider its verdict.

25 On 11 December 2018 at 3:44pm, the jury delivered verdicts of guilty.[7]

26 At that time, the swimmers trial was listed to commence in the County Court on 11 March 2019. It remained extant until 26 February 2019, when the applicant filed a notice of discontinuance of the charges to be tried in that trial, following an evidentiary ruling by the trial judge. The evidentiary ruling that caused the prosecution of the swimmers trial to be abandoned was unrelated to the publication of the impugned reports. The suppression order was revoked later that day. Until that occurred, the suppression order was in force, operative for the reasons explained in the Suppression Order Ruling.

The publications and the application to vary the suppression order

27 By no later than 9:45am on 12 December 2018, online publications originating outside of Australia (but accessible within Australia) began reporting the conviction, including articles naming Pell and identifying information derived from the trial.

28 That day, various local media companies instructed Macpherson Kelley to apply to the court to have the suppression order varied or revoked. Those solicitors first contacted the Associate to Chief Judge Kidd by phone seeking an urgent hearing for an application to review the suppression order, and at 5:18pm on 12 December 2018 they were notified by email that Chief Judge Kidd would hear any application on

7 Since overturned by the High Court of Australia*: Pell v The Queen* (2020) 376 ALR 478.

14 December 2018 at 9:30am.

29 In the evening of 12 December 2018, after that notification from the court, the guilty respondents began publishing the impugned reports. My detailed findings in respect of the impugned reports follow, but it is notable that they were published between 7:11pm on 12 December 2018 and the morning of 14 December 2018.

30 On the morning of on 13 December 2018, after several of the impugned reports were published, Macpherson Kelley confirmed it acted for HWT (the first respondent), Nationwide News (the ninth respondent), The Age Company (the fifteenth respondent), Nine Network Australia Pty Ltd, Macquarie Media Ltd and Seven Network (Operations) Ltd on the application to review the suppression order ('**intervening media parties**'). That hearing proceeded on 9:30am on 14 December 2018.

31 Pausing here, at trial, the applicant relied on 35 publications by overseas media, including by the Washington Post, the New York Post, Radar Online and the Daily Beast ('**overseas publications**'). In the No Case Ruling, I set out my findings of the publication times of the overseas publications and identified the sequence of their publication, and the publication and removal of the impugned reports.[8] For publications that I concluded were published within a specific time period, I identified the earliest possible time they could have been published, so as to draw the most favourable inference reasonably open on the applicant's case in the context of the No Case Ruling.

32 The guilty respondents contended on the plea hearing that the factual findings on the timing of the overseas publications ought be the latest possible time that could have occurred, so as to reflect the applicant's burden of proof. For reasons that will later become apparent, I do not accept the emphasis that the guilty respondents placed on the precise timing of the overseas publications. While I am satisfied that the requisite tendency, as alleged by the applicant, was evident because the impugned reports did

8 No Case Ruling, Annexure 1 (n 2).

encourage readers to search online and identify information derived from the cathedral trial, that was not the gravamen of the tendency to frustrate the suppression order, as I will later explain. For the purposes of penalty, although the chronology is relevant, it is sufficient to conclude that an article was published within a certain time period, rather than identifying a precise time in that range if it is not readily apparent from the article.

33 Save for correcting a typographical error,[9] I restate my findings in the No Case Ruling on timing of publication, in the form of the below table. The entries in the chronology relating to the impugned reports are shaded for emphasis, appearing in green for the time of publication and red for the time removed.

Time (AEDT)	**Publication**
11 December 2018	
Between 4:00pm and 12 December 2018 3:59pm	Black Christian News article published
12 December 2018	
9:43am	The Daily Beast article published
Between 9:43am and 3:59pm	Gov't Slaves article published
9:55am	News Republic article published
1:06pm	Radar Online article published
Approximately 3:00pm	Church Militant article 1 published
Between 4:00pm and 13 December 2018 at 3:59pm	Fox News article published
	National Catholic Reporter article 1 published
	Now The End Begins article published
	America Magazine article published
7:11pm	The Age online article published
13 December 2018	

[9] The references to The Washington Post article 1 and The Washington Post article 2 have been substituted for each other. I reject the guilty respondents' submission that the Gov't Slaves article (item (k)) was published on 12 December 2018, on the basis that a version of the article tendered in the trial (LAY.500.209.0001) bears the date '12/11/2018', being 11 December 2018 expressed in MM/DD/YYYY format.

Between 12:00am and 15 December 2018 at 6:15am	The Washington Post article 2 published
Between 12:00am and 2:57pm	New York Post article published
1:10am	VOA News article published
2:48am	Catholic News Agency article published
	Catholic World Report article published
	EurAsia Review article published
4:16am	National Review article published
5:32am	Today Show segment published
5:41am	2GB Breakfast segment published
6:00am[10]	Courier Mail article published Daily Telegraph article published The Age article published SMH article published
6:00am	Today Show segment published
6:16am	Life Site article published
7:01am	Slate article published
7:02am	Today Show segment published
7:45am	Mamamia.com.au online article published
8:41am	The Washington Post article 1 published
9:00am	Business Insider online article published
9:25am	2GB Breakfast segment (podcast version) published
9:54am	The Age online editorial published
10:24am	Herald Sun online article published News.com.au online article published Daily Telegraph online article published Geelong Advertiser online article published The Advertiser online article published Weekly Times online article published
Between 11:00am and 14 December 2018 at 10:59am	The Catholic Universe article published
11:29am	The Washington Post article 3 published

[10] These publications were in hard copy and printed on the night of 12–13 December 2018.

11:38am	The Hill article published
1:17pm	AFR online article 1 published
Between 4:00pm and 14 December 2018 at 3:59pm	The Tablet article published
	Church Militant article 2 published
	Church Militant article 3 published
6:00pm (approx.)	2GB Breakfast segment (podcast version) removed
6:01pm	Herald Sun online article removed News.com.au online article removed Daily Telegraph online article removed Geelong Advertiser online article removed The Advertiser online article removed Weekly Times online article removed
6:20pm	The Age online editorial removed
11:41pm	UPI article published
6:25pm	AFR online article 2 published
14 December 2018	
6:00am[11]	AFR article published
8:00am	The Straits Times article published
3:39pm	Asia Times article published
Between 4:00pm and 15 December 2018 at 3:59pm	First Amendment Watch article published
	Richard Dawkins Foundation article published
15 December 2018	
6:15am	The Day article published
18 December 2018	
1:01pm	The Age online article removed
19 February 2019	
11:10am	Mamamia.com.au online article removed
22 February 2019	
1:46pm	AFR online article 1 removed AFR online article 2 removed
6:04pm	Business Insider online article removed

[11] This publication was in hard copy and printed on the night of 13–14 December 2018.

34 At 11:00am on 13 December 2018, Chief Judge Kidd called the parties to attend a special mention hearing to discuss the media reporting that had occurred overnight. Chief Judge Kidd expressed a concern to the prosecution and defence counsel, which I now note as it was pressed by the applicant in these proceedings. His Honour said:

> Some of the media that has occurred overnight at the very least raises a serious question as to whether my suppression order has been breached in the most egregious way possible. The media coverage overnight also raises a serious question, quite independently of that, of contempt of the court, namely bringing inappropriate and improper pressure upon me to vary or revoke my suppression order application.

35 Chief Judge Kidd observed that the media:

> seem to be operating on a misinformed basis that it's okay to print everything and anything apart from the name of [Pell]. And that's not what my suppression order says. … My suppression order says "no information", and that includes the conviction.

36 Some journalists were surprised by a ferocity evident in the Chief Judge's response, and the judge himself questioned whether he ought calm his demeanour before proceeding, such was his response to the evidence of breach of the suppression order. He directed that the transcript of his remarks be distributed to the media, which occurred by email at 1:49pm that afternoon.

37 Although some guilty respondents took down certain impugned reports (as I will note in due course), a number of other respondents continued to publish throughout 13 December and into 14 December 2018 (either by updating existing publications or publishing fresh articles), including Fairfax Media Publications (the publisher of the AFR) and the publishers of the News Corp online articles.

38 On 14 December 2018, Chief Judge Kidd dismissed the application to review the suppression order, which he confirmed.[12] At that hearing, the intervening media parties were represented by counsel.

39 The primary argument put by the intervening media parties was that it would be idle, ineffectual or futile to maintain the suppression order. His Honour noted that on the

---

12 *DPP v Pell (Review of Suppression Order)* [2018] VCC 2125.

basis of two affidavits placed before the court, the intervening media parties submitted that the extent of online dissemination had generated significant publicity of information concerning the conviction, noting references on Twitter, Facebook, Reddit, Wikipedia, Google and other publications originating outside of, but accessible within Australia. They contended that the suppression order was futile, as the 'genie was out of the bottle'.

40 Chief Judge Kidd observed that the necessity for the suppression order was reinforced by the jury's verdict in the cathedral trial, commenting, were it lifted, that it would be forensically devastating to Pell's ability to run any defence — particularly one that involved mistaken identity, accident or misunderstanding — if any information derived from the cathedral trial was published. His Honour considered that any direction that he might give to the jury in the swimmers trial would be ineffectual, at least to some material degree.

41 His Honour concluded that exposure of potential jurors to the publication material relied on by the intervening media parties required an active level of investigation or enquiry, which limited the reach of its dissemination within Australia, in contrast to the consequences of exposure to mainstream media saturation, which would inevitably be widespread and total. The extent of overseas media exposure did not, in the Chief Judge's view, render the order nugatory or unnecessary. His Honour noted the possibility, but did not take it into account, that some of the media organisations may not have come to court with clean hands, given the publicity in the 24 to 48 hours prior to the review application. I pause to note that this possibility assumed significance in the trial of this proceeding, which is later discussed.

42 From 6:01pm on 13 December 2018, the impugned reports available online began to be removed. Notwithstanding his Honour's ruling, a number of the impugned reports remained online after the intervening media parties' application was dismissed. The last of the articles were removed on 22 February 2019, some ten weeks after the suppression order was confirmed.

The impugned reports

43 I now return to the impugned reports to express my findings about the circumstances of their publication, what information derived from the trial was conveyed in breach of the suppression order, and about distribution.

News Corp online articles

Circumstances of publication

44 Prior to the plea agreement, Ms Saunders gave evidence, and through her the applicant tendered business records of the News Corp corporate respondents. Ms Saunders explained the online publication system and the syndication process used by the News Corp respondents.

45 News Corp operates a series of '**online mastheads**', in the names of its corresponding newspaper mastheads, apart from News.com.au. Each online masthead syndicates its content with the others. A story that is first published to the Herald Sun's website will also be capable of appearing on the websites of the Daily Telegraph, the Courier Mail and the Geelong Advertiser, among others. Although journalists know that syndication may occur, they have no control over the syndication process.

46 Relevantly, the Herald Sun online article, the Geelong Advertiser online article, the Daily Telegraph online article, the Weekly Times online article and the Advertiser online article were each a syndication of the News.com.au online article. Each of those articles was accessible on their corresponding online mastheads at an identical time and were each updated simultaneously. News Corp's automated syndication process means that chronology for publication of the News Corp online articles is identical, such that I need only refer to the News.com.au online article to explain the circumstances of their publication.

47 News Corp's online publishing system consists of four platforms. Journalists and editors use a publishing system known as Methode to draft, edit and prepare articles for publication. Content in Methode can be 'saved to digital', which creates a digital preview of the article and causes it to be archived in another platform, a repository called CHP. Alternatively, articles can be published to the online mastheads in

Methode by pressing the 'publish' button. This causes the article to be sent to an intermediary platform called CAPI, which automatically populates the content that appears on the websites. Generally speaking, journalists do not have authority to unilaterally take that step and publish content to the online mastheads. That responsibility is reserved for the chief of staff, editors or news desk staff.

48 Although CAPI is populated when the 'publish' button is used, some limited metadata is transmitted to CAPI when the 'save to digital' function is used, including the 'live' field, which identifies the first time that the function is used for a particular story.

49 Once the 'publish' button is pressed, although a new story or changes to an existing story will be accessible from the domains of each of the online mastheads almost immediately, such material may not necessarily appear as a story on the homepage or one of the topic-specific areas of every website. As part of the editing process, the article will be assigned to a specific 'section' of the originating online masthead, which will determine the location from which it can be accessed on that site. That location is evident by the article's 'page route', a part of its URL that navigates a user directly to that part of the website, rather than the homepage.

50 In some cases, one online masthead may have different sections to that of another. A further application — Kurator — is responsible for populating CAPI with the equivalent sections as assigned to the article on the originating online masthead. This means that if a story is published to a section of one website that does not exist on another, it will still be accessible from that website via a comparable section.

51 Although content is syndicated across the online mastheads, each website is curated by its respective digital editors and sub-editors. This means that the homepage or section page of one website may display different stories to that of another. Generally, each online masthead can control which stories are displayed on its homepage and topic-specific pages through a process of 'ranking'. By reviewing the stories that are assigned to a specific section, an editor can rank those stories in a way that mean they

are prominently featured. Conversely, a story that is not ranked may not prominently appear on a website, or at all. In the case of the 'News/National' section, which relevantly was the section assigned to the News.com.au online article, ranking is undertaken by a national team and not individually by each online masthead.

52 Returning to the publication of the News.com.au online article, Ms Saunders stated that Ms Charis Chang was the author, as its by-line suggests. Ms Chang is an experienced senior reporter.

53 On the morning of 13 December 2018, Mr Oliver Murray (News Editor), requested Ms Chang write the article. When journalists are so tasked, they prepare and submit articles electronically. A sub-editor at the news desk reviews it and determines the category (or 'section') and the context in which it will be presented online, and may make changes to the content. In respect of a 'risky' or controversial' story (meaning one where it is perceived that potentially adverse legal consequences may follow its publication), sub-editors and editors seek legal advice before the editor signs off on publication, a process described as 'legalling'.

54 Ms Saunders explained that at 7:42am on 13 December 2018, Ms Chang created the News.com.au online article in Methode. At 7:46am, Ms Chang sent herself an email containing a link to The Age online article that had been published the previous evening, which was referred to as a source in the report that was ultimately published. At 8:00am, the story was 'saved to digital' for the first time in Methode, an action recorded in the 'live' field in CAPI. At 8:23am, the article was archived to CHP.[13]

55 At approximately 8:24am, Mr Murray sought pre-publication legal advice from the News Corp Australia group in-house legal team. At approximately 9:57am, Mr Michael Cameron (National Editorial Counsel for News Corp Australia) provided advice to Mr Murray. News Corp Australia respondents claimed client legal privilege

[13] Ms Saunders explained that the archive system updates periodically, so that articles are 'ingested' at times that are routinely later than the actual time that the story is 'saved to digital' or published. However, Ms Saunders stated that versions of an article that were saved and published using the 'publish' function embedded a timestamp in the URL of images that accompanied the story. This timestamp is accepted as correctly identifying the precise time that each version of the News.com.au online was published.

over all legal advice received in respect of the publication.

56 Ms Chang's article was published to the News.com.au website for the first time at 10:24am, when Mr Murray, according to counsel, pressed the 'publish' button in Methode, causing the article to be sent to CAPI, which in turn made it publicly available from each of the News Corp online mastheads. The 10:24am version was the second version of the News.com.au online article saved in CHP. The article was published and appeared on the News.com.au website in substantially as written by Ms Chang. Ms Saunders stated that the editor of news.com.au, Ms Kate de Brito, had the final say in whether the article would be published and in what form.

57 When it was published, the news editor assigned the article to the 'VIC Courts and Law' section of the News.com.au website, with a page route of '/national/victoria/courts-law/', and it was automatically syndicated to each of the other News Corp online mastheads. As that section did not exist on the other online mastheads, Kurator identified the equivalent section — 'National News', with a page route of '/national/news/' — and updated CAPI with this information accordingly.

58 Between 10:24am and 12:21pm, several further iterations of the News.com.au online article were saved and published in Methode using the 'publish' function. The effect of these amendments included the addition of the last six paragraphs of the article (drafted by Ms Chang) that appear in the annexure to the No Case Ruling, which referred to the front pages of the Herald Sun and the Daily Telegraph newspapers published that day, and other statements regarding suppression orders. As was the case with the previously published version of the article, News Corp's in-house legal team gave legal advice prior to the amendments being published.

59 A further revision was made at approximately 3:40pm, before the article was 'legal killed' at 6:01pm and removed from each of the News Corp online mastheads.

Content in breach of the suppression order

60 The article reported information 'derived from the trials', namely that:

(a) a 'high profile Australian known across the world' had been 'convicted' of a

'serious crime';

(b) the person had been 'found guilty in the Victorian County Court';

(c) the person was 'due to face court again for a separate trial in March'; and

(d) there was a 'conviction' the publication of which might prejudice the separate case.

61 The article identified that the person was 'due to face court again for a separate trial in March' referring to the fact of multiple trials.

62 The effect or content of the suppression order was addressed, considered and discussed in the article, including when stating that:

(a) there was a story that 'we can't report';

(b) 'the details [of the story] cannot be published by any media in the country';

(c) a 'suppression order was put in place to prevent the publication of the details of the person's name or the charges. This is because the person is due to face court again for a separate trial in March and publication of the conviction might prejudice the case';

(d) the order was 'an archaic curb on freedom of the press in the currently digitally connected world';

(e) there was a 'media ban' that 'News Corp Australia … [was] challenging'; and

(f) 'We believe that you have the right to know this story now and without any further delay'.

63 The article stated that 'the person's high-profile status has meant that international publications are already reporting on the case and details have been released on social media'.

64 The article referred to the Daily Telegraph article, The Age online editorial, and to a

'Washington Post column on the story' by Margaret Sullivan. Ms Sullivan's column is referred to in these reasons as 'The Washington Post article 1'[14] and is one of the overseas publications relied on by the applicant.

Extent of publication

65 The News Corp respondents discovered analytical reports identifying the precise number of page views that each article received in the relevant period.

66 Based on a review of those documents;

(a) the Herald Sun online article received a total of 29 page views between 10:24am and 6:01pm on 13 December 2018, of which 23 were from Victoria;

(b) the News.com.au online article received a total of 210,507 page views between 10:24am and 6:01pm on 13 December 2018, of which 56,487 were from Victoria, and 76 were from an unspecified location;

(c) the Geelong Advertiser online article received a total of 15 page views between 10:24am and 6:01pm on 13 December 2018, of which 13 were from Victoria;

(d) the Daily Telegraph online article received a total of 63 page views between 10:24am and 6:01pm on 13 December 2018, of which 8 were from Victoria;

(e) the Weekly Times online article received a total of 86 page views between 10:24am and 6:01pm on 13 December 2018, of which 22 were from Victoria; and

(f) the Advertiser online article received a total of 32 page views between 10:24am and 6:01pm on 13 December 2018, of which 2 were from Victoria.

Daily Telegraph article

Circumstances of publication

67 On 12 December 2018 at 3:20pm, Mr Anthony Deceglie (Deputy Editor) emailed Mr Ben English (Editor) and others with the subject '*Apparently Damon just called Zak to dump wrap*' stating '*Cause they think they may be able to run it?*'. What this

[14] Erroneously referred to in the No Case Ruling as 'The Washington Post article 2' (see n 9).

communication meant was unclear, but the inference is plainly open that at this time discussions were occurring within the newspaper about running the Daily Telegraph article.

68 That afternoon, Mr Cameron and Ms Gina McWilliams of News Corp's in house legal team advised Mr Deceglie regarding the article's publication.

69 At 5:34pm, Mr English emailed Mr Deceglie a copy of what appears to be a draft of the Daily Telegraph article, although the content differs substantially from what was ultimately published on the front page of the newspaper the following day.

70 On 13 December 2018 at 9:29am (after the Daily Telegraph article had been published), Mr Lachlan Cartwright (a Senior Reporter at The Daily Beast) sent Mr English an email with the subject 'Cracking splash today mate' containing a link to The Washington Post article 1. I infer that the reference to 'splash' was to the Daily Telegraph article published on the front page of the masthead that day.

71 At 10:06am, Mr English replied:

> Cheers Lachie. History will be on our side on this

72 At 12:44pm, Mr Cartwright responded:

> No doubt. Happy to have played a part to shine a light on these ridiculous and draconian suppression orders. Story is breaking wide here now. Hope to catch you for a bevy soon mate.

Content in breach of the suppression order

73 The article reported information 'derived from the trials', namely that 'a high-profile Australian with a worldwide reputation' had been 'convicted' of an 'awful crime' and was 'GUILTY'.

74 The article stated that 'The Daily Telegraph and other Australian media are prohibited from telling you about it' but that 'the world is talking about it and reputable overseas news sites have published lengthy stories …'.

75 The existence of the suppression order was acknowledged by statements such as, 'The

Daily Telegraph and other Australian media are prohibited from telling you about it', 'The courts demand that you ignore the story totally until they see fit', and the order was described as 'an archaic curb on freedom of the press in the current digitally connected world'.

76 The article claimed an awareness that 'YOU MAY HAVE READ THE NEWS ONLINE ALREADY' and that 'many of our readers have probably read the international stories written about this person that are published online outside the jurisdiction of the Australian courts'.

Extent of publication

77 The Daily Telegraph had 161,703 print sales Australia-wide on 13 December 2018, of which 196 were sales in Victoria.

Courier Mail article

Circumstances of publication

78 On 12 December 2018 at approximately 7:00pm (Queensland time), Ms McWilliams of News Corp's in house legal team advised Ms Kara Vickery (a senior journalist) regarding publication of the Courier Mail article. At 8:45pm, Mr Sam Weir (Editor) sent Ms Vickery a draft of the Courier Mail article.

79 This article was also published in the hard copy edition on the morning of 13 December 2018.

Content in breach of the suppression order

80 The article reported information 'derived from the trials', namely that 'a high-profile person was found guilty of a terrible crime, which was a secret scandal and court censorship. The world was reading about it 'but we can't tell you a word'.

Extent of publication

81 The Courier Mail had 98,199 print sales Australia-wide on 13 December 2018, of which 67 were sales in Victoria.

The Age articles

82 The three articles with which The Age Company is charged were published in the print edition of The Age and on its website: The Age article, The Age online article and The Age online editorial. The SMH article, for which Fairfax Media Publications is charged, was substantially identical to The Age article, as are its circumstances of publication. For that reason, it is convenient to refer to all four publications as '**The Age articles**'.

83 The Age article and The Age online article were published under the by-line of Mr Patrick O'Neil and Mr Michael Bachelard. Mr O'Neil was the masthead's 'PM news editor'. Since May 2016, he was also the 'Justice Editor', with responsibility for crime and court reporters. Mr Bachelard was The Age/SMH's foreign editor and The Age's investigations editor at the time of the publication.

Circumstances of publication

84 In the afternoon of 11 December 2018, soon after the jury's verdict, Ms Marissa Calligeros (News Editor) received a phone call from Mr Adam Cooper (Court Reporter), who had been observing the trial. Mr Cooper informed Ms Calligerios that that Pell had been convicted. Ms Calligerios informed Mr Lavelle of Mr Cooper's call and the verdict that he had conveyed to her. Subsequently, discussions occurred between several senior editorial staff, including Mr Lavelle, Mr Bachelard and Mr O'Neil, about the verdict and whether it was possible to publish a story. Mr O'Neil was tasked with drafting a short article for discussion purposes, to test whether it was possible to publish a story.

85 At 5:15pm, Mr O'Neil contacted Mr Peter Bartlett, a partner at MinterEllison and external solicitor for The Age Company by email, with the subject 'Can I say any more than this? Or too much?'. The email contained the draft short article that Mr O'Neil had prepared.

86 At 5:50pm (after Mr Bartlett had responded to Mr O'Neil's earlier email), Mr Lavelle exchanged emails with Mr James Chessell (Group Executive Editor, Fairfax Media), Ms Margaret Easterbrook (Managing Editor, Fairfax Media) and Ms Lisa Davies

(Editor, SMH) to gauge their opinion on the short article.

87 At 5:53pm, Ms Davies replied:

> Hmmm. Isn't that just going to annoy people?

88 At 5:59pm, Mr Lavelle responded:

> I'm not saying we should and it's controversial obviously. Bach thinks we should run it, most others think not. It's interesting that there's nothing on Twitter yet. It would be surprising if it wasn't run in international media overnight.

89 Mr Lavelle explained the reference to 'controversial' in this email as a reflection on what he perceived as an unprecedented case of a suppression order remaining in place when the news would likely leak out nonetheless.

90 Around this time, Mr Lavelle decided that no story about the verdict would be published that evening.

91 Meanwhile, Mr O'Neil had prepared a longer version of the draft article to explore whether it was possible to publish a story with more information. At 6:23pm, Mr O'Neil sent Mr Lavelle that version in an email with the subject 'A bit rough but something like this'. This draft included much of the information derived from the cathedral trial that was ultimately published in The Age online article.

92 On the morning of 12 December 2018, staff at The Age discussed the number of overseas articles that had been published overnight and were accessible via Twitter. Mr Lavelle stated that during the day, other staff, including Mr O'Neil, informed him that readers were querying the absence of coverage of the verdict, and some had accused the paper of participating in a cover up or a Catholic conspiracy. I pause to note that no direct evidence of any of these queries or allegations was tendered at trial or on the plea hearing. I am satisfied that this was the expression of a perception of an obligation by the journalists to readers, rather than a groundswell of reader concern of any significance.

93 At 2:00pm, Mr Lavelle held a regularly scheduled afternoon news conference with the

news director and senior editors, including Mr O'Neil, Mr Bachelard and Mr Chessell (by phone). The meeting agreed that Mr O'Neil and Mr Bachelard would work on Mr O'Neil's draft, and the newspaper would explore publishing a story explaining why it was not able to report on the conviction. At 2:36pm, Mr Lavelle contacted Ms Larina Alick (Editorial Counsel)[15] by text message to inform her that The Age was leaning towards the possibility of running the story and confirmed she would be available to review a draft.

94 At 3:03pm, Mr Lavelle forwarded Mr O'Neil's draft article to Mr Bachelard, Mr Mark Fuller (Deputy Editor), Ms Selma Milovanovic (Weekday Print Editor) and Ms Duska Sulicich (Sunday Age Editor). At 3:22pm, Mr O'Neil sent Mr Bachelard a separate email with the subject 'Words from last night', containing an amended version of his draft provided to Mr Lavelle the previous day.

95 At 3:35pm, Mr Bachelard created a new entry for the article in the 'INK' content management system operated by The Age. At 3:44pm, Mr Bachelard saved the first draft of The Age online article into INK. The first draft largely resembled what Mr O'Neil had sent Mr Bachelard in the 3:22pm email. Between 3:44pm and 4:21pm, Mr Bachelard made six further revisions to the text of the draft article in INK.

96 At 4:15pm, Mr O'Neil sent an email to Mr Lavelle and Mr Bachelard with the subject 'Screenshots', attaching two screenshots. The first screenshot was of the results of a Google search for the search term 'george pell guilty'. Those results included links to the Church Militant article 1 and the Radar Online article in the 'top stories' section of the page. The second screenshot was of the Twitter website showing that 'george pell' was a trending topic.

97 At 4:23pm, Mr Bachelard sent an email to Ms Alick with the subject 'Story that cannot be named' seeking legal advice. One minute later, Mr Bachelard changed the status of the draft of The Age online article in INK from 'Legal Status: None' to 'Legal Status:

---

15 Ms Alick was an in-house lawyer for Nine Entertainment and also provided legal advice to Fairfax Media Publications (in respect of the AFR articles) and Allure Media (in respect of the Business Insider online article).

Pending', meaning that it had been sent to lawyers for review.

98 At 4:25pm, Mr Bachelard emailed Messrs O'Neil and Lavelle, with the subject 'Story [sic] that can't be named', a link to the 4:24pm version of the draft article in INK and the following:

> Hi guys,
>
> Can you have a look?
>
> The last couple of pars we get very editorialising.
>
> I've left them there from the original, because I'm not sure what you two agreed, but they seem out of character with the more newsy elements of the story.
>
> We also need to embed the Google trends graphic.

99 At 4:38pm, Ms Milovanovic, who had earlier received a copy of the draft article, sent Mr Lavelle an email with the subject 'Legal matter':

> Hi
>
> Regarding the suppressed case, I am totally against publishing this story today, as I have said earlier. The final decision, of course, is not mine, but I need to say this for the record.
>
> I am totally for a free press. However, I believe everyone should have the same legal protection when facing court. The person in question is the same in the eyes of the law as the wife basher today, whose prior convictions we are only reporting now - **after t**he outcome of his current case.
>
> In the past decades, we have never argued otherwise. One of our worst mass killers, Peter Dupas, was in the same situation. We sat on convictions for years.
>
> Whether this is right or not is a matter for argument - but it is the law.
>
> To challenge the suppression in court en masse is one thing, but to publish something **ahead** of this is quite another.
>
> Of course, I will respect any decision you make on this issue and act accordingly.
>
> Regards
>
> S[16]

100 At 4:46pm, Mr O'Neil amended the draft of The Age online article in INK, and at

---

16 Emphasis in original.

4:47pm he responded to Mr Bachelard's email of 4:25pm:

> Thanks Bach. Have cut those last pars as you suggested (the original incarnation was more of an editorial tone).

101 At 5:06pm, Mr Lavelle responded to Ms Milovanovic's email:

> I am very sympathetic to that view Selma. It's a hard one and I think there are valid arguments on both sides. I think one of the things that is different now is that the stories are everywhere and easily accessible, which was not the case with Dupas presumably. There are those who would say that this is more evidence that the MSM is irrelevant and we don't need them. And there are people asking why we aren't reporting on this story.
>
> We are not breaching the suppression order, just explaining why we can't report on the story.
>
> Anyway, I'll weigh this up with lawyers and make a call. If it is likely to hurt the chances of overturning the suppression order when we challenge it, then that will be taken into account too.

102 At 5:09pm, Mr Michael Short (Chief Editorial Writer) sent Messrs Bartlett, Lavelle and Bachelard an email with the subject 'here's the Pell leader. Would be great to run it tonight/tomorrow'. Mr Short was providing a draft of The Age online editorial to Mr Bartlett for legal review. Mr Bartlett responded to Mr Short's email at 5:21pm.

103 At 5:09pm, Ms Alick provided Mr Bachelard with legal advice regarding the draft of The Age online article he provided to her earlier that afternoon, and the pair exchanged further emails regarding that advice between 5:12pm and 5:22pm.

104 Between 5:21pm and 5:30pm, Mr Bachelard made three further edits to the draft of The Age online article in INK following receiving legal advice received from Ms Alick. Mr Bachelard also changed the 'Legal Status' field from 'Pending' to 'Approved', confirming that the article had been cleared for publication by Ms Alick.

105 At approximately 5:30pm, Mr Lavelle contacted Mr Bartlett by a text message requesting a phone conversation to discuss the anticipated publication of The Age online article. Mr Lavelle stated that although the article had already been reviewed by an internal lawyer, in light of the unprecedented nature of the story contemplated for publication, he also wanted Mr Bartlett's advice. Mr Bartlett phoned Mr Lavelle

shortly afterwards and the pair spoke for several minutes.

106 At 5:31pm, Mr Bachelard sent a further email to Ms Alick regarding legal advice.

107 At 5:34pm, Mr Bachelard sent a further email to Mr Bartlett seeking legal advice in respect of The Age online editorial. Mr Bartlett provided that advice by return email at 6:16pm.

108 At 5:44pm, Mr Bachelard made his last edit to the draft of The Age online article in INK.

109 At approximately 6:15pm, Mr Lavelle, Mr Chessell and Ms Davies had a telephone conference for several minutes to discuss The Age online article. Mr Lavelle stated that they discussed the legal advice he had received from Ms Alick and Mr Bartlett and his conclusion that the story was in a fit state to publish. Both Ms Davies and Mr Chessell agreed that the story should be published by The Age and the SMH.

110 At 7:11pm, The Age online article was published online, with Messrs O'Neil and Bachelard both appearing in the by-line.

111 At 7:21pm, Mr Lavelle emailed Mr Short about The Age online editorial:

> we will take a breath on the leader Michael and plan to run tomorrow. Thanks

112 Mr Short responded at 9:07pm:

> Ok, thanks Alex. Are you holding the other stuff, too? If not, I'm not sure why we wouldn't package it for maximum impact on this crucial issue. That is a comment, not a criticism.

113 Mr Lavelle stated that his decision to hold the The Age online editorial from publication was because he wanted further time to consider its publication. His focus had been on considering publication of The Age online article, and he did not want to complicate the matter by running another story that day. He rejected the suggestion that the 'maximum impact' of publishing both articles together, as described by Mr Short, was not a consideration; he wanted to play the situation as safe as possible.

114 At 9:55pm, Mr Lavelle uploaded a draft of The Age online editorial to INK. He set the

'Legal Status' attribute to 'Approved'. The draft had been referred to, and discussed with, Mr Bartlett earlier that day.

115 On the morning of 13 December 2018, The Age article and the SMH article appeared in the print editions of those respective masthead. These articles were identical to The Age online article. The Age article was published with both Mr O'Neil and Mr Bachelard's names in the by-line. The SMH article was not published with a by-line.

116 At 9:54am on 13 December 2018, The Age online editorial was published online. That article was removed at 6:20pm that day.

117 The Age online article was removed on 18 December 2018 at 1:01pm.

Content in breach of the suppression order

The Age online article, The Age article and the SMH article

118 The Age online article, The Age article and the SMH article each reported information 'derived from the trials', namely that:

(a) a 'very high-profile figure was convicted on Tuesday of a serious crime';

(b) the person 'was convicted on the second attempt, after the jury in an earlier trial [had been] unable to reach a verdict';

(c) the person would 'return to court in February for sentencing' and 'would be remanded' when that occurred;

(d) a suppression order relating to 'the case' had been issued by the 'Victorian County Court' (and therefore the case had been in that court); and

(e) there was 'a further trial being held in March' which might be prejudiced by 'knowledge of the person's identity in the first trial' and thereby referred to the fact of multiple trials.

119 The articles expressly referred to the existence and terms of the suppression order. They noted that the person's case had 'attracted significant media attention' and that

'in this case, the word has got out widely online and through social media'. They stated that that 'Google searches for the person's name surged [on Wednesday 12 December 2018] … Two of the top three search results on the suppressed name showed websites that were reporting the charges, the verdict and the identity of the person in full', and 'Yesterday afternoon, the person's name was the subject of thousands of tweets. The tweets both named the individual and the charges and posted links to online sites where the information was available'.

120 The stories asserted that readers were questioning why '[The Age] [was] not reporting this major issue in the public interest', which they answered by stating that failing to adhere to the suppression order could lead to charges of contempt. The articles concluded with discussion of a review of the *Open Courts Act* by 'retired judge Frank Vincent'.

The Age online editorial

121 The Age online editorial appeared with the headline 'Rampant use of suppression orders has become absurd'. The article reported information 'derived from the trials', namely that:

(a) an 'internationally prominent person' had been 'found guilty of appalling crimes';

(b) the person would be 'remanded in custody in February after a sentencing hearing'; and

(c) the person was to 'face a related trial next year'.

122 The article identified that the person would 'face a related trial next year' and a 'second hearing' referring to the fact of multiple trials.

123 The article expressly referred to the existence and terms of the suppression order, stating 'the Victorian County Court has blocked the publication of details, including the perpetrator's name and the charges, in the belief it could prejudice the jury in the second hearing'. It argued that ''Justices blind to reality' were 'undermining freedom

of speech and the public's right to know how well the system their taxes [funded] might be working'. It opined about the futility of suppression orders in the context that 'in the digital era news reports and other information instantly span the world, amplified by social media', which was demonstrated by 'the international coverage of a case we cannot tell you about in any detail'.

124 The article stated that online searches of the person's name 'rocketed only hours after the guilty verdicts' and '[w]ith but a few key strokes, people were immediately directed to foreign websites reporting the full details'.

Extent of publication

125 The evidence disclosed that:

(a) The Age had 85,948 print sales Australia-wide on 13 December 2018, of which 84,138 were in Victoria;

(b) The Age online article received 226,576 page views between 12 December 2018 at 7:12pm and 18 December 2018 at 1:01pm (no precise breakdown by location was provided);

(c) The Age online editorial received 5,119 page views on 13 December 2018 between 9:54am and 6:20pm (no precise breakdown by location was provided); and

(d) the SMH had 69,962 print sales Australia-wide on 13 December 2018. Although circulation figures for the SMH were not calculated on a state by state basis, I accept that the majority of sales occurred within New South Wales.

The AFR articles

Circumstances of publication

126 Next, I turn to the evidence relating to the three articles for which Fairfax Media Publications is charged that were published in the print edition of the AFR and on its website: the AFR online article 1, the AFR online article 2 and the AFR article ('**the AFR articles**').

127 Mr Patrick Durkin was the author of each of the AFR articles. He was the AFR's Melbourne bureau chief and the deputy editor of the 'BOSS' magazine in the relevant period. Mr Durkin prepared the articles in a form for publication and they were published under his by-line.

128 In the evening of 12 December 2018, Mr Durkin exchanged several emails with Ms Alick seeking legal advice, which Ms Alick provided. Although no direct evidence was led about those emails, the timing and the subject — 'George Pell' — makes clear that they related to the jury's verdict and the extant suppression order.

129 On 13 December 2018 at 8:30am, senior AFR editorial staff held a regularly scheduled morning news conference to identify the key stories to be worked on that day. The conference was attended by Ms Fiona Buffini (News Director), Mr Michael Stutchbury (Editor-in-Chief), Mr Paul Bailey (Editor) and Mr Mark Coultan (News Editor). The prospect of running a story about the conviction was discussed at this meeting, because at 8:50am, Ms Buffini emailed Mr Durkin with the subject 'hi, if pell suppression gets lifted, are you able to write on it?' stating:

> the story about what he did etc.

130 At 9:37am, Mr Durkin replied to Ms Buffini:

> Sure if today or tomorrow – sounds unlikely to happen today though? I finish up for Xmas on Friday too.

131 At 9:38am, Ms Buffini replied to Mr Durkin:

> Yes, aaron is keen to help out too but given you went to it…are you here friday or no?

132 At 9:42am, Mr Durkin replied to Ms Buffini:

> Yes here Friday I can do. Just working on a bumper piece and a Feb Boss cover before I go FYI

133 Between 9:47am and 11:23am, Mr Durkin exchanged several emails with Ms Buffini and Ms Alick in which further legal advice was sought and provided.

134 At 11:27am, Mr Durkin created a new entry for a story in 'CQ', the AFR's internal

content management system. The story was created on the 'personal' desk for Mr Durkin in the system with a status of 'DRAFT', meaning that it was still in the process of being prepared by a journalist. At 11:54am, Mr Durkin uploaded a draft of the AFR online article 1 to the entry in CQ, which included what would largely be the first few paragraphs of the final article. The draft also contained rough drafting notes and what appears to be an extract from the Business Insider online article. Between 12:00pm and 12:38pm, Mr Durkin made a further 20 edits to the draft in CQ.

135 At 12:36pm, Mr Durkin emailed Ms Alick and 'AFR web editorial' (an internal email group distribution list including all of the editorial staff at the AFR), both seeking legal advice and to convey that the draft had been completed and the story was ready for editing. At 12:38pm, Mr Durkin formally filed the story by amending the status of the draft in CQ from 'DRAFT' to 'REVIEW'. At 12:40pm, the draft was moved from Mr Durkin's 'personal' desk to the 'production' desk, signalling that an editor had begun working on the story.

136 At 12:49pm, Ms Alick responded to Mr Durkin's email of 12:36pm providing legal advice. Fairfax Media Productions claimed privilege over that communication.

137 At 12:58pm, he emailed Ms Buffini with the subject 'Pell', stating:

> Can we use this as image?

The email attached an image of the Herald Sun's front page published that day.

138 At 1:01pm, Ms Buffini replied:

> i've uploaded and added to story can you upload any other ones ta

139 At 1:06pm, Mr Durkin amended the draft in CQ to include images of the front pages of the Daily Telegraph and The Age published that day.

140 At 1:17pm, the AFR online article 1 was published online, with Mr Durkin's name appearing in the by-line.

141 Sometime that afternoon, Mr Coultan received a copy of the transcript of the special

mention before Chief Judge Kidd. He distinctly recalled reviewing the transcript, as he thought the Chief Judge's remarks expressing anger about the publications by other media outlets were extraordinary.

142 At 5:06pm, Mr Durkin emailed Mr Coultan, Mr Stutchbury and Mr Bailey with the subject 'Pell'. The lengthy email is largely redacted for client legal privilege, save for a link to the AFR online article 1. At 5:11pm, Mr Coultan replied to Durkin's email:

> ok – Stutch [Mr Stutchbury] and Paul [Mr Bailey] have agreed to run this story. Can you create a new shell?'

I infer that the redacted portions of Mr Durkin's email to Messrs Coultan, Stutchbury and Bailey related to the legal issues associated with publication of the AFR online article 2.

143 At 5:17pm, Mr Durkin created a new entry in CQ for the AFR online article 2. As was the case with the AFR online article 1, the story was created with a status of 'DRAFT' on Mr Durkin's 'personal' desk. Between 5:17pm and 5:25pm, Mr Durkin edited the draft on a further six occasions. At 5:26pm, the AFR online article 2 was saved to the 'production' desk with the status of 'REVIEW'. Mr Durkin had filed the story and the editing process had commenced.

144 At 5:32pm, Mr Durkin emailed Ms Alick, copying Messrs Coultan, Stutchbury and Bailey, followed by a further, shorter, email at 5:35pm, redacted for client legal privilege. At 5:55pm, Mr Durkin sent a further email to Mr Coultan and Ms Alick, the contents of which were also redacted for client legal privilege. At 6:06pm, Ms Alick sent Messrs Coultan, Stutchbury, Bailey and Durkin a lengthy email, redacted for client legal privilege. At 6:11pm, Mr Durkin responded to Ms Alick's email:

> Thanks Larina, Mark [redacted for CLP].

145 At 6:25pm, the AFR online article 2 was published online, with Mr Durkin's name appearing in the by-line.

146 At 6:52pm, Mr Durkin emailed Mr Coultan:

> You get [redacted for CLP] Mark?

147 At 6:55pm, Mr Coultan responded:

> yes no worries

148 On 14 December 2018, the AFR article was published in the print edition of the AFR. The text of the article was substantially similar to the AFR online article 2, including Mr Durkin's name appearing in the by-line.

149 The AFR online article 1 and the AFR online article 2 were both removed on 22 February 2019 at 1:46pm.

Content in breach of the suppression order

150 The AFR online article 1, reported information 'derived from the trials', namely that:

(a) an Australian had been 'convicted' of a 'serious crime';

(b) that person had been 'found guilty' by a 'Victorian jury'; and

(c) a suppression order about the case had been issued by the Victorian County Court.

151 The article expressly referred to the existence and terms of the suppression order. It noted that the overseas publication the Daily Beast first reported the conviction,[17] and that the case that can't be named was being reported around the world. The article commented that 'high profile global media companies are flouting a suppression order in relation to an Australian who has been convicted of a serious crime after a Victorian jury found the person guilty of charges this week.'

152 The article observed that that 'Global websites available in Australia including the Jeff Bezos owned The Washington Post and National Public Radio were publishing the news on Wednesday and Thursday including in push notifications to Australians with the Washington Post app.'[18] It also referred to the stories in the Daily Telegraph

---

17 An overseas publication relied on by the applicant in this proceeding and referred to above and in the No Case Ruling as the 'Daily Beast article'.

18 Three articles from The Washington Post are relied on by the applicant as overseas publications and are referred above and in the No Case Ruling as 'Washington Post article 1', 'Washington Post article 2' and 'Washington Post article 3'.

and The Age.

153 Under the headline, 'Judge slams 'flagrant' media over world's worst kept secret', the AFR online article 2 and the AFR article reported information derived from the media's application to discharge the suppression order made on 14 December 2018. The articles also repeated much of the material from the AFR online article 1, which reported information derived from the cathedral trial. The articles expressly referred to the existence and terms of the suppression order.

154 The AFR online article 2 concluded with a section 'Most Viewed In News' that consisted of hyperlinks to other articles. The first two hyperlinks, in order, were:

(a) 'How the case that can't be named is being reported around the world' (the AFR online article 1); and

(b) 'Cardinal George Pell removed from Pope's Vatican cabinet'.

Extent of publication

155 The evidence disclosed that:

(a) the AFR online article 1 received 54,753 page views between 13 December 2018 at 1:17pm and 22 February 2019 at 1:46pm, of which 49,437 were identified as being located in Victoria;

(b) the AFR online article 2 received 13,723 page views between 13 December 2018 at 6:25pm and 22 February 2019 at 1:46pm, of which 13,074 were identified as being located in Victoria; and

(c) the AFR had 35,427 print sales Australia-wide on 14 December 2018, of which 10,416 were sales in Victoria.

Mamamia online article

Circumstances of publication

156 Ms Jessica Chambers, a content producer during the relevant period, wrote the Mamamia online article.

157 On 13 December 2018 at 6:01am, Ms Clare Stephens (Editor) posted a message to an internal chat service apparently used by staff at Mamamia:

> Can you start on this one @jessicachambers - I know it's a weird story but bloody important. A deep dive on Twitter will show you what it is... but we're not allowed to report it. Literally just a few pars of copy saying we're not allowed to report it, and embeds of the daily telegraph front page today/any other front pages that refer to it

158 The message included links to The Age online article, an electronic copy of the Daily Telegraph article and a publication by Nine News regarding the suppression order.

159 At 6:02am, Ms Stephens posted a further message:

> We just have to be SUPER careful that nowhere names him. So with that daily Tele tweet - that none of the replies name him. And we'll have to keep a close eye on our fb, Twitter etc that no one comments naming him

160 At 6:14am, after acknowledging the request, Ms Chambers and Ms Stephens had the following exchange:

> Chambers: Do you know who the aussie is??
>
> Stephens: yep - it's George Pell
>
> Stephens: it was all over twitter last night
>
> Chambers: OMG They weren't lying were they. It is a huge story

161 At 6:18am, Ms Chambers asked for clarification regarding the form of the article:

> So just to be clear, my article is like:
>
> There was a person convicted of a crime yesterday, according to the HS [Herald Sun] and the Age.
>
> According to teh [sic] HS and the Age, we can't report his name
>
> He was named on Twitter But the tweets appear to have been deleted

Ms Stephens responded:

> YEP – he's on like Radar Online and weird websites
>
> …
>
> I think not even saying he was named on Twitter
>
> just, we can't report his name
>
> lots of tweets of front pages/allthe news sites with their stories

explaining why we can't name him

(which is literally like a sentence about a suppression order)

Ms Chambers replied:

Oh ok – sure thing. ☺

162 At 6:58am, Ms Chambers asked Ms Stephens:

Oh by the way - is that [an image of the Daily Telegraph article] my feature image then? They're bit 'the nation's biggest story'?

Ms Stephens responded:

Hmmm let me think about a feature. I reckon two front pages together. OK here's herald sun front page

163 At 7:21am, Ms Chambers completed the draft of the Mamamia online article and sent a link (saved within Mamamia's internal content management system) to Ms Stephens. Ms Chambers had limited insight into the implications of the suppression order and was not assisted in this respect by Ms Stephens. She stated:

By the way, I wish I was more of a legal expert, just so I could better explain what predjudice (sic) is and what the implications could be. People on Twitter are saying that if his name gets released it could jepodise (sic) the court case in March. i guess because if the judge is like, 'there' no way for him to get a fair trail in australia' then they just have to change it to a judge-only trail, which must be harder to do or something

164 Between 7:21am and 7:45am, Ms Stephens saved an edited version of the Mamamia online article for publication. The changes between versions are not relevant and the edited version was in substantially the same form as Ms Chambers' draft.

165 At 7:46am, the Mamamia online article was published online, with Ms Chambers' name appearing in the by-line.

166 Mr Lavigne stated that editorial staff, including Ms Stephens and Mamamia's Head of Content, Ms Holly Wainwright, made a positive decision to not obtain legal advice because it was not considered necessary. That belief was apparently based on the extent of coverage the story had received that day, both in newspapers and on social media, and because the article was a 'write around': it was limited to reporting what

had already been reported on by other media. At the relevant time, it was rare for Mamamia to obtain pre-publication advice.

167 At no time prior to publication did Mamamia see, have, or seek to obtain a copy of, the suppression order. Despite not receiving legal advice, Mamamia formed the view that it was a legally contentious story. It took care to only refer to information contained in other publications and to not add any further editorial comment. Mr Lavigne conceded that in doing so, they were assuming that those reports had each been legalled by their respective publishers and approved for publication on the basis they did not breach the suppression order.

168 At 3:16pm, Mr Gardiner forwarded Ms Stephens an email that he had sent to media representatives earlier that day, together with copies of the suppression order and the transcript of the special mention before Chief Judge Kidd:

> Dear Media,
>
> Please note that the matter of the Director of Public Prosecutions v George Pell is currently before the County Court of Victoria.
>
> There is a suppression order in effect made by Chief Judge Kidd on 25 June 2018. Please see attached.
>
> This order applies Australia wide. The Court is not able to provide any legal advice about this order.
>
> Today, Thursday 13th November at 11:00am, the Director of Public Prosecutions appeared before Chief Judge Kidd for a Mention to discuss publicity that has occurred regarding the matter. The full transcript is attached below.
>
> A hearing has been scheduled for 9:30am Friday 14th December 2018 in court room 4.3. The hearing is an application for review of the suppression order made on behalf of number news media organisations.
>
> If you have any further questions, please contact media@countycourt.vic.gov.au.

169 Despite being sent to Ms Chambers, the email went unacknowledged and Mr Lavigne did not become aware of its existence until it was produced by the applicant in this proceeding.

170 On 14 December 2018 at 10:59am, Ms Valentina Todoroska (Managing Editor) sent the

following email to all editorial staff:

> Hi team,
>
> As you know media this morning received a reminder of the suppression order surrounding the Pell case.
>
> Please do not publish anything else Pell related or allude to the case we're unable to report on.
>
> Also be mindful of activity on your own social media accounts.
>
> Please come and see me if you have any questions.

171 The Mamamia online article was removed from the website on 7 February 2019 at 11:10am.

Content in breach of the suppression order

172 The Mamamia online article, reported information 'derived from the trials', namely that:

(a) a 'very well-known Australian' had been 'found guilty' of a 'serious crime on Tuesday' and that the crime was 'awful';

(b) the person 'has been remanded in custody';

(c) the person would be 'sentenced in February';

(d) the person was 'GUILTY' and had been 'found guilty';

(e) the person's name had been suppressed by the 'Victorian County Court' (and therefore the case was in that court); and

(f) there was to be 'another trial involving the same person in March'.

173 The article expressly referred to existence of the suppression order. It stated that 'overseas websites may report on the story' and noted that it was argued that Australians could easily read the full story on overseas sites given the nation's widespread access to the internet. The article concluded with a note that if any of its readers knew the person's name, 'we please ask that you **do not** share it in the

comments below'.[19]

Extent of publication

174 Between 13 December 2018 at 7:45am and 7 February 2019 at 11:10am, the Mamamia online article received a total of 29,041 page views, of which 25,529 were from unique people.

Business Insider online article

Circumstances of publication

175 The Business Insider online article was written by Mr Simon Thomsen, whose name appeared in article's by-line. Allure Media relied on Mr Thomsen's affidavit on the plea hearing.

176 On the morning of 13 December 2018, Mr Thomsen and Mr Paul Colgan (Editor) discussed the extent of the reporting of the jury's verdict by other media outlets. Mr Thomsen stated that the two thought the widespread coverage of the story was a 'wow moment', and they agreed that if it was legal to do so, the Business Insider should also publish a story.

177 At 6:41am, Mr Thomsen emailed Ms Alick to enquire about the position that other Fairfax publications was taking on covering the story. At 7:30am and 7:36am, Ms Alick responded with legal advice.

178 At 8:19am, Mr Thomsen sent a draft of the article to Ms Alick for legal review. At 8:31am, Ms Alick provided her advice on the draft.

179 Based on the legal advice received, and from discussions with his colleagues, Mr Thomsen considered there was no risk in publishing the article. His view was bolstered by the fact that several other media outlets had reported on the story, including on the front pages of major newspaper mastheads.

180 At approximately 9:00am on 13 December 2018, the Business Insider online article was

[19] Emphasis in original.

published.

181 The Business Insider online article was removed from the website on 7 February 2019 at 6:04pm.

Content in breach of the suppression order

182 The Business Insider online article, reported information 'derived from the trials', namely that:

(a) there had been a 'high-profile criminal conviction';

(b) a 'prominent Australian' had been 'convicted' of a 'serious crime'; and

(c) 'a Victorian jury' had found 'the person guilty of the charges this week'.

183 The article expressly referred to the existence and some of the terms of the suppression order. It stated:

(a) 'However, in the global internet era, what has occurred is being widely reported globally. The name of the person has featured heavily on social media in the last 24 hours'; and

(b) 'The Sydney Morning Herald reports that Google searches for the person's name surged on Wednesday, particularly in Victoria, and reveal widely (sic) coverage by international media, although some websites have been geo-blocked to prevent Australian residents reading it'.

Extent of publication

184 There was no evidence of the number of times the Business Insider online article was accessed. Mr Thomsen stated that as of December 2018, there were hundreds of thousands of people accessing the Business Insider website per month (and possibly as many as a million), and the Business Insider online article prominently appeared as the second story on the website when it was initially published.

2GB Breakfast segment

Circumstances of publication

185 Radio Sydney 2GB relied on an affidavit of Mr Gregory Byrnes, Head of Content at Nine Radio, for the purposes of its submissions on penalty. Mr Byrnes was not employed by Nine Radio at the time of the 2GB Breakfast segment and deposed to the circumstances of its publication on the basis of information and belief.

186 The 2GB Breakfast segment was part of the Alan Jones Breakfast Radio Show, which was broadcast live every weekday morning for three and a half hours. The show's titular host, Mr Alan Jones, was on leave on 13 December 2018 and Mr Chris Smith was the guest presenter of the program that day.

187 For segments like the 2GB Breakfast segment, scripts are prepared for presenters in consultation with the show's Executive Producer, who was then Mr Paul Christenson. Although presenters are not required to follow a script word for word, it is expected that they will not ad lib on sensitive topics.

188 On 11 December 2018, Ms Alessandra Steele (General Counsel at Nine Radio), received general legal advice from external solicitors about reporting on Pell's conviction. This advice was not directed at a draft script or story.

189 At 11:57am on 12 December 2018, Ms Steele provided further general legal advice to Radio Sydney 2GB. This advice was sent to Mr Michael Thomson (National Executive Editor), and to an internal 'Suppression Orders' email distribution list that did not include Mr Smith or Mr Christenson. At 9:26pm, Mr Thomson forwarded that advice to an internal '2GB programs' email distribution list that included both Mr Smith and Mr Christenson, however neither saw the email before the 2GB Breakfast segment was broadcast.

190 Early in the morning of 13 December 2018, a script was prepared for the 2GB Breakfast segment. A copy of the script was discovered by Radio 2GB Sydney and relied on by the applicant. The script matches almost precisely the words that were used by Mr Smith during the broadcast, save that it omits his concluding remarks, which were

the following:

> So as I said I can't tell you who it is. But I can also encourage you to get on Google and start asking these questions: high profile Australian, worldwide reputation, conviction of an awful crime. And you'll find out who it is.

191 Mr Byrnes frankly conceded that Mr Smith inappropriately 'went off script' in making this statement.

192 The 2GB Breakfast segment was broadcast on radio and online on 13 December 2018 at 5:41am. It was also included in the Alan Jones Breakfast Show podcast episode of that day's show, which was available on 2GB website from 9:32am that day until 12 February 2019 at 6:18am.

Content in breach of the suppression order

193 The 2GB Breakfast segment, reported information 'derived from the trials', namely that:

(a) a 'high profile Australian with a worldwide reputation' had been 'convicted' of an 'awful crime';

(b) such person was 'a very high profile figure who's been convicted of a serious crime';

(c) the identity of the person could not be revealed owing to 'a suppression order issued by the Victorian County Court';

(d) the person's case 'had received significant media attention' and he 'was convicted on the second attempt after the jury in an earlier trial was unable to reach a verdict'; and

(e) the person was 'due to return to court in February for sentencing'.

Extent of publication

194 The evidence disclosed that:

(a) the 2GB Breakfast segment was broadcast to approximately 60,000 people;

(b) it was not possible to identify precisely how many people listened to the segment on the website; and

(c) the podcast episode containing the 2GB Breakfast segment was downloaded 422 times, of which 68 were from Victoria.

Today Show segments

Circumstances of publication

195 Late in the evening of 12 December 2018 and into the morning of 13 December 2018, producers at the Today Show sought and received legal advice from Kiah Officer (Executive Counsel) about the Today Show segments. Those exchanges occurred in 24 emails, each the subject of a claim for client legal privilege, that relevantly included Mr Simon Hobbs (Sydney Director of News), Mr James Birtles (Managing Editor of the Today Show), Mr Geoff Maurice (Executive Producer), and each of the presenters who were on air during the Today Show segments: Ms Lara Vella, Ms Deborah Knight and Ms Christine Ahern. Of these emails, four included Ms Knight and Ms Vella as recipients, 10 included Ms Ahern as a recipient, and four were sent by Ms Ahern.

196 Prior to their broadcast, the presenters were each provided with a copy of the script for the segments and told to specifically read only from that script and not ad-lib any portion. The show's producers informed Mr Wick that Ms Ahern took the unprecedented step of moving inside for her live cross, as she had been instructed not to deviate from her prepared script and she was concerned that she may not be able to comply with this direction because it was raining that morning.

197 At 5:32am, the 5:32am Today Show segment was broadcast. Ms Ahern, the reporter of the segment, appeared from an outdoor location depicting Melbourne's skyline, after a decision was made that she not present from outside the County Court, or a church, or any other place that might infer that Pell was the 'high profile' person the segments each referred to. In this broadcast, Ms Ahern referred to The Age article, which was printed on the front page of the newspaper that day.

198 At 5:45am, Ms Ahern sent Mr Maurice an email with the subject 'Can unread [I read]

out the HSUN [Herald Sun] front page for the next one [segment]?':

> Geoff was there any legal advice from Kiah that suggested otherwise?
>
> Just a better headline than the age

199 Mr Maurice forwarded that email to another employee of Nine, Mr Matthew Russell, who shortly replied to Ms Ahern's email providing legal advice.

200 At 6:00am and 7:02am respectively, the 6:00am Today Show segment and the 7:02am Today Show segment were broadcast. In both of those broadcasts, Ms Ahern referred to the Herald Sun front page, rather than The Age front page that was broadcast on the 5:32am Today Show segment.

Content in breach of the suppression order

201 The Today Show segments, reported information 'derived from the trials', namely that:

(a) a 'high profile Australian with a worldwide reputation' had been 'convicted' of an 'awful crime';

(b) the identity of the person and details of the case could not be revealed because of 'a legal ban imposed by the Victorian County Court';

(c) the person was 'due back in court in February';

(d) 'we here at Nine believe this is a story that needs to be told';

(e) 'Orders by the court here in Australia don't apply overseas so international media can report on this high profile case without the same restrictions'; and

(f) the world is reading a very important story that is relevant to Victorians' and 'But trust us, it is a story that you deserve to read'.

Extent of publication

202 Ms Launders deposed that based on 'renowned audience measurement panel services', the average audience at the time of:

(a) the 5:32am Today Show segment was 22,704;

(b) the 6:00 Today Show segment was 22,553; and

(c) the 7:02am Today Show segment was 49,417.

Principles

203 As the High Court observed in *Australasian Meat Industry Employee's Union v Mudginberri Station Pty Ltd*, the purpose of the law of contempt is to 'uphold and protect the effective administration of justice'.[20] Publications that tend to prejudice the prosecution or defence in pending proceedings interfere with the due administration of justice in that proceeding and constitute contempt of court.[21] That purpose is central to the sentencing process.

204 The fundamental function of punishment when sentencing for contempt of court for breach of a suppression order is to uphold and preserve the undisturbed and orderly administration of justice in the courts according to law.[22]

205 Although s 23 of the *Open Courts Act* creates a statutory offence for contravention of a suppression order, the applicant charged the respondents with the common law offence of contempt of court. The court's inherent power to punish for contempt is regulated by r 75.11 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic). All of the guilty respondents are corporations, which may be punished by sequestration, fine or both. The court may make an order subject to terms, including a suspension of punishment. There is no maximum fine.[23]

---

20 (1986) 161 CLR 98, 107 ('***Australasian Meat Industry Employee's Union***'). See also *James v Robinson* (1963) 109 CLR 593, 602; *Attorney-General v Times Newspapers Ltd* [1974] AC 273, 315; *Witham v Holloway* (1995) 183 CLR 525, 538–9; *BHP v Dagi* [1996] 2 VR 117, 145, 170.

21 *R v David Syme & Co Ltd* [1982] VR 173, 177; *Attorney-General v John Fairfax & Sons Ltd* [1981] NSWLR 362.

22 *Hinch*, [12] (n 4), citing *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309, 314; *Registrar v Nationwide News Ltd* (2004) 89 SASR 113, 123 [45]; *Corporation of the City of Woodville v Williams* (1992) 57 SASR 278, 280.

23 *Smith v The Queen* (1991) 25 NSWLR 1, 14; *DPP (Vic) v Johnson (No 2)* [2017] VSC 45, [8]. Contrast this with s 23 of the *Open Courts Act 2013* (Vic), which has provided at all relevant times a maximum penalty of 3000 penalty units in the case of a corporation contravening the terms of a proceeding suppression order. Between 1 July 2018 and 30 June 2019, the value of a penalty unit was $161.19.

206 In *R v The Age Company Ltd*,[24] Kyrou J set out a non-exhaustive list of considerations that regulate the exercise of the sentencing discretion that I find, with due respect, to be most helpful. Those considerations include:

(a) the seriousness of the offence;

(b) the circumstances of the offence;

(c) any prior convictions;

(d) specific and general deterrence;

(e) the culpability of the contemnor;

(f) whether any harm was actually caused by the contempt;

(g) the existence or otherwise of any system for the prevention of contempt;

(h) whether legal advice was sought before publication;

(i) the general nature and purpose of the publication; and

(j) whether the contemnor has pleaded guilty, apologised and offered to pay costs.[25]

207 Kyrou J also noted — as the respondents submitted was appropriate in this case — that in some circumstances, the burden of a prosecution and the trial itself, together with the published findings of a court and an order for costs, may be adequate to vindicate the public interests, rendering it unnecessary to further punish the contemnor.

208 There is a significant issue in these proceedings, when assessing the culpability of their contempt, of whether the respondents intended to interfere with or obstruct the due administration of justice. Proof of intention to interfere with or obstruct the due administration of justice is not a necessary element of the specie of contempt

24 [2008] VSC 305.
25 Ibid [22]–[23] (citations omitted).

charged.[26] It is sufficient to prove that the contemnor intended to make the statements or do the acts charged, which had the requisite tendency to interfere. Thus, a deliberate act or omission that is in breach of a suppression order will constitute wilful disobedience, unless it is casual, accidental or unintentional,[27] because proof of a specific intent is not required. This principle permits a contemnor to show by way of exculpation that the contravention was 'casual, accidental or unintentional' or — as is put by the guilty respondents — an innocent error of judgment.

209 Although it is accepted that the principles of the *Sentencing Act 1991* (Vic) do not apply in terms, in *Varnavides v Victorian Civil and Administrative Tribunal*, the Court of Appeal stated:

> Nevertheless, contempt of court is a serious offence and should be approached, as far as possible, in a way which is consistent with that adopted when dealing with criminal conduct generally. There is no reason to suppose that the provisions of the *Sentencing Act* were intended to fetter the unlimited jurisdiction of the Supreme Court to punish for contempt of court.[28]

210 With necessary modification, having regard to the nature of the jurisdiction, a range of the principles applicable to sentencing in criminal proceedings are relevant to the determination of an appropriate disposition when punishing for contempt of court.[29]

211 The News Corp respondents submitted that principles derived from the *Sentencing Act* are relevant in four broad ways.

212 Firstly, the only relevant purposes for imposing a sentence are to:[30]

(a) punish the respondents to an extent and in a manner which is just in all the circumstances;

(b) deter the respondents or other persons from committing offences of the same

---

26 *CFMEU v Grocon* (2014) 47 VR 527, 564 [138] ('***CFMEU***').

27 *Anderson v Hassett* [2007] NSWSC 1310, [6].

28 (2005) 12 VR 1, 6 [18] ('***Varnavides***').

29 *R v The Age Company Ltd and Ors* [2008] VSC 305, [23]; *R v Herald & Weekly Times Pty Ltd* [2008] VSC 251, [45]–[50]; *Rich v A-G (Vic)* (1999) 103 A Crim R 261, 281–2 [46]–[47]; *DPP (Vic) v Johnson* (2002) 6 VR 235, 236 [3], 237 [7]; *Varnavides*, 6 [18] (n 28); *DPP (Cth) v Haunga* (2001) 4 VR 285, 291–2 [16]; *Law Institute of Victoria Ltd v Nagle* [2005] VSC 47, [37]; *National Australia Bank Ltd v Juric (No 2)* [2001] VSC 398, [58]; *National Australia Bank Ltd v Juric (No 3)* [2002] VSC 86, [69].

30 *Sentencing Act 1991* (Vic) s 5(1).

or similar character;

(c) establish conditions within which it is considered that rehabilitation of the respondents may be facilitated;

(d) manifest the court's denunciation of the respondents' conduct; and

(e) protect the community from the respondents. In context, this reference is to protecting the due administration of justice.

213 In *R v Hinch (No 2)*, Kaye J (as his Honour then was) observed:

> The fundamental function of punishment, for the contempt which you have committed, is to uphold and preserve the undisturbed and orderly administration of justice in the courts according to law. The principal purposes of sentences for contempt, which are designed to achieve that end, include specific deterrence, general deterrence and denunciation. Bearing in mind those purposes, the considerations, which are relevant to the imposition of a sentence for contempt, include the objective seriousness of the particular contempt, the context in which the contempt occurred, whether any harm was occasioned by the contempt, the subjective culpability of the person convicted of the contempt, the character and antecedents of the contemnor, and whether any apology has been made by the contemnor for the contempt.[31]

214 Secondly, the *Sentencing Act* provides that the court must have regard to:

(a) current sentencing practices;

(b) the nature and gravity of the offending;

(c) the respondents' respective culpability and degree of responsibility for the offending;

(d) the impact of the offence on any victim and any injury, loss or damage resulting directly from the offence;

(e) whether the respondents pleaded guilty and the stage at which they pleaded guilty;

---

31 [2013] VSC 554, [12].

(f) the respondents' character; and

(g) the presence of aggravating or mitigating factors.[32]

215 Thirdly, in assessing the respondents' character, the *Sentencing Act* provides that the court may consider:

(a) the number, seriousness, date, relevance and nature of any prior offences;

(b) the respondents' general reputation; and

(c) any significant contributions made by the respondents to the community.[33]

216 Fourthly, the *Sentencing Act* gives a sentencing court a discretion to impose a fine on respondents without recording a conviction, to impose a conviction and order the discharge of the respondents, or to order the discharge of the respondents or the release on adjournment without a conviction.[34] In exercising a discretion whether to record a conviction, the Act directs the court to have regard to all of the circumstances of the case, including:

(a) the nature of the offence;

(b) the character and past history of the respondents; and

(c) the impact of recording a conviction on the respondents' economical social wellbeing.[35]

217 I accept that, as the respondents submitted, the principles of proportionality and in some cases the principles of totality and the need to avoid double punishment must be observed when determining the appropriate penalty.[36]

---

32 *Sentencing Act 1991* (Vic) s 5(2).
33 Ibid s 6.
34 Ibid sub-ss 7(1)(f)–(j).
35 Ibid s 8(1).
36 The operation of these principles is more particularly described in *Pearce v The Queen* (1998) 194 CLR 610, 623 [40]; *R v Stamenkovic* [2009] VSCA 185, [7]; *Veen v The Queen (No 2)* (1988) 164 CLR 465, 471–2, 485–7, 490–1, 495–6; *R v Krieg* [2005] VSCA 23, [70]; *Postiglione v The Queen* (1997) 189 CLR 295, 307–8, 339–40; *Mill v The Queen* (1988) 166 CLR 59, 62–3; *DPP (Vic) v Grabovac* [1998] 1 VR 664. See also, by analogy, *Interpretation of Legislation Act 1984* (Vic) s 51.

218 Although the *Sentencing Act* refers to current sentencing practices as a relevant consideration, I agree with the applicant's submission that in the circumstances of the present case, little assistance is to be gained by detailed comparisons of the present cases with other cases.[37] For one, the value of money changes over time, as was observed in *A-G (Vic) v Gordon* by Brooking J:

> In considering fines imposed in other cases, regard must be had to the fall in the real value of money, even since the *David Syme* case was decided. Four and a half years have passed since then and a judge who imposed fines of $80,000 at that time might now think in terms of $100,000. If fines are to be appropriate, they must in a broad and general way reflect changes in the purchasing power of money. Almost everything costs more as time goes by, and, other things being equal, contempt should cost more.[38]

A further reason is that both the circumstances and the impact of one contempt upon the court process are infinitely variable to those of another. I ought steadfastly focus on what is appropriate in these particular circumstances.

219 In *Pelechowski v Registrar, Court of Appeal (NSW),* the High Court considered whether a sentence of six months imprisonment was manifestly excessive. Kirby J observed about general principles governing penalties for contempt:

> In approaching this submission, it is essential to remember a number of general propositions which govern punishment for contempts of the kind in question here where the punishment is not limited by statute but is at large. In determining the order which is appropriate to the contempt found, the Court must take into account those general principles which govern the sentencing of persons convicted of criminal offences which are apt to the peculiar character of contempt. The underlying purpose of the law on this form of contempt is to vindicate the due administration of justice. Contempts of the kind illustrated in this case may be technical, wilful but without a specific intent to defy the authority of the Court, and contumacious. In the last category a serious act of deliberate defiance of judicial authority is evidenced.
>
> Conceding that such categories of contempt may sometimes overlap, in a case of a technical contempt, where the contemnor has offered an apology which the court accepts, it will sometimes be sufficient to make a finding of contempt coupled with an order for the payment of costs. Where a wilful contempt is shown, in the sense of deliberate conduct but without specific intent to defy judicial authority, a finding of contempt and an order for the payment of costs may not be sufficient. In such a case, a fine (and sometimes more) may be

---

37 The respondents referred to *R v Herald & Weekly Times Pty Ltd* [2008] VSC 251; *R v The Age Company* [2008] VSC 305; *R v General Television Corporation Pty Ltd* [2009] VSC 84; *R v Herald & Weekly Times Pty Ltd* [2009] VSC 85.

38 (unreported, Supreme Court of Victoria, Brooking J, 12 July 1985), 20–1.

> needed to vindicate the authority of the court. But in a case of contumacious defiance of a court's orders and authority, it will frequently be appropriate for a custodial sentence to be imposed as a response to an apparent challenge to the authority of the law.
>
> Unless courts are seen to respond firmly to deliberate defiance of their orders, their effectiveness in the authoritative determination of disputes of law would be undermined. And if they were not effective, "serious and lasting damage to the fabric of the law may result". Obviously, the culpability of the contemnor is relevant to the order which must be made. The contemnor must then be punished in an emphatic way. He or she must be deterred effectively from any temptation to re-offend. However, the focus of attention is not solely on the contemnor. It is also addressed to the community at large and to any others who might consider acting in a similar manner.[39]

220 In *CFMEU v Grocon,*[40] the Court of Appeal examined the distinction between wilful contempt and contumacious contempt. The court held that a statement of charge alleging contempt by breach of court order need not plead that the contemnor acted contumaciously in order that they be convicted of criminal contempt. However, the presence of a specific intent to interfere in the administration of justice is relevant to penalty. The authorities analysed by the court distinguish between a contempt which is wilful and one that is a contumacious act. The latter involves deliberate defiance of, or a specific intention to defy, a court order, including, for example, where the person knows that the conduct is prohibited and there is no reasonable belief that it can be excused.[41] A wilful contempt is one where the disobedience is more than casual, accidental or unintentional, but falls short of being contumacious or defiant.[42]

Applicant's submissions

221 The applicant contended that the nature and circumstances of the contempt warranted a substantial penalty. She submitted that contempt by breach of a suppression order is a serious matter and that the suppression order was made with due regard to the capacity for very great prejudice to Pell from potential media 'saturation' and a 'febrile' media atmosphere in the absence of a suppression order. The Chief Judge considered the circumstances to be of a kind that would clearly strain the ability of

---

39 (1999) 198 CLR 435, 484–5 [147]–[149] (citations omitted).
40 *CFMEU* (n 26).
41 Ibid 565 [147]–[152].
42 Ibid 569–70 [171]. See also *Australasian Meat Industry Employees*, 113 (n 20); *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, 551 [65].

judicial directions to guard against sympathy and prejudice. His reasoning that the suppression order was in the public interest to protect the proper administration of justice was readily accessible to the respondents.

222 The terms of the suppression order were clear and unambiguous and provided no basis to assume that publication was permitted of detail other than Pell's name and the charges.

223 Each impugned report breached the plain terms of the suppression order and frustrated its effect in two ways.

224 First, by publishing material 'derived' from the cathedral trial and (in some cases) the fact of a second pending trial, the guilty respondents published materials that were clearly contrary to the plain terms of the suppression order, frustrating its intended purpose, and thereby frustrating the administration of justice.

225 Second, by publishing information in a manner and in content that would attract the interest of readers or viewers by referring to a high profile conviction for a serious criminal offence, and the availability of more fulsome details in accessible overseas articles, the publications had a tendency to encourage readers/viewers to search for information which would disclose Pell's name and the nature of the offences. Such conduct also frustrated the efficacy of the suppression order and the administration of justice. The conduct of respondents who referred to specific overseas articles, such as the Washington Post articles, or to the fact that Google searches would reveal further information, was of a particularly aggravated character.

226 The guilty respondents' assertions, put as matters in mitigation, that there was no intentional breach of the suppression order should be rejected. Particularly having regard to the unambiguous terms of the suppression order, little weight should be given to the evidence that was proffered to the court on the plea hearing, when the guilty respondents largely relied on hearsay evidence proffered by senior management as to the beliefs of senior editors based on information, including information over which client legal privilege was maintained such that the decision

makers themselves avoided exposure to cross-examination.[43]

227 The applicant contended that the court should infer that in publishing the impugned reports, the guilty respondents took a calculated risk of breaching the suppression order, and took that risk for one or more of three reasons:

(a) the respondents disagreed with the purpose and scope of the suppression order;

(b) the respondents' objective was to pressure or influence Chief Judge Kidd in his determination of the application to review the suppression order on 14 December 2018; and

(c) the respondents sought to increase circulation/readership ratings of their respective publications.

That was the only available explanation for what occurred, given the clear terms of the suppression order and the receipt of legal advice and the plea of guilty.[44]

228 In respect of that second objective, the applicant contended that such an inference may be drawn from the fact that the Chief Judge's chambers informed the media interveners on 12 December 2018 that he would to hear their application for review of the suppression order on 14 December 2018. The timing of the impugned reports on 13 December 2018 — between receiving confirmation of the listing of the review application and the hearing of that application — was said to support the inference.

229 The publications were neither inadvertent nor the result of a breakdown in systems. In each case (leaving aside publication by syndication), the respondents made a definite decision to publish the impugned reports.

230 As Kaye J observed in *Hinch*:

> It is not for the media, or anyone else, to pick and choose which suppression order should be obeyed and which orders should not be obeyed. Our system

---

43 Excepting Mr Thomsen in respect of the charge against Allure Media and Mr Lavelle in respect of the charges against The Age Company.

44 Compare *R v Pacini* [1956] VLR 544, 551.

> of justice would be unworkable if others were to embark on the course of conduct undertaken.[45]

That observation was submitted to be apposite in this case. The respondents ignored the unambiguous restraint on publishing 'any information derived from the trial', apparently believing in an entitlement to pick and choose what information derived from the trial was published, on the basis that other information was not disclosed. Such conduct plainly involved taking a calculated risk. Publishing prior to knowing the outcome of the scheduled review application also involved a calculated risk.

231 While the applicant accepted that there were no actual consequences for the swimmers trial by reason of the frustration of the effects of the suppression order by the impugned reports, she submitted that Pell's right to a fair trial in the swimmers trial was put in grave jeopardy. The adverse consequences for that trial, had it proceeded, could have occurred in many ways, including jurors in that trial recalling the impugned reports and 'joining the dots' as to who they were referring to, or jurors searching online either generally or for overseas publications they had been told named the accused.

232 At the time when the impugned reports were published, the potential for harm was real, and the media storm that followed the lifting of the suppression order in February 2019 demonstrated that the prospect of a fair trial for Pell could have evaporated in a maelstrom of publicity, such that a fair trial of the second round of charges might never have been had.

233 The disclosure that had occurred through overseas publication cannot detract from the seriousness of the consequences of breach of the suppression order by the impugned reports. Potential members of a jury pool were much more likely to read local media than conduct internet searches. Further, the presentation of the information in most of the impugned reports is reasonably described as sensationalist. Local readers were more likely to believe reputable media sources than internet sources.

---

45 *Hinch,* [21] (n 4).

234 The applicant contended that the guilty respondents were substantial organisations in Australia with the capacity to pay significant fines, and would not be specifically deterred from breaching suppression orders in the future unless the fines imposed were commensurate with their size and financial standing.

235 While accepting that the respondents' guilty pleas were appropriate to be taken into account in mitigation of penalties, those pleas should be assessed having regard to the following factors.

236 First, the pleas were entered at a very late stage, towards the end of the trial after the applicant had closed her case and during the presentation of the respondents' defences. Accepting that whether there has been genuine and appropriate contrition requires evaluation in all of the circumstances of the case before the court,[46] and there was no objective evidence of remorse at any prior time. The respondents vigorously defended the proceeding, taking every procedural point and starting several interlocutory skirmishes, over a period of nearly two years. Given the nature of the evidence presented by the applicant, there was no satisfactory explanation of the timing of the guilty plea as might support it as a significant mitigating factor.

237 Second, since those pleas were taken, the respondents other than Mamamia have suggested (in statements to the media or in evidence on the plea) that it was necessary to defend the proceeding unless and until the natural person respondents were released from the charges against them. The apologies took the form of a statement by counsel of an unqualified and sincere apology to this court, the County Court of Victoria and to Chief Judge Kidd. The applicant contended there were many opportunities to have proffered an apology prior to that time.

238 The applicant contended that the guilty respondents' assertions[47] that, as a mitigating factor, they relied on legal advice in deciding whether to publish the impugned reports should be afforded little, if any, weight as a sentencing consideration. The

---

46 *Phillips v The Queen* (2012) 37 VR 594, 604–5 [36] ('***Phillips***').

47 Which were not made by Mamamia or Radio 2GB Sydney and are irrelevant to the sentencing exercise as it relates to them.

applicant noted:

(a) the precise nature and content of the advice is unknown and cannot be evaluated, as the respondents have maintained a claim for client legal privilege over it. In those circumstances, it is speculative for the respondents to contend that the relevant decision makers had a reasonable and honest belief that the suppression order would not be breached, as the basis for that belief is not open to scrutiny; and

(b) the terms of the suppression order were clear and unambiguous on a plain reading, such that it was difficult to contend — irrespective of legal advice — that the respondents' decision makers held a reasonable and honest belief that the suppression order would not be breached by publication of the impugned reports.

239 The applicant submitted that any adverse impact on the individual journalists, editors and presenters who were formally charged were irrelevant to the issue of the appropriate penalty for the contempt committed by the (corporate) respondents. Further, given the absence of probative evidence in support of such submissions, they cannot attract any significant weight. In any event, account should also be taken of the fact that the charges against individual respondents were withdrawn, a consequence that to the court seemed advantageous for some, if not all, of those individuals.

Mitigating factors

240 The guilty respondents submitted that the following mitigating factors were relevant to the exercise of the court's sentencing discretion in relation to the charges they faced:

(a) the degree to which the impugned reports actually frustrated the suppression order by 'encouraging' readers, listeners or viewers to search for the overseas publications;

(b) the absence of any evidence that any readers, listeners or viewers in fact conducted any such searches;

(c) the relevant respondents' purpose and intention for publishing the impugned report(s);

(d) the content, tone and subject matter of the impugned report;

(e) the respondents' editorial systems for managing the risk of committing a contempt of court, including the seeking of legal advice;

(f) in some cases, the limited extent of publication of the impugned report;

(g) the extent to which the impugned report prejudiced the swimmers trial;

(h) the respondents' guilty pleas;

(i) the respondents' good character;

(j) the impact of the charges and any penalty which the court might impose on the respondents;

(k) the respondents' apologies and agreement to pay costs; and

(l) in some cases, the need for penalties that accord with the principles of totality and proportionality in order to avoid double or excessive punishment.

241 These factors are now considered in two stages. I will first consider factors of wider application across the respondents, or in respect of which all respondents put a common submission. I will come later in these reasons to matters specific to each individual respondent.

242 The first seven mitigating factors identified by the respondents are of considerable importance to my findings about the degree of culpability in the respondents' contempt, and it is convenient to deal with them together.

Culpability and responsibility

Assessment

243 It is settled law that the mere contravention of a suppression order in terms is

insufficient to constitute the *actus reus* for a charge of common law contempt of court by breach of a suppression order. The impugned conduct must have frustrated the purpose or efficacy of the order in a manner that had a tendency to interfere with the due administration of justice.[48]

244 In assessing the nature and gravity of the contempt, the degree or quality of the tendency of the conduct to frustrate the purpose or efficacy of the order is distinct from the inquiry into the intentions of the contemnor. A contemnor's intentions are relevant to the related inquiry into their culpability and degree of responsibility.

Tendency to interfere with due administration of justice

245 The tendency of media reporting to interfere with the due administration of justice in Pell's prosecution was the central question when the suppression order was granted. It was not contentious that the Chief Judge carefully considered whether the suppression order was necessary to avoid a real or substantial risk of interference with the administration of justice, and the manner in which the order should be framed so that it extended no further than was necessary. It was common ground between the prosecution, Pell and the intervening media parties that, at the very least, a suppression order in relation to Victoria was necessary to preserve the integrity of the jury pools for the two trials, the impartiality of the jury in the second trial, and to ensure that the accused received a fair and impartial trial.

246 Self-evidently, when the suppression order was made, there would be a verdict in one trial before the second trial was held, shortly after that verdict. Reporting of, or commenting about, information derived from the first trial outside of Victoria and outside of Australia, but accessible over the internet in the geographical location of the potential jury pool, was to be expected. The reasons why the public interest favoured Pell's right to a fair trial on the second set of charges over a delay in media reporting within Australia of any information derived from the first trial, although

---

48 *A-G (UK) v Leveller Magazine Ltd* [1979] AC 440; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465, 477; *A-G (NSW) v Mayas* (1988) 14 NSWLR 342, 356; *R v Savvas* (1989) 43 A Crim R 331, 334–5; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 279 [123]; *Fairfax Digital Australia and New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52, 69 [59]–[60]; *Hinch*, [52] (n 4); No Case Ruling, [153]–[154] (n 2).

common ground, were clearly articulated by Chief Judge Kidd.[49] Those reasons were without error, as there was no appeal.

247 There is no evidence that any of the guilty respondents, or those advising them, engaged with the Chief Judge's reasoning when preparing the impugned reports for pubilcation. Superficial references in the articles to the purposes of suppression orders are not evidence of engagement. To the very limited extent that there was direct evidence from a decision maker for a respondent, I am satisfied that in respect of The Age articles, Mr Lavelle was familiar with the terms of the order, but did not consider the specific reasoning for it.

248 I am satisfied, in particular, and have no doubt, that the guilty respondents did not engage with the following passage in the Chief Judge's reasoning:

> It is difficult to envisage beyond the bare fact of prosecution for historical sexual offences what other information could safely be disclosed without giving away information which has the capacity to prejudice the accused man's right to a fair trial. That is because the information which has the capacity to prejudice this right lies at the core of these proceedings: the nature of the charges, the number of complainants and the number of trials. To demonstrate this take the following:
>
> a) Publicity concerning the number of trials would inevitably suggest to prospective jurors in one trial that the accused man is facing other serious sexual offences involving other complainants.
>
> b) Likewise, it would not be sufficient to merely prohibit publication of a conviction arising out of the first scheduled trial (i.e. the swimmers trial), since the jury would have already been inundated with all the details of the allegations. They would also then be left to speculate about the outcome.
>
> I accept that public scrutiny is essential to engender public confidence in the administration of justice. It might be said that this is especially so where the prosecution involves such a high level official from a significant institution. The accused man is presently a Cardinal, one of the most senior positions within the Catholic Church. That said, the accused man, like anyone else is entitled to a fair trial. In my view, his rights to a fair trial should not be diminished because of who he is, or the office he occupied at the time of the alleged offending, or the office he occupies today.
>
> As I have said, no media organisation has contended that a suppression order

[49] Suppression Order Ruling, [35]–[48], [51], [52] (n 6).

is not justified in Victoria.[50]

249 Further, the guilty respondents did not engage with the Chief Judge's reasoning that interstate publicity was likely to have a more significant and widespread impact upon Victorians than any indirect exposure to international coverage, and in respect of the latter, the Chief Judge said:

> [I]nterstate publicity is likely to have a more significant and widespread impact upon Victorians than any indirect exposure to international coverage.
>
> Further, while such international exposure has the capacity to undermine, to some degree, the efficacy of any order that I make, the law recognises that a trial judge can only do so much to protect the interests of an accused person. Perfect justice might well be an aspiration, but it is not a requirement of a fair trial. The fact that an order does not guarantee perfect impartiality does not mean that such an order is unnecessary.[51]

250 The careful balancing of the public interest in being informed of the detail of Pell's prosecution with the public interest in an accused receiving a fair trial informed the Chief Judge's conclusion about the necessary form and content of the order. I explained my reasons for agreeing with the Chief Judge's conclusion in this respect in the No Case Ruling and now repeat what I said:

> Anticipating the possibility that the jury in the first trial returned verdicts of guilty, it would be a foregone conclusion that members of the jury pool for the second trial would have learned of Pell's conviction prior to the empanelment. Knowing that there were two different sets of allegations of child sex offences or that one set of allegations had been found proven could, to the prejudice of a fair trial, cause a jury to engage in impermissible reasoning. The common law recognised long ago the dangers of tendency, coincidence and context reasoning. The risk that many members of a jury pool would know these things was very high because of the prevailing level of community interest in the forthcoming prosecution of Pell.
>
> While courts employ strategies to attempt to ameliorate the adverse consequences of publicity such as particular care in jury selection, change of venue, delaying trials and charging a jury with strong directions in respect of its deliberations, there were many factors that had ignited an unprecedented interest in these trials, such that these strategies could not be assumed likely to reasonably guarantee a fair and impartial trial. Self-evidently, Chief Judge Kidd thought so. It was futile not to recognise that there had already been widespread publicity of the fact that Pell faced prosecution for historical sex offences, and the order permitted that disclosure.

---

50 Ibid [51]–[53].

51 Ibid [59(d)]–[59(e)].

…

In protecting the impartiality of a jury pool to ensure that an accused person receives a fair trial, the due administration of justice seeks to guard against the prejudice of impermissible reasoning by a jury. The obvious example I have noted is the improper use of tendency, coincidence, and context evidence.

Another concern is the issue of a recovered memory or a subconscious bias, which is why the order extended to prohibit more than identification of Pell as the accused and of the charges that he faced. Members of a jury pool for the swimmers trial who did not relate Pell's circumstances to the impugned publications about the 'high profile Australian' that had been 'convicted' of 'awful crimes' when they first saw it might do so after being empanelled and when serving on the swimmers trial jury and learning what that trial was about. The average jury members' capacity for inference in this context would more closely resemble that of the ordinary reasonable reader, rather than the fair minded lay observer. Vetting of jury pools and strong directions against jury research are not foolproof. As Bingham J (as his Lordship then was) observed, albeit in a more striking context of contempt, in *Attorney-General v Sport Newspapers Ltd*.

> [The information] was simple, easy to grasp and likely to be remembered, or recalled, by anyone who read the paper (or was informed of its contents) and later came to try the case.

A like observation may be made in the present circumstances. Although now is not the time to express concluded findings on the nature of many of the impugned publications, it is uncontroversial to say they constituted, generally speaking, extraordinary journalism; designed to first attract the reader's attention and then make a point, including by encouraging inquiry to understand why the news media organisations were taking that stand. What was conveyed was simple, easy to grasp, and likely to be remembered or recalled. I consider that the applicant's case, drawing all reasonable inferences, readily permits a conclusion that a person selected for the swimmers trial jury and learning of the substance of the allegations in that trial could 'join the dots'.

Although some of the impugned publications recognised and discussed the public interest being protected by the proceeding suppression order, most took a limited and simplistic interpretation: not disclosing the name of the person or identifying the offences of which they were found guilty was sufficient compliance and represented the appropriate balancing of that interest against the public's right to know what and when the media want to tell them. That limited construction failed to appreciate and accommodate the myriad ways in which the law, from very long experience, seeks to preserve its processes to ensure that, as society demands, every person accused of a crime receives a fair and impartial trial. These matters are why an effective proceeding suppression order prohibits publication of more than the name and the charges, but does so only for so long as the due administration of justice requires.

For these reasons, I am satisfied that the applicant's case is capable of establishing that a real risk of prejudice to the due administration of justice from disclosure of any information derived from the trials would be evident to the hypothetical ordinary reasonable reader from the content of the impugned publications. That reader would readily appreciate that what was in the

> balance was not whether disclosure of the facts of the Pell prosecutions was required by the public interest in freedom of speech, but rather whether a short deferral of disclosure to satiate that public interest was justified, having regard to the public interest in the due administration of justice in a civilised society...[52]

Frustration of purpose or efficacy of suppression order

251 There are two parts to the relevant inquiry as to whether the purpose or efficacy of the suppression order was frustrated:

(a) Did the publication contain material that was contrary to or that infringed the terms of the order? So much is plainly admitted by the guilty respondents by their pleas and is evident from the detailed analysis of the articles set out earlier.

(b) Did publication of the article frustrate the effect of the suppression order? Conceptually frustration refers to the tendency of a breach of the order to diminish its purpose or efficacy, and thus prejudice the due administration of justice, but the respondents contended that the impugned reports neither had that consequence nor were they relied on by the applicant to so prove.

252 The authorities make it clear that the tendency of a publication to prejudice the due administration of justice is to be assessed primarily from the content and circumstances of what is published. I discussed this issue in the No Case Ruling in some detail, explaining why I respectfully agreed with the analysis in *Hinch* that the tendency of the publication in question is to be established objectively, by reference of the nature of the publication and the circumstances in which it was made.[53]

253 The respondents' pleas necessarily admitted that the publication of their report(s) frustrated the effect of the suppression order because they contained material that was contrary to, or that infringed, the terms of the order. Focussing on the second part of the test, assessment of the respondents' culpability on this element must focus on the quality of frustration exhibited by the report. The frustrating quality impacts upon the efficacy of a suppression order. The inquiry must focus on the degree to which the

---

52 No Case Ruling, [170]–[176] (n 2).
53 Ibid [106]–[114].

article bears on the efficacy or purpose of the order. The time at which the inquiry is made to identify the quality of frustration possessed by the offending material must necessarily be the time of its publication.

254 A tendency to diminish the efficacy of the order, or to undermine its intended purpose, will be frustration in the relevant sense. Put another way, a real and substantial risk that the efficacy of the order might be diminished by the publication demonstrates that requisite tendency to frustrate. The degree of that tendency or risk is relevant to the assessment of the gravity of the contempt. Although the consequences of publication are relevant when assessing the culpability of the contemnor's conduct, particularly where demonstrable harm has occurred, the contemptuous act that must demonstrate a quality of frustration of the order is the act of publication itself. It is not what may follow; for example, the action (or lack of action) of a potential juror in searching on the internet. That is why the law speaks of the effect of the publication on the intended purposes of the order; of whether the effect of the publication is detrimental to the efficacy of the order. Determining the character of the frustrating conduct is an important consideration in assessing culpability.

255 The assessment of the frustration was ordinarily a matter to be made on the evidence before me, but the respondents contended otherwise.

Respondents' contentions

256 During the presentation of the applicant's case, the respondents contested the precise publication times of both the impugned reports and the overseas publications. On that contest, my findings are already set out. The respondents' cases were that searches or investigations for the further information alluded to, but not revealed by the impugned reports (including the identity of the accused and the charges he faced) were actually minimal, or not fruitful. They submitted that an analysis of the evidence of such conduct showed that the tendency of the impugned reports to interfere with the administration of justice was insignificant. In substance, provided Pell and the Catholic Church were not named and the offences of which he had been found guilty not identified, publication of other information 'derived from the trial' would not

constitute contempt because such publication would be a breach *simpliciter* of the suppression order that would not carry the necessary quality of the relevant tendency.

257 Once the plea agreement was reached, the respondents contended that although contempt was admitted by each of them, their culpability was significantly diminished as the degree of frustration admitted by their pleas was minimal.

258 The respondents accepted that the purpose of the suppression order was to protect Pell's right to a fair trial in the swimmers trial, by limiting the risk that jurors in that trial might be exposed to information derived from the cathedral trial that was prejudicial to his defence. However, they contended that they had an honest belief that the information to which potential jurors were exposed was not prejudicial to Pell if he was not identified. They accepted that their belief was wrong, but contended their error of judgment in acting on that belief was an honest and innocent mistake.

259 The News Corp respondents contended that:

(a) they did not identify Pell, the Catholic Church or the crime for which Pell had been found guilty;

(b) the News Corp articles in print media (the Daily Telegraph article and the Courier Mail article) did not identify the court or the state in which the verdict was delivered;

(c) the News Corp online articles were only available fleetingly, for less than 10 hours; and

(d) the reports for which they were charged did not result in the swimmers trial being aborted.

260 Accordingly, the News Corp respondents has submitted that their publications did not directly frustrate the purpose or efficacy of the suppression order, and that it was not unreasonable for them to come to that view when deciding to publish the articles.

261 The Nine Entertainment and Mamamia respondents accepted that their reports had a

tendency to encourage readers to conduct investigations that might have resulted in their learning of Pell's guilt, but, as a matter of practical reality, that tendency was very limited and tempered. As the applicant made no attempt to quantify that tendency, their reports were not comparable to those in other cases where the accused had been named and their crimes identified in the publication itself, or where there was evidence that readers had in fact conducted searches to ascertain that information.

262 All respondents made a further submission, which adopted a similar argument to that raised by the third ground considered in the No Case Ruling. They contended that because their reports did not identify Pell or the charges of which he had been found guilty, those publications were not capable of frustrating, and did not directly frustrate, the purpose or efficacy of the suppression order. The applicant had not alleged frustration of the suppression order by reference to the content of the impugned reports. Frustration was confined to the '**foundational allegation**'[54] advanced by the applicant: that the impugned reports offered encouragement to readers to search for and locate one or more of the overseas publications to identify the offender and the charges accepted by the jury. The respondents argued that the applicant was confined by the foundational allegation in her pleading, by which the tendency to frustrate the efficacy of the suppression order was particularised.

263 It was that, and only that, potential jurors, having read the articles, would conduct their own investigations and so learn that it was Pell who had been convicted in the cathedral trial of serious historical child sexual abuse crimes. If the guilty respondents' encouragement to those potential jurors to investigate the mystery to which the reports alluded was unlikely to identify Pell, or his crimes, publication of other information derived from the trial could not have any more than a minimal or modest tendency to frustrate the purpose of the suppression order.

264 The respondents contended that, limited in that way, the relevant inquiry to assess the seriousness of the contempt must focus on the tendency of the reports to encourage searches and the practical consequences that were likely to have followed. It did not

---

54 As so described by counsel for the Nine Entertainment respondents and Mamamia.

extend to the objective assessment of the content of the impugned reports, the words used and the meanings conveyed, or the circumstances in which publication was made, as frustrating the efficacy of the order in that manner was not how the case had been pleaded. The foundational allegation was simply that the frustrating tendency to interfere with the efficacy of the order only arose through encouragement of 'simple searches' by readers that led to the discovery of the identified overseas publications.

265 The Nine Entertainment and Mamamia respondents submitted that the applicant at all times assumed the burden of establishing the foundational allegation in relation to each charge. The element of frustration of the purpose or efficacy of the order was inextricably linked to the search for overseas publications, rather than the content of the impugned reports.

266 The consequence, the respondents asserted, was that their guilty pleas were procured to the charges as pleaded, and the applicant could not be permitted, after the plea agreement, to resile from her pleaded case. More significantly, the court could not punish the respondents on a different basis from that set out in the applicant's pleading.

Analysis

The foundational allegation

267 The first difficulty with the foundational allegation submission is that unlike those cases that support the conventional rule in criminal trials that was the basis for this submission, the respondents did not plead guilty until after the court had heard the whole of the applicant's evidence. The applicant's case, as particularised, had been presented to the court, tested by the respondents through cross-examination, and closed. The cases of The Age Company and Fairfax Media Publications had also closed before the plea agreement was entered into. The respondents had the opportunity, first, to object to any evidence that was inconsistent with the pleading and, secondly, to test all of the applicant's evidence. When announcing the plea agreement, it was not put to the court that, as part of that agreement, the court was to accept a particular set of agreed facts differing from what could be properly drawn from the evidence in

the trials. In the absence of agreed facts, the applicant and the respondents each adduced further evidence, further exposing the lack of merit in the respondents' foundational allegation submission.

268 The convention in a criminal trial that that Crown opening constitutes an agreed factual basis for sentencing when a plea is taken before the trial is opened is not the applicable convention in this circumstance. In that situation, the standard practice is to use the depositions and related exhibits from the committal as the basic evidentiary material that fleshes out the opening statement.

269 In the present cases, the evidence for sentencing purposes is that presented and tested at trial, which was defined and confined by reference to the pleadings and the summaries of prosecution openings, and the further evidence led on the plea. It is on that evidentiary base — not the pleadings — that I apply the principle that I may not take facts into account in a way that is adverse to the interests of a respondent, unless those facts have been established beyond reasonable doubt.[55] On the other hand, if there are circumstances that I propose to take into account in favour of a respondent, it is enough if those circumstances are proved on the balance of probabilities.[56]

270 In any event, I reject the respondents' submission that the construction of the particulars of the prosecution case was limited to the foundational allegation. It misconstrued the pleadings. A plain reading of the particulars demonstrated that, in respect of the second element of the charge — frustrating the purpose or efficacy of the suppression order — the applicant put her case in two ways. The impugned reports:

(a) each reported 'information derived from the trial', contrary to the suppression order and frustrating its purpose or efficacy; and

(b) when so breaching the suppression order in the manner alleged, encouraged

---

55 *R v Storey* (1998) 1 VR 359, 369 ('***Storey***'); *Ashton v The Queen* [2010] VSCA 329, [20]-[22]; *Bourne v The Queen* [2011] VSCA 159, [38]; *Ristevski v The Queen* (2011) 31 VR 193, 195 [10]; *Formosa v The Queen* (2012) 36 VR 679, 681 [8]; *Le v The Queen* [2019] VSCA 80, [81].

56 *Storey*, 369 (n 55); *R v Olbrich* (1999) 199 CLR 270, 281 [27]; *Phillips*, 622 [105] (n 46).

simple searches by readers to identify further information derived from the trial.

271 I explained earlier in these reasons why the reporting of any information derived from the trial would be prejudicial to the administration of justice, even when Pell's name and the charges found proved were not disclosed. The applicant's first four particulars, common to all respondents, clearly alleged the reporting of information derived from the trial as the cause of the frustration of the efficacy of the suppression order. I am not persuaded that the Nine Entertainment and Mamamia respondents misunderstood the particulars, as their submission implied.

272 The material allegation that the applicant needed to, and did, particularise was the frustrating effect of the impugned reports. It was not necessary to identify the myriad ways in which the proper administration of justice might be affected by a breach of the suppression order. Why a publication reporting information derived from the trial, but sanitised by not naming Pell or identifying the charges, would nonetheless have a frustrating effect on the suppression order was identifiable from the Chief Judge's reasoning in the Suppression Order Ruling, and from my reasons in the No Case Ruling. The purpose and extent of the suppression order was carefully considered when it was made. Any material breach of it would necessarily frustrate the proper administration of justice to some extent. The particulars of material breach of the suppression order were pleaded in unambiguously clear terms.

273 A further way in which the applicant put her case was that the frustration of the efficacy of the suppression order occurred because the impugned reports encouraged simple searches. It was clear from the language of this fifth particular that it was an additional and/or alternative way of demonstrating how the second element of the charge could be established. I reject the Nine Entertainment and Mamamia respondents' contention that the particulars were cumulative and consisted of the single foundational allegation.

274 The second basis for rejecting the respondents' contention is that the manner in which

the frustration of the order was put against them was the subject of argument on the respondents' submission of no case to answer. At that time, the applicant — having closed her case and in opposing the no case submission — made her case clear, and I ruled on the basis of the evidence adduced by the applicant. If the respondents wished to contend that the applicant had agreed that the pleas of guilty were in response to a set of agreed facts that differed from how she had put her case to the court, it was incumbent upon them to not only negotiate the terms of that agreement, but to make it clear to the court that it was proposed that the remaining charges would proceed according to a different set of facts than those established by the evidence at trial.

275 Because this did not occur, I do not accept that the respondents can now be heard to say that they would have run their case differently, called different evidence, or pleaded guilty at an earlier point in time, had they realised or understood the way that the case was being put. This submission was a bald assertion and there was no basis to contend that the respondents lost those opportunities. I do not accept that the respondents did not realise or understand the way that the applicant's case was put. In any event, the issue of whether the impugned reports frustrated the purpose or efficacy of the order by their content were matters for submissions. The suppression order and the impugned reports were in evidence, and how the order ought be construed in the circumstances could not have affected the way that the respondents might have run their case up to the point when they determined to plead guilty.

276 Any conduct that attempted to reset the balance struck by the trial court between the accused's right to a fair trial and the public's right to immediately know what happened in the first trial — in favour of the latter and to the prejudice of the former — carries the necessary tendency to frustrate the efficacy of the suppression order. The court's inquiry into the gravity of the contempt was not limited to what the respondents characterised as the foundational premise of the applicant's case; whether the publications encouraged 'simple searches' on the internet to identify the offender and the charges found proved. The submission is fallacious.

277 I am satisfied that the information derived from the trial that did not identify Pell or

the charges he faced, which the respondents believed to be appropriately sanitised in the impugned reports, tended to frustrate the purpose or objective of the suppression order.

278 For example, in the sections of the No Case Ruling extracted earlier, I specifically identified that the danger of subconscious recall was plainly within the Chief Judge's contemplation when considering the efficacy of directions that a trial judge might give to a jury pool during empanelment, and to the jury once impanelled. That reasoning is incompatible with the respondents' submission that not identifying Pell and the charges he faced when publishing other information derived from the trial was no more than breach *simpliciter*, and not contempt. Those dangers are foreseeable consequences that demonstrate why the Chief Judge considered it necessary to frame the order in the manner in which he did.

279 I am persuaded beyond doubt that the information derived from the trial, published in the impugned reports, frustrated the purpose and intended effect of the suppression order in a significant degree. It is significant because the respondents necessarily usurped the function of the court in protecting the proper administration of justice by determining for themselves where the balance ought to lie. I will develop this conclusion further.

280 The fallacy that underlies the respondents' submission is its focus on the impact of conduct encouraged by the impugned reports on the administration of justice, without recognising that the crux of the second element of the charge is frustration of the efficacy of the order. The effect of frustration of the order must be to frustrate the administration of justice because, as I have noted, the necessity for a suppression order in order to further the proper administration of justice was settled by the Chief Judge when originally making the order. Not only was that assessment soundly reasoned, it was never challenged. The publication of information derived from the trial — notwithstanding that it was not linked directly to Pell or the charges of which he had been found guilty — in and of itself substantially frustrated the efficacy of the suppression order.

Intention in publication

281 The respondents raised their intention in publishing as a mitigating factor, by contending they each had an innocent, but mistaken, belief that the order was not breached by publishing the impugned reports.

282 Although the applicant was not obliged to prove motive or intention as a necessary element of the contempt, she was entitled to rebut the respondents' contention of innocent error of judgment as a mitigating factor. She was also entitled to contend that the contumacious, alternatively deliberate, conduct of each respondent was an aggravating factor. The applicant put this submission in two ways.

To pressure Chief Judge Kidd

283 First, the applicant contended that publication in breach of the order was deliberate and directed to achieve a particular outcome. The deliberate intention of the respondents, or some of them, in publishing the articles was to put pressure on the Chief Judge when he came to consider the media's application to review the suppression order on 14 December 2018. This state of mind was put as an aggravating factor and, as such, needed to be established beyond reasonable doubt.

284 Had this intention been proved, the contempt charged would be regarded as contumacious and most egregious and extreme. Although the Chief Judge made reference to that possibility during the special mention on 13 December 2018, he did not regard such an intention on the part of the media as established on the evidence then before him. It is more probable that the Chief Judge, when referring to the possibility of contempt, felt his impartiality compromised by the media's characterisation of the suppression order as futile in advance of the argument before him on that issue, creating an appearance of influence over him however he ruled. That possibility was not raised at trial, and I say no more about it.

285 I am not persuaded to draw the inference of that deliberate contumacious intention for two reasons.

286 First, I accept the clear, consistent and immediate denials credibly given by each of the

witnesses to whom that suggestion was put by the applicant in cross-examination. Mr Lavelle, Mr Thomsen, Mr Byrnes, Mr Wick, Ms Saunders and Ms Launders each denied that intention.

287 Secondly, I was not persuaded by the applicant that the only inference of motive that was reasonably and necessarily open from publication of the impugned reports was the intention to put pressure on the Chief Judge or in some way redefine the parameters for justification of the suppression order ahead of its review. The consequence of publication must be distinguished from the intention of each guilty respondent. I am not persuaded that this state of mind was proved for any respondent,[57] nor do I accept the applicant's contention that no alternative inference consistent with the absence of that deliberate intention could be drawn on the evidence.

To take a calculated risk in publication

288 The applicant's second and alternative submission was that the manner in which the respondents took the calculated risk reflected their intention to publish information in breach of the terms of the suppression order.

289 I accept the applicant's alternative submission. I am satisfied beyond reasonable doubt that this motivation of the guilty respondents, or at least most of them, is clear from the terms of the publications themselves. The respondents did take a calculated risk and intended the meanings conveyed when they published the impugned reports. What individual respondents intended to achieve varied between those who reported directly and those (Mamamia and Allure Media) who characterised their reportage as a write around. I will return to this distinction later in these reasons. I will presently set out my reasons for being so persuaded about motive after explaining the respondents' contentions about motive.

290 In resisting the applicant's submission on calculated risk, the respondents contended that:

---

57 *Shepherd v The Queen* (1990) 170 CLR 573, 576, 579; *Mannella v The Queen* [2010] VSCA 357, [41].

(a) they had made innocent errors of judgment, premised on an honest belief that by publishing the impugned reports, they would not breach the suppression order; and

(b) it was not unreasonable for the decision makers to so conclude.

291 This was the second key plank of the respondents' submission that their contempt was at the lower end of the spectrum. I have not been so persuaded.

292 No respondent affirmatively developed a narrative about its intention when publishing the impugned reports. Most respondents contended that their honest (but mistaken) belief was formed by their editors after careful reflection, including considering legal advice. Maintaining client legal advice privilege over that advice, the relevant senior executive of a respondent (giving evidence on information and belief), or in some cases, the decision makers themselves, invited me to find that after considering the issue, the respondents honestly believed that what they published did not breach the terms of the suppression order.

293 The process of reasoning to this honest belief was mostly underdeveloped and unpersuasive. I was invited to accept that the reasoning process included considering legal advice given, in most cases, about the terms of a prepared article, but the conclusion that publication would not breach the suppression order was not determined by the legal advice, which was but a factor in that deliberation. The respondents carefully maintained privilege over the legal advice during the trial.

294 I was not persuaded on the balance of probabilities that any respondent proved a basis for having the honest belief they contended for. There were logical gaps or inconsistencies in the basis for that belief. Some respondents advanced fatuous suggestions. They apparently felt obliged over an unambiguous suppression order to answer their reader's inquiries as to why there was no local coverage of a developing story in international publications. They considered that 'the cat was out of the bag'. They were not reporting information derived from the trial because they were reporting information published elsewhere, so the information could be said to be

derived from another source. None of those suggestions could sit with the fact that the respondents were aware of the existence of the suppression order, and either understood or were indifferent to its terms.

295 All of the impugned reports in terms identify the existence of the suppression order. Although the Chief Judge's reasons did not become available on the internet until after the suppression order was lifted, they were provided to the parties, including the media representatives who appeared on the suppression order application. I am satisfied beyond reasonable doubt that the respondents had or were able to obtain a copy of those reasons at that time, as:

(a) entities from both News Corp (Nationwide News Pty Ltd[58]) and Nine Entertainment (Nine Network Australia Pty Ltd[59]) (Nine Entertainment) appeared on the suppression order application and were represented by solicitors and counsel. It was conceded that those entities each appeared as a vehicle for the interests of their respective group;

(b) Macpherson Kelley (and later Thomson Geer) acted for the intervening media parties before the Chief Judge and for all of the respondents at all relevant times;

(c) media organisations were able to request a copy of the Suppression Order Ruling from the County Court's media office. At least one journalist made such a request on the day the suppression order was made, and a copy of the ruling was promptly provided to them.

296 At times, a possible ambiguity in the terms of the suppression order was hinted at, but there was no argument for ambiguity advanced by counsel in final submissions. The order prohibited publication of any report of the whole or any part of the cathedral trial, and of any information derived from that trial. Neither the executives who gave evidence (based on a belief formed on information received), nor the decision makers,

---

58 The ninth respondent.

59 The parent company of GTC, the thirty-third respondent.

identified a reasonable and credible path of reasoning to the erroneous conclusion that the order would not be breached if Pell and the charges against him were not identified. I am not prepared to infer a path of reasoning supporting an honest belief as existing at the time of publication when it could not be explained at trial.

297 The applicant's contention that the respondents took a calculated risk was an allegation of an aggravating factor, and she accepted that she bore the onus to establish that intention, as a sentencing fact, beyond reasonable doubt.

298 Bearing in mind these different perspectives, the assessment of the culpability of motive/intention is best not made on the somewhat unconvincing explanations given in evidence, but instead from the statements made and adopted in the impugned reports themselves.

299 The motive of each respondent, except Mamamia and Allure Media, is clear from the words they published, either as direct opinion or as statements of others adopted without criticism. Those respondents disagreed with the reasoning of the Chief Judge. Their opposition to the balance that his Honour struck was express. Most contended, explicitly or implicitly, that media should not be restrained from reporting the outcome of the cathedral trial. Some examples follow of that sentiment, whether in the writer's own words, or the adopted comment of others:

(a) the News Corp online articles:

> Victoria uses more suppression orders than any other state in Australia but their effectiveness is being questioned in the internet era.
>
> …
>
> News Corp Australia, the publisher of news.com.au, is challenging the ban.

(i) quoting its sister publication, the Daily Telegraph:

> [t]he media ban was an 'archaic curb on freedom of the press in the currently digitally connected world.'
>
> …
>
> 'Our political representatives need to fix those rules which run

> contrary to the universal principles of the open administration of justice… We believe you have the right to know this story now and without any further delay.'

(ii) quoting from The Age online editorial:

> [T]he rampant use of suppression orders by Victorian courts has become 'almost absurd' in the digital era and seeking to censor information had become futile.
>
> 'We believe this overuse is insidious and against the public interest.'

(iii) quoting a Washington Post columnist:

> suppression orders were 'almost unheard of in the United States.' 'They are an anachronism in the digital age, where information, thankfully, can't be shut up in a padlocked barn.'

(b) the Daily Telegraph article:

> [r]eputable overseas news sites have published lengthy stories on the case — but The Daily Telegraph and other Australian media are prohibited from telling you about it.
>
> The courts demand that you ignore the story totally until they see fit, but we think that it would be a disservice to the readers of The Telegraph who would expect the same fair and fearless reporting of this case that we have delivered on other similar stories.
>
> …
>
> It would therefore be bizarre to publish today's newspaper without raising what we think is an archaic curb on freedom of the press in the current digitally connected world.
>
> Our political representatives need to fix those laws which run contrary to the universal principles of the open administration of justice. We believe you have the right to know this story now and without any further delay.
>
> We believe there are strong grounds to fight the ban. If we're successful then you'll be the first to know.

(c) The Age online article/The Age article/SMH article:

> Victoria uses more suppression orders than any other jurisdiction in Australia, with the state accounting for more than half of such orders nationally.
>
> The wide dissemination of the suppressed information online, however, highlights the challenges of the suppression regime in some high-profile cases of public interest.

A year-long review of Victoria's 2013 Open Courts Act by retired judge Frank Vincent called into question the function and efficacy of suppression orders in an internet age.

[Despite the Vincent report] Victorian judges were "troublingly" issuing as many suppression orders as they ever were.

The Vincent report made 18 recommendations, none of which has been implemented by the state government

(d) The Age online editorial:

The rapid use of suppression orders by Victorian courts has become almost absurd; in the digital era news reports and other information instantly span the world, amplified by social media. Seeking to censor information has become futile, as the international coverage of a case we cannot tell you about in any detail demonstrates beyond reasonable doubt.

…

The Victorian County Court has blocked the publication of details … This is standard practice.

…

Suppression orders have a noble genesis; they are intended to help ensure a fair trial by preventing jurors from being influenced by media coverage. That is obviously outmoded, yet the courts have responded by issuing a blizzard of suppression orders. Victorian courts issue more suppression orders than the rest of Australia's states and territories combined.

…

We believe this overuse [of suppression orders] is insidious and against the public interest, an argument we comprehensively set out only months ago in a series of articles examining the unfettered use of censorship and secrecy by government and their agencies, and by the judiciary.

None of the 18 recommendations in the Vincent report has been implemented. The Age calls on the Andrews government to implement them all without any further delay.

Blind justice is an unimpeachable principle. But Justices blind to reality are undermining freedom of speech and the public's right to know how well the system their taxes fund might be working.

The courts should no longer quixotically resort to the overuse of suppression orders. They ought to take greater responsibility for managing and instructing jurors about their duty to disregard media reports.

…

> The case in point demonstrates beyond reasonable doubt the need for change. It involves one of the most important issues that exist, and The Age believe that the suppression order, which could lead to a contempt of court conviction were it breached, has harmed the public interest by curbing community debate for many months.
>
> …
>
> The courts should lift the suppression order; the public interest in covering this case exceeds the purpose the order is clearly not serving. Enough is enough.

(e) the AFR online article 1:

> Nine, publisher of The Australian Financial Review, has joined a local application to the court to seek to have the suppression order lifted.
>
> …
>
> The widespread reporting of the case globally and on social media has sparked a debate about the application of suppression orders - almost unheard of in the United States – despite being quite common in Australia.
>
> Reports that Victoria accounts for 52 per cent of Australian suppression orders has led to it being labelled the "Suppression State" on social media.

(i) quoting the Washington Post:

> "We understood there could be legal, and even criminal, consequences if we ran this story," Daily Beast editor Noah Shachtman told the Post. "This is major, major news. The public deserves to know about it."

(f) the AFR article/AFR online article 2:

> Judge slams 'flagrant' media over world's worst kept secret

(g) the Business Insider online article:

> The Australian media wants to talk about a high-profile criminal conviction but can't-- here's why

(h) the 2GB Breakfast Segment:

> So as I said I can't tell you who it is. But I can also encourage you to get on Google and start asking these questions: high profile Australian, worldwide reputation, conviction of an awful crime. And you'll find out who it is.

(i) the Today Show segments:

> NEWSREADER: Chris, what more can you tell us?
>
> AHERN: … [V]ery little, unfortunately. Because of a legal ban imposed by the Victorian County Court, I'm unable to reveal the identity of this person, details of this case, or their crime. All I can tell you is that we here at Nine believe this is a story that needs to be told. And we, and other members of the Australian media, are working very hard to be able to bring you at home the full story. The major newspapers around the country are obviously also very restricted in what they can report on, and they have taken to their pages to vent their [anger and] frustration today.[60]

300 It was not within the power of the respondents' decision makers to determine that information derived from the trial could be reported without interfering with the due administration of justice, under cover of an attack on the policy underlying the suppression order, or the claims that 'justices (being a reference to judges, as opposed to justice) are blind' and that courts are futile censors in a digital age. The precise manner in which the court sought to protect the due administration of justice in the particular circumstances was not a matter for public debate in the manner adopted by the respondents in the impugned reports. Under the applicable provisions of the *Open Courts Act*, Parliament has provided a process for the orderly determination of how the competing interests ought to be balanced. Relevant news media organisations were, as I have noted, notified of their right to, and did, appear and put submissions before Chief Judge Kidd when the suppression order was made. Dissatisfied media organisations did not appeal the order, meaning the accepted and unchallenged views of the trial judge necessarily prevailed.

301 How publication of information might interfere with the proper administration of justice is a matter for a court, not for media organisations or their journalists and editors. Excepting an appeal to a higher court, there is no place for the media to revisit, or ignore, the concerns that exercised the mind of a trial judge seeking to ensure that an accused person was tried by an impartial jury that had not been infected by material that might encourage impermissible reasoning processes. As counsel for the

---

60 This extract is from the 5:32am Today Show segment, but a nearly identical exchange also occurred in the segments that were broadcast at 6:00am and 7:02am. The words 'anger and' in the final sentence were only included in the 7:02am Today Show segment.

News Corp respondents pointed out to the court, using Pell's prosecution as an apt example, if the wrong balance is struck, appeal courts exist to correct such errors.

302 As I stated earlier, the intended purpose of the suppression order was to protect Pell's legal rights. It was never imagined that simply not identifying Pell as the accused would achieve that purpose. It did not matter that the media perceived the parameters of the public interest debate had shifted, and any such perception was wrong, as nothing had happened that had not been predicted by the Chief Judge and set out in the Suppression Order Ruling.

303 There was an unacceptable risk that Pell's right to a fair trial might be compromised if public disclosure was permitted of information derived from the first trial, to satiate the media's perception of the public's right to know of what had occurred, and when to be informed of it. On this point, it is notable that the media's right to publish what it thinks the community deserves to know was never to be permanently suppressed. At worst, for the public's right to know, a deferral of that disclosure until the second trial,[61] was a period that turned out to be a mere 77 days.

304 The Chief Judge was not satisfied that other means of preserving the integrity of a jury trial would guarantee Pell his rights. The balance of interests achieved by the suppression order would be upset by conduct that contradicted the manifest purpose of the order. The Chief Judge's reasons ought to have made it apparent to any journalist, editor or media lawyer that anonymising Pell and the offences found proved, but otherwise publishing information derived from the trial, could not appropriately inform a public apparently anxious to know why the local media was not reporting on an important story that was being noted in overseas reports and on social media. That would necessarily follow because the reasonable and ordinary reader of the Suppression Order Ruling would know that the public's right to know about the first trial had been deferred to accommodate Pell's right to a fair trial.

305 No media executive or editor, engaging in this campaign for press freedom by taking

---

61 *R v Saxon* [1984] WAR 283, 292.

the law into their own hands and redefining the balance of the competing interests while expressing arguments on the legitimacy of the suppression order, actually worked through the Chief Judge's reasoning when making that order. Although some of the reports do recognise competing arguments, the court's authority to strike the proper balance to ensure the due administration of justice is unimpeachable. The fact the articles went further and challenged that authority is clear from the examples of comments set out above.[62]

306 That is the true, and egregious, aggravating characteristic of the contempt.

307 Excepting those published by Mamamia and Allure Media, the content of the impugned reports simply does not support the contention generally advanced by the respondents. The respondents expressed an entitlement to challenge the very notion of suppression orders using, as the platform, information derived from the cathedral trial. In doing so, the respondents deliberately breached the terms of the suppression order. They felt justified to assert their right to immediately tell part of the story in a teasing way, in precedence to the authority of the court, by reference to some higher ideal that they attempted to describe in the impugned reports.

308 In these circumstances, no factual basis exists for an inference of an honest belief that publication was a simple error of judgment, unless it is to be found in the fact that they acted on the basis of legal advice. I will return to this issue.

Content, tone and subject matter

309 All respondents stressed that the impugned articles did not name Pell or identify the charges of which he had been found guilty. They maintained that the subject matter of the reports was the legal conundrum that had resulted in Australian media being prevented from reporting on the cathedral trial while news of the jury's verdict spread throughout the international press and across social media.

310 Carefully considering the content of each report, I was generally not persuaded by the respondents' characterisation of their focus. In truth, the position of international

62 At [299] above.

media was quite peripheral. The real focus of the reports was their rejection of the basis upon which the suppression order was originally made. The message was clearly conveyed — whether in the words of the journalist, or the words of others adopted or quoted by the journalist — that the suppression order was futile, its purpose having been frustrated by the conduct of the international media and by publications on social media.

311 That said, I was not persuaded by the applicant that the layout of certain articles was an aggravating factor. The presentation of the articles — for example, large fonts, the story appearing on the front page of a masthead, or the use of opaque headlines satiating a reader's interest — was apt to grab attention, but that is not unusual in these times. To the extent they were incorporated into the impugned reports, I do not accept that attributes consistent with what might be described as 'clickbait'[63] reporting went beyond what is generally accepted by today's standards of journalism.

312 A number of the Nine Entertainment respondents, and Mamamia, contended that the reports they published were 'write-arounds': entirely derivative of matters in the public domain which had been reported by other news media outlets. I was invited to consider these publications not as factual reports of what happened in court, and not 'information derived from the trial', because it was information derived from other media sources. They submitted that the extent to which such publications had a tendency to frustrate the purpose or efficacy of the suppression order ought to be assessed in the context of any prejudice that the court considers arose from the reports that were the original source of information.

313 Standing alone, this submission is unpersuasive, and I reject it as an artifice to disguise republication of information derived from the trial. The mere fact that some reports published what was being reported by the major media outlets does not alter the obvious features of their content. Those respondents were in no doubt that there was a suppression order, and that the publications upon which they were commenting

63 The use of image/text links on websites that are deliberately presented in a sensationalist and/or misleading way to attract attention, thereby 'baiting' the reader to 'click' it and read, view, or listen to the linked content.

were alluding to Pell having been found guilty in the cathedral trial.

314 In some cases, republication occurred in circumstances where the suppression order was not specifically reviewed, despite its existence being obvious, and those respondents made an assumption that they could rely on the major media outlets to have legalled their articles.

315 The necessary implication of this submission was that if an article published by a major media outlet contained information derived from the trial, contrary to the suppression order, publication of a 'write around' article referring to that report would not be tainted by the same contravention. This reasoning is fallacious. Only a moment's reflection is needed to realise that derivative/secondary reporting of content from major media outlets was transparently publishing information derived from the trial. There could be no other source for that information. I do not accept the submission by those respondents that their culpability is reduced because they were republishing the reports of other media outlets.

316 However, what may come into consideration in favour of those respondents is whether they were motivated by different considerations, consistent with a lesser degree of culpability than the considerations motivating News Life Media and The Age Company. This is best assessed by reference to the inferences properly drawn from the content of the articles, and will be addressed specifically to each of those respondent later in these reasons.

Editorial systems and reliance on legal advice

317 Most respondents contended that their editorial systems operated in the intended manner, including reliance on legal advice which was obtained prior to publication. Accordingly, the existence of those systems and the evidence that they operated as designed, including receipt of legal advice, were mitigating features reducing the culpability of the contempt.

318 This submission cannot survive careful analysis. I accept that, in most cases, systems and processes were followed, but what did not fall from the evidence was why

publication of the impugned reports was nonetheless an error of judgment. The contrary conclusion that the meanings conveyed by impugned reports were deliberate and intended is inescapable.

319 For present purposes, it may be accepted that most respondents[64] had a system for 'legalling' a possibly contentious publication. That process involved journalists and their editors seeking advice from experienced media lawyers on a draft or proposed article. The respective legalling processes were invoked by the respondents prior to publication. However, beyond that bald fact, the circumstances in which legal advice was sought and given, the content and nature of that advice, and how it influenced the belief formed and decision to publish was not, in any case, disclosed.

320 At all times, the respondents maintained claims of client legal privilege over the content of legal advice regarding the publications and the circumstances in which it was obtained. They were entitled to do so. However, the consequence was that the court was unable to assess the respondents' submissions as to how these protective systems operated in the circumstances of these publications. All that could clearly be inferred was that the respondents' systems and processes failed without any further conclusion that failure followed from inadequate or inappropriate instructions given for legal advice, or that the quality and accuracy of the legal advice received was questionable, or the legal advice was ignored (a proposition that was denied when put) or the subsequent decision by that respondent following receipt of legal advice to publish was flawed in some way.

321 Kyrou J's observation in *R v Herald & Weekly Times Pty Ltd* is pertinent to this evidentiary omission:

> To have significant weight, details of the advice must be put into evidence. The instructions given and the legal advice obtained are obviously subject to legal professional privilege and a respondent has a choice whether to waive privilege by giving evidence of these matters. However, a respondent who asks the court to be lenient on account of the fact that legal advice was obtained whilst maintaining privilege and not disclosing to the court what advice was sought and given and how this related directly to the item that constituted the contempt cannot complain if the court does not give this consideration any

64 There are some exceptions to which I will return to later in these reasons.

significant weight.[65]

322 I respectfully agree with and adopt his Honour's conclusion. Absent evidence about the precise manner that any legalling process operated in the circumstances of publication of the impugned reports, the respondents' assertions that legal advice was taken into account cannot, and will not, be given significant weight. That is particularly so in these cases, because the plain and unambiguous meaning of the text of the suppression order — the prohibition of 'information derived from the trial' — was not followed. Given the terms of the impugned reports, how could it be said that such a belief was actually held? What were the basal facts on which the belief was formed and what was the path of reasoning from those facts to the belief?

323 In the absence of evidence dealing with these matters, the respondents failed to satisfy me, on the balance of probabilities, that the processes of legalling the impugned reports is a basis for, and warrants, any leniency. But there is further significance in the operation of the protective editorial systems to be considered.

Considerations particular to News Life Media and The Age Company

324 Having concluded that I was not persuaded by the respondents' general contentions of innocent error of judgment as the mitigating motive or explanation for their conduct, and that the applicant had not established, beyond reasonable doubt, her allegation that the respondents' motive in publication was to influence the Chief Judge to vary the suppression order, the applicant's calculated risk submissions remain to be analysed.

325 In evaluating the applicant's calculated risk submissions, I consider that the culpability and responsibility of News Life Media and The Age Company is in a different category to the other respondents. I am persuaded that these respondents in particular deliberately took a risk by intentionally publishing information derived from the trial to advance a particular purpose — a collateral attack on the role of suppression orders in Victoria's criminal justice system — that was obviously in conflict with the purpose of the suppression order. It is necessary to examine further

65 [2008] VSC 251, [28].

the evidence about the intention of these respondents, drawing inferences to the requisite standard from the circumstances of publication of the relevant impugned reports.

326 The Age articles involved a collaborative effort between senior journalists/writers (Mr Short, Mr Bachelard and Mr O'Neil) and senior editors (Mr Lavelle, Ms Davies, Ms Easterbrook and Mr Chessell), to name the most senior decision makers. Many others were invited to comment, including senior members of the editorial team at The Age (Mr Fuller, Ms Milovanovic and Ms Sulicich). Discussions about the articles commenced almost immediately after the jury's verdict was taken. Within two hours of the conviction, an early draft of The Age article had been sent to Mr Bartlett — an experienced media lawyer — for legal review.

327 The articles ultimately published were painstakingly and carefully crafted over several hours on the afternoon of 12 December 2018. The various draft versions of the article, extracted from the INK system, before it was published were in evidence. The dozen substantive edits, both before and after interactions with lawyers (including Mr Bartlett and Ms Alick), are revealing in identifying The Age's motivation for publication, and that the decision makers were determined to publish as 'close to the line' as they dared, to adopt their counsel's submission. What was originally drafted for publication, but not ultimately included in The Age articles is illustrative:

> Reporting of the case is irrefutably in the public interest and The Age believes suppression of its existence has for months stifled discussion of one of the most important issues facing society.
>
> …
>
> However, the wide dissemination of the suppressed information online highlights the ~~futility~~ challenges of the suppression regime in some high-profile cases of public interest.
>
> …
>
> This is not the first time a suppression order had stifled important public discourse.
>
> In 2013 Adrian Bayley was convicted of Jill Meagher's rape and murder, but he was set to face three other rape trials. Suppression orders over the results of the first trial meant that, for two years, even in general stories about violence

> against women, Bayley could not be mentioned on pain of contempt of court charges.
>
> Australia's first overseas corruption case, involving the Reserve Bank of Australia's note printing businesses Securency and Note Printing Australia, was shrouded in suppression orders for a number of years until the final verdict was handed down in recent weeks.
>
> And the "Informer 3838" scandal was likewise shrouded in secrecy as police convinced courts to keep the information suppressed. That ended when the High Court last week over-ruled the Victorian system and demanded the information be released in the public interest.
>
> …
>
> The Age believes the public interest in reporting this case outweighs the imposition of this suppression order ostensibly to ensure the right to a fair trial and calls on the judiciary to lift this suppression order.
>
> …
>
> Our legal system is founded on the premise that a jury will heed a judge's instructions about what evidence it can and cannot consider in its verdict. Yet our legal system does not recognise this when it comes to juror's potential knowledge of convictions in previous trials.

328 The News.com.au online article also involved a collaborative effort between senior journalist, Ms Chang and editors, Mr Murray and Ms de Brito, with legal advice from Mr Cameron. There was collaboration within the News Corp group, including the Daily Telegraph, whose views (expressed in the Daily Telegraph article) were emphasised in the News.com.au online article. Both Mr Cameron and/or Ms McWilliams, from the News Corp's in-house legal team, legalled the reports from News.com.au, the Daily Telegraph and the Courier Mail.

329 I am in no doubt, after considering the circumstances in which the News.com.au online article and The Age articles were prepared, that the content, tone and subject matter of each reflects conscious deliberation over, and choice of, the precise words used, and the precise sentiments and opinions expressed by News Life Media and The Age Company. This deliberate and careful development of the meanings conveyed by the publications does not admit any inference of innocent error of judgment. No part of the meanings conveyed by their reports was accidental. No other conclusion is open. The suppression order was the object of the reports. They were not written by court reporters covering the cathedral trial, but by senior journalists, in collaboration

with, or under the review of, the senior editors — assisted by lawyers — who reviewed the text of reports.

330 For the foregoing reasons, I am satisfied that the contempt of News Life Media and The Age Company was a particularly blatant example of conduct constituting a wilful challenge to the integrity of criminal justice in the State, represented by the suppression order. Such conduct is properly characterised as contumacious. This is a consideration of significant persuasion when assessing the culpability of the conduct of these respondents, and the particular need for penalties to achieve general and specific deterrence, denunciation of the conduct, and maintenance of the integrity of the proper administration of justice. I will say more about these meanings throughout these reasons.

Other factors

Harm

331 The applicant accepted that there were no actual harm that could be regarded as an aggravating factor. The charges to be tried in the swimmers trial were discontinued by the prosecution, and there was no actual consequence for that trial from the frustration of the efficacy of the suppression order. The applicant submitted, correctly, that it was unnecessary to establish actual harm, because contempt is defined by reference to the tendency of the conduct to interfere with the due administration of justice; in this case, by frustrating the efficacy of the order. When harm is actually caused, the circumstances of the contempt will be necessarily aggravated, but the absence of harm is not a factor that can be submitted as a mitigating factor.

332 The respondents disagreed that the absence of actual harm could not be considered in mitigation when assessing the gravity of their conduct. They contended that the accused's right to a fair trial was, in any event, prejudiced by the overseas publications that were beyond the reach of the suppression order. I accept there were at least 35 overseas reports accessible in Australia and that there was further evidence before Chief Judge Kidd on the review application of extensive social media publicity. The respondents submitted that it was inevitable that, in these circumstances, the trial

judge in the swimmers trial — had it proceeded — would have been forced to give very close consideration whether to direct the jury about the cathedral trial verdict, and to instruct them to remove it and any prior publicity about it which they might have read out of their minds. They submitted that this consequence moderated the extent to which the respondents frustrated the purpose or efficacy of the suppression order.

333 I reject this submission. It is speculative. It is impossible to gauge ahead of assembling a jury pool the extent to which members of that pool may have actively followed social media or have read international publications. The submission fails to grapple with the most likely connection between that material and prejudice to the accused's right to a fair trial: the conduct of the guilty respondents themselves. The Chief Judge considered the possibility that these very consequences might eventuate when framing the order. I am not persuaded, on the balance of probabilities, that the extent of publication beyond the geographical reach of the suppression order was such as to moderate the extent to which the respondents' conduct frustrated the purpose or efficacy of the order.

334 The tendency to frustrate is assessed at the time of publication and not by reference to subsequent events, although such events may add relevant context to that assessment; for example, if publicity was such that a court was later persuaded to permanently stay a prosecution, or if a trial was aborted to allow time to pass to diminish the impact of prejudicial reporting. The potential for harm at the time of publication was very real, running as far as the possibility that further prosecution of Pell after the cathedral trial would not have been possible.

335 The evidence of internet searches that was led at trial established that the tendency to encourage enquiry to successfully identify Pell and the charges found proved, and other information not disclosed in the impugned reports was real, not fanciful. As the applicant rightly contended, references being made to information derived from the trial by reputable local Australian media embellished the partial disclosure that was occurring, and embellished it with a sense of trust and/or authority added by the local

standing of those media organisations. That was sufficient to establish the tendency to frustrate the efficacy of the order.

336 In this context, the most extreme example was the 2GB Breakfast segment, when the presenter, Mr Smith, went off script and said:

> So as I said I can't tell you who it is. But I can also encourage you to get on Google and start asking these questions: high profile Australian, worldwide reputation, conviction of an awful crime. And you'll find out who it is.

337 The average consumer of the impugned reports possessing a modicum of curiosity may well think like Mr Smith and could readily identify search terms, derived from the content of those publications, if minded to satisfy their curiosity. For those less experienced with search engines, a morning radio presenter was helpfully able to offer obvious suggestions.

338 Accordingly, the tendency carried by the publications is not ameliorated by the actual consequences. In any event, the most significant amelioration of the consequences of the publications was the conduct of Chief Judge Kidd in calling on the special mention on 13 December 2018 and expressing views that resulted — eventually — in many of the articles being pulled down.

Character

339 The character of each of the guilty respondents is a relevant consideration to be assessed on an individual basis. On the one hand, it was submitted that respondents had demonstrated themselves to be exemplary corporate citizens through their contributions in fulfilling the community's right to be informed generally, and also through philanthropic undertakings. On the other hand, a number of them have prior convictions for contempt. Each of these factors affected the relative weight to be accorded to sentencing objectives of deterrence, denunciation and rehabilitation, but must be considered in the context of each individual respondent. This is a matter dealt with later in these reasons individually for each respondent.

The guilty pleas

340 The guilty respondents contended that their guilty pleas were evidence of their

remorse and contrition, had served a significant utilitarian purpose, were reasonably timed, and should be afforded full mitigatory effect in the sentencing analysis.

341 The applicant accepted that the pleas of guilty were a matter in the respondents' favour, however she urged rejection of the contention that there was any significant utilitarian value. She submitted that careful analysis was required to determine their evidentiary value in demonstrating remorse.

342 In *Phillips v The Queen*, the Court of Appeal observed:

> The conduct and statements of the offender over time provide a more informative and precise guide than the plea itself as to whether genuine and deep contrition exists.[66]

and later:

> In every case the genuineness of the contrition and the time and manner in which it is manifested in association with the plea of guilty will require evaluation by the sentencing judge in the light of the overall complexity of the facts before the Court.[67]

343 It may be noted that the applicant's response to the media reporting of the jury's verdict has been reshaped over time. The respondents submitted that initially 388 separate charges were foreshadowed against at least 63 separate individuals and corporations. When proceedings were issued, 211 separate charges against 36 separate respondents were pressed in the originating motion. Some further charges were withdrawn during the course of the trial and some were dismissed in the No Case Ruling. After the plea agreement, a total of 21 charges against the 12 guilty respondents remained.

344 No evidence of contrition was observable to the court prior to the announcement of the plea agreement. The respondents contested all charges from initiation until the plea agreement — a period of about two years — requiring numerous pre-trial hearings, a significant interlocutory ruling in relation to discovery,[68] a mediation, and

---

66 *Phillips*, 614 [69] (n 46).
67 Ibid 616 [72].
68 *The Queen v The Herald & Weekly Times Pty Ltd & Ors (Ruling No 1)* [2020] VSC 616.

a significant interlocutory ruling on a submission of no case to answer.[69]

345 There was debate before me as to whether the pleas, as an expression of respondents' contrition, could be described as timely. Undoubtedly, the pleas were taken very late in the process. Obviously the court was not informed that discussion to resolve the contest, on the basis that some respondents would plead guilty to some charges and charges against other respondents would be withdrawn, was taking place during the trial; that bargain was simply announced when reached. The parties led no evidence about when these discussions occurred in the period prior to the announcement of the plea agreement.

346 At least until the delivery of the No Case Ruling on 4 December 2020, all respondents considered there was no case to answer in respect of all charges, on the basis of what is described as 'ground three' in that ruling. Further, the 'journalist respondents' and the 'presenter respondents' submitted there was no case to answer on what is described in the ruling as 'ground one'. However, on the afternoon of 3 December 2020, having been put to their election whether to call evidence before the No Case Ruling would be delivered,[70] they withdrew that submission.

347 To suggest, as the respondents did, that a significant saving in court resources was achieved (as most of the defence case was not presented) and there was significant utilitarian value in the plea, overlooked several features of the conduct of the proceedings. Significant court resources had been allocated to an analysis of the applicant's case as a consequence of the respondents' submissions of no case to answer. At the time the journalist and presenter respondents withdrew the ground one submission after being put to their election, my reasons for ruling on that ground had been completed, although ultimately that work remained useful in preparing these reasons. As the applicant submitted, the plea agreement came close to the end of the trial, part way through the presentation of the defences. The question begged is

---

69 No Case Ruling (n 2).

70 Being the second of the three courses open to a trial judge considering a submission of no case to answer, as identified by Tadgell J in *Protean (Holdings) Ltd v American Home Assurance Co* [1985] VR 187, 237.

whether there was good reason for the respondents not to plead until they did.

348 The respondents submitted that there were a number of reasons that demonstrated the timing of the guilty pleas was not a matter that detracted from their value in demonstrating remorse and contrition. I do not accept that submission.

349 First, the respondents contended that they faced a forensic dilemma because the applicant had pursued charges against the journalist and presenter respondents, who lacked editorial responsibility for the impugned reports. The respondents submitted that those individual respondents had a strong arguable defence, including on the basis that they were not liable in law as publishers. Because those respondents did not elect to pursue that ground of no case to answer and then called no evidence because of their release under the plea agreement, I did not rule on that contention. However, I consider that, broadly speaking, the forensic dilemma identified was of the respondents' own making.

350 The respondents submitted on the no case submission that the contention that individual journalists did not publish the impugned reports was soundly based in authority, particularly the Court of Appeal's decision in *Howe v Harvey*.[71] I had cause to carefully review the respondents' submissions before their election, and I am satisfied that the respondents misconceived *Howe v Harvey*. Other authorities reject as unsound the proposition that, whether as a matter of practice or a rule of law, an editor's acceptance of responsibility will absolve the authoring journalist of any responsibility for publishing or causing to be published a contemptuous article.[72]

351 The applicable principle is that a court must examine the extent to which any person has been involved in the preparation of the article, through to its ultimate dissemination to the public, to determine whether that person's contribution to that process was sufficient for them to be held responsible for causing publication,

---

71 (2008) 20 VR 638, 675 [181]–[182], 676 [186]. The respondents also cited *Attorney-General (NSW) v Willesee* [1980] 2 NSWLR 143, 155-160 [34]-[46] and *R v Griffiths, Ex parte Attorney-General* [1957] 2 QB 192, 202.

72 *Registrar of the Court of Appeal v John Fairfax Group Pty Ltd* [1993] NSWCA 229, 6, 12; *R v West Australian Newspapers Ltd ex parte DPP (WA)* (1996) 16 WAR 518, 538–9; *Harkianakis v Skalkos* (1997) 42 NSWLR 22, 61; *DPP (Cth) v Sexton* (2008) 181 A Crim R 507, 511–12 [18]; *R v Nationwide News Pty Ltd* (unreported, Supreme Court of Victoria, Gillard J, 22 December 1997) 5.

irrespective of whether other persons may have also contributed to publication. A journalist's conduct need only be a cause of publication, operating concurrently with conduct of others (such as editors) contributing to publication, unless, in the circumstances, the conduct of those others constituted a *novus actus interveniens*.

352 The fact-sensitive enquiry into whether the individual respondents had a strongly arguable defence at law to the contempt charges was cut short by the plea agreement. Not having heard evidence from any of the individual journalists in defence of the charges, I am unable to make any findings in this respect. However, the proper analysis of the position of those respondents was not that they had a strongly arguable defence. It was that they faced a significant risk of being found guilty of contempt, and that risk was nullified by the plea agreement. The decision to plead guilty could have been reached by properly advised respondents at a much earlier point in time.

353 The guilty respondents attempted to construct a forensic dilemma in which their conduct of the proceeding, particularly in relation to the timing of the pleas, was determined by the complexity of the applicant's approach, which constrained their ability to achieve an early resolution of the proceeding. I cannot see the suggested complexity. It is not for me to identify for which parties the plea agreement was beneficial, or to seek to understand the motivations for decisions and dealings occurring out of court. Plainly, the respondents had the benefit of the argument and the No Case Ruling during negotiations that resulted in the pleas.

354 Further, I do not accept the respondents' contention that there was at least an arguable basis to resist the remaining charge, having regard to the way in which the applicant pleaded her case, for reasons earlier explained. I reject their submission that the circumstances are not analogous to those cases where an accused refuses to face the music until the eleventh hour, or when the writing is well and truly on the wall. In my view, that is an apt description of what occurred here. The guilty respondents did not enter pleas of guilty from a sense of genuine contrition and remorse. In respect of the News Corp and Nine Entertainment respondents, they did so to protect their employees, the individual respondents, from conviction on the contempt charges. So

much was evident from the cross-examination of Ms Saunders and Ms Launders, and the overall circumstances surrounding the plea agreement.

355 The only inference reasonably open to the court is that once it was clear that the individual respondents remained at significant risk in the proceedings, following the completion of the applicant's case, the plea agreement was negotiated. There was no evidence pointing to genuine contrition existing at any point in time earlier that the No Case Ruling.[73]

356 I have not been persuaded that the pleas of guilty carry the full mitigating weight in the respondents' favour in the sentencing synthesis that is afforded to early and genuine expressions of contrition for offending. I have taken the pleas into account in mitigation, as I must, but their utilitarian value was lessened because there was no compelling reason why significant saving of public resources and court time could not have been achieved at an earlier stage, had there been genuine contrition and remorse. Because it was open to the guilty respondents to plead at any stage of the proceeding, their vigorous defence of the charges, particularly in the context of the above analysis of culpability and motive, does not persuade me that there is any significant degree of remorse or contrition evident at an appropriate time to be taken into account in their favour. The respondents achieved a significant benefit from the plea agreement by achieving their goal to protect their individual editors, journalists and presenters from any further consequences.

Impact on the respondents

357 The News Corp respondents submitted that each of them, together with the individual respondents they employed — Ms Chang, Mr English, Mr Weir, Mr Andrew Piva (Geelong Advertiser), Mr Lachlan Hastings (Weekly Times) and Mr Michael Owen-Brown (Advertiser Newspapers) — have been burdened by the charges brought by the applicant for over two years, and Ms Saunders suggested that some of those individuals have carried varying degrees of stress and anguish in their personal and

[73] I accept that the applicant clarified that her case was not that there was no sign of genuine contrition prior to the plea agreement.

professional lives. The News Corp respondents submitted that strain placed on their employees affected their productivity, morale, workplace environment and culture.

358 There was no credible evidence of diminished productivity, morale, workplace environment and culture caused by the unresolved charges, and I would not otherwise assume that consequence to follow in a large commercial organisation. I was not persuaded that this submission carried any significance, particularly as it failed to take into account the benefits achieved for the individual respondents still parties to the proceeding when the plea agreement was reached. It is clear from the applicant's description of the agreement that she only agreed to withdraw the charges against those individuals in consideration for the corporate respondents pleading guilty.

359 The News Corp respondents submitted that weight to be accorded to the prior convictions recorded against some of them was extremely limited, having regard to the size of its business. What was evidenced was a remarkably good record. I do not accept the logic of this submission. As is set out below, most of those respondents have a blemished record, and the question is whether the extent of those blemishes is such to add weight to the objectives of specific deterrence, denunciation and rehabilitation in the sentencing synthesis. Some of the News Corp respondents do not have prior convictions, however the relationship between these respondents and those with prior convictions in the context of the current corporate structure and past corporate reorganisation was not explained. Senior executives in related corporations would be aware of the facts and circumstances of prior convictions of companies in the group.

Apology

360 I accept that each respondent has proffered a sincere and unreserved apology and, after prompting by the court, offered their apology directly to Chief Judge Kidd and to the County Court. The implications and significance of these apologies was somewhat overstated by the respondents in their plea submission, but I accept that the apologies are matters properly to be taken into account in mitigation in the sentencing synthesis.

Costs

361 I also take into account in the respondents' favour that they have agreed to pay the applicant's costs fixed in the sum of $650,000. In reaching that agreement, the guilty respondents have accepted that other respondents against whom charges were withdrawn or dismissed will not make any claim for costs against the applicant.

362 However, details of the precise contribution that each respondent will make towards this sum were not provided. Such information would have materially assisted with the task of taking these payments into account when setting the quantum of any fine, as the respondents contended for. I can do no more than generally allow as a mitigating factor the agreement by the respondents to contribute to the applicant's costs.

Considerations particular to individual respondents

Publishers of News Corp online articles

363 The News Corp respondents were correct in submitting that all of the News Corp online articles were published as a result of a single course of conduct instigated and at all times controlled News Life Media, the publisher of News.com.au. The substance and subject matter of these reports is the same, as is the manner in which they are alleged to have frustrated the preceding suppression order I will take care to ensure proper application of the principles of totality and the rule against double punishment. It is convenient to deal with the balance of sentencing factors in respect of the News.com.au online article first.

News Life Media

364 News Life Media invited me to infer that in publishing the News.com.au online article, it did not intend to frustrate the purpose or efficacy of the suppression order. In its submission, it mischaracterised that purpose as suppressing the identity of Pell and the details of the charges for which he was convicted. It submitted that care was taken in the preparation of the article by Ms Chang and on editorial review.

365 It invited me to accept Ms Saunders' evidence that those with editorial responsibility (Mr Murray and Ms de Brito) understood the suppression order to mean something

different to what they now understand it to mean, that they considered reasonable minds might differ as to the meaning of the suppression order, and that they published the News.com.au online article because they thought they were not breaching the suppression order. In particular, it relied on the unattractive notion, advanced on behalf of all of the News Corp respondents, by Ms Saunders that those with editorial responsibility considered any risk in publishing information to be low because the articles did not identify Pell or the offences.

366 For reasons explained earlier, I reject this contention in respect of all of the News Corp respondents. I am not persuaded, having not heard directly from those editors — who were not exposed to cross-examination — that it is probable that their intention can be so characterised. As earlier explained, intention is best inferred from the words actually used. It is not helpful to a court, when assessing probable inferences as to a state of mind of a corporation, to be offered no more than hearsay evidence of an interpretation of the state of mind of the actual decision makers by a senior executive, who has interest and reason to cast the respondents' conduct in a most favourable light.

367 I do not accept the submission, relied on by all of the News Corp respondents, that those with editorial responsibility were seeking to simply report on the conundrum that international media were free to report on the outcome of the trial, but the Australian media were not. Ms Saunders conceded that in publishing the relevant impugned reports, the News Corp respondents were calling for law reform and review of the system in which suppression orders were issued.

368 In circumstances where the inferences about intention contended for by News Life Media are not the natural inferences arising from the content of the News.com.au online article, and the relevant decision makers did not enter the witness box, I am not persuaded to draw the inference of innocent error of judgment in respect of this article.

369 I have set out above the evidence in respect of the editorial systems and legal advice systems that News Life Media employed. Having pleaded guilty to contempt, the

respondent accepted that its systems failed it. Yet it provided no cogent explanation as to why those systems failed. For the reasons set out earlier, I am satisfied beyond reasonable doubt that the decision makers acted with deliberation and took a calculated risk in publishing the News.com.au online article.

370 News Life Media also contended that the News.com.au online article was published well after several other impugned reports, including the front page stories carried by print mastheads, and the extent to which it frustrated the purpose or efficacy of the suppression order must be assessed in the context of prejudice that arose from those earlier reports.

371 This submission has no practical value. It was only a matter of hours after those reports were first published that the News.com.au online article appeared online, and they constituted republication of the sentiments expressed in those earlier articles.

372 However, there was some evidence that the News Corp respondents' editorial legal teams will provide expanded training to editorial staff across the country on suppression orders and contempt of court, which will include a specific review of this proceeding, its outcome, and the lessons that News Corp can learn from it. This expectation lacks sufficient detail to engender significant optimism for the future. I accept the fact that taking steps to decrease the possibility of future breaches of suppression orders can have an ameliorating effect on the importance of the element of specific deterrence in sentencing, but in the present circumstances, there was insufficient explanation and illustration of what occurred and what has changed to provide the court with confidence that these offences would not be repeated. The fact that the expansion of such training has not yet taken place — despite the contraventions having occurred more than two and a half years ago — is consistent with my finding that remorse and contrition on the part of the News Corp respondents first appears after the plea agreement.

373 I am satisfied that News Life Media's contempt was a serious and deliberate contempt that requires significant weight be given to the objectives of general and specific

deterrence. It was contumacious. It was wrong for the News.com.au online article, using the words of others, to describe a process affording an accused person a fair trial as 'an archaic curb on freedom of the press', and to usurp to itself the right to assess the proper balance by suggesting that the court had adopted an 'insidious' process that was 'against the public interest'. News Life Media's frustration of the efficacy of the suppression order challenged, and carried the potential to diminish, the court's authority and standing, undermining public confidence in the administration of justice in a most serious way.

374 Ms Saunders gave evidence that the News Corp respondents have demonstrated and been recognised for their excellence in journalism, including the receipt of multiple Walkley Awards, and various accolades for their regional reporting. In 2020, News Corp Australia raised more than $18 million for the Royal Children's Hospital, and donated nearly $6 million to bushfire affected communities and charities affected by the COVID-19 pandemic. Several of its mastheads have each initiated various other community campaigns and philanthropic activities.

375 The applicant correctly submitted that the News Corp respondents' excellence in journalism and philanthropic work had to be viewed in the context of serious prior convictions for contempt recorded against several of them, albeit not News Life Media. Insufficient detail was provided to enable a clear assessment to be made of the significance of awards and philanthropic work attributed to individual respondents. Likewise, the publishing history of individual mastheads and their ownership by individual respondents did not allow for a thorough assessment. News Life Media had not won any awards prior to publication, and it could point to little by way of philanthropic activity prior to publication.

376 It is just in all the circumstances to record a conviction and punish News Life Media with a substantial fine that will make manifest the court's denunciation of its conduct. In quantifying an appropriate fine, further considerations are relevant.

377 The News Corp online articles were removed from the internet at 6:01pm on

13 December 2018, plainly a consequence of the distribution of the transcript of the Chief Judge's remarks at the special mention earlier that day. It is not evidence of any insightful initiative on the part of News Life Media about the culpability of its contempt. That said, I accept that, serendipitously, there was no actual harm to the due administration of justice.

378 The News Corp respondents also submitted that the extent to which the News Corp online article encouraged readers to conduct online searches was insignificant. They also contended that there was no evidence before the court of persons other than employees within the Office of Public Prosecutions conducting any such searches. As explained above, this submission is of marginal relevance. It does not support the contention that the gravity of the offending was towards the low end of the spectrum. To the contrary, the circulation of the News.com.au online article was significant; it was the second most viewed of the impugned reports,[74] with more than 210,000 page views, a figure that far exceeded the circulation of each of the print mastheads. Of those views, 56,487 originated from within Victoria.

Syndicated publishers

379 Having regard to the evidence about the News Corp respondents syndication process and the principles of totality and proportionality, I accept the submission on behalf of HWT, Queensland Newspapers, Geelong Advertiser, Nationwide News and Advertiser Newspapers that their culpability in relation to the publication of the News Corp online articles is substantially lessened.

380 There was no evidence that any of these respondents who published the News.com.au online article by the syndication process had any system in place to avoid the syndicated publication of contemptuous articles. The applicant invited me to infer that the failure of the syndicated respondents to have in place such systems ought to be considered an aggravating factor.

381 I reject this submission. The import of Ms Saunders' evidence regarding the

74 The first being The Age online article.

syndication process, summarised above, was that these articles were not 'published', in the sense they were able to be accessed via the homepage of each online masthead. Rather, they were only accessible by drilling down into the relevant 'section' that the article had been allocated to, or directly via the specific URL for the article.

382 So much is clear from the very limited relevant audience of the syndicated versions of the News Corp online articles, the evidence in respect of which has been set out above. I accept that the culpability of these respondents and the gravity of the contempt are diminished by the evidence of page views for the syndicated articles in respect of which they have been charged.

383 HWT has eight prior convictions for contempt recorded between 1945 and 2009. Three of those prior conviction, recorded between 1996 and 2009, were for contempt for breach of suppression order.[75]

384 Queensland Newspapers admitted two prior convictions for contempt, one in 1941 and one in 1962.

385 Nationwide News has seven prior convictions for contempt from 1990 to 2018, and I take particular note of the sentence it received on 2 October 2018 — only two and half months prior to the publications in question — following conviction of *sub judice* contempt for publication of the prior criminal convictions of an accused.[76]

386 Advertiser Newspapers has two prior convictions in 1996 and 2015, the latter being a conviction for breach of a suppression order.

Queensland Newspapers and Nationwide News

387 In respect of the charges against Queensland Newspapers and Nationwide News for the Courier Mail article and the Daily Telegraph article, I note that both articles were directed primarily to audiences in metropolitan Brisbane and Sydney respectively,

---

75 *R v Herald and Weekly Times Ltd* (unreported, Supreme Court of Victoria, Harper J, 15 April 1996); *Registrar v Nationwide News Ltd* (2004) 89 SASR 113; *R v The Herald and Weekly Times Pty Ltd* [2009] VSC 85.

76 *R v Nationwide News Pty Ltd* [2018] VSC 572.

were short, and did not reference the pending swimmers trial.

388 Further, the evidence of the circulation of these publications in Victoria was that such publication was extremely limited. Although there were no circulation statistics for metropolitan Melbourne, I would infer, as a matter of common knowledge and from the statistics available in respect of Victoria, that Melbournians do not read the Daily Telegraph or the Courier Mail. The absence of a meaningful circulation in Victoria is a factor that I consider of considerable significance to the extent that the efficacy or purpose of the suppression order was frustrated by these publications.

389 The Courier Mail article was, by reason of its brevity, very general in its terms. It disclosed only one piece of information derived from the trial, being the conviction.

390 The Daily Telegraph article went substantially further. On its terms, its purpose was plainly to frustrate the efficacy or purpose of the suppression order. It was a front-page editorial that directly challenged the court's authority, referring to the order as 'an archaic curb on freedom of the press' and one on which there were 'strong grounds to fight'.

391 Its language was particularly encouraging of its readers undertaking searches online to identify overseas reporting on the conviction, using phrases like 'You may have read the news already' and '[M]any of our readers have probably read the international stories about this person that are accessible online'. Although it is not responsible for subsequent republication by other news media outlets, the fact that several of the impugned reports made direct reference to the Daily Telegraph article, including image copies of the article itself, demonstrates the significance of the publication.

392 The intention that the article have a frustrating purpose is further evidenced by the email exchange that its editor, Mr English, had with an overseas journalist, where made reference to the fact that 'History will be on our side on this'.

393 In respect of the Daily Telegraph article, I regard the culpability of Nationwide News

as high, particularly in light of its prior history, but ameliorated by its limited reach into metropolitan Melbourne.

The Age Company

394 I pause to observe that Fairfax Media Publications published the SMH article that I have earlier referred to as one of The Age articles. Fairfax Media Publications also published the AFR articles that are separately considered later. In this section, when referring to The Age Company, I include publication of the SMH article by Fairfax Media Publication in that reference.

395 I accept that The Age article, The Age online article, and the SMH article were in material identical form and written by the same authors. The Age online editorial was separately written, but all four articles had, in effect, the same tendency to frustrate the purpose or efficacy of the suppression order, and were the product of the same course of conduct and a single editorial process.

396 The Age Company contended that Mr Lavelle's intention was not to publish an article about the trial and verdict but, rather, to try and publish a story that explained to readers why The Age was prevented from reporting on Pell's guilty verdict, in circumstances where the story had already broken on international websites and social media.

397 I do not accept Mr Lavelle's evidence that this was his major concern. For this, and the reasons given above, I reject The Age Company's contention. I also find this explanation inconsistent with Mr Lavelle's statements, which I do not accept, that his personal risk appetite was extremely low for publishing stories that risked breaching suppression orders, and that he didn't have an appetite to fly 'close to the line'. A person with a low personal risk appetite who had, as Mr Lavelle admitted, read the suppression order, would not have published an article containing information derived from the trial, and certainly would not do so when an application to review the suppression order was extant before the court.

398 I am satisfied to the requisite standard that The Age Company deliberately chose —

adapting their counsel's metaphor — to actually cross the line.

399 As I have explained, a narrow and artificial construct of what might frustrate the purpose or efficacy of the suppression order is sufficient to demonstrate why its submission concerning its intention cannot be accepted. The suppression order was not frustrated by what was not said, it was frustrated by what was published: namely, information derived from the trial. That information was published in a particular context that adds much relevant colour. For the reasons I have already given, the offending by The Age Company was planned, deliberate, and well-considered. It was contumacious.

400 The Age online editorial was prepared by Mr Short, and the three other articles were authored by senior journalists, Mr Bachelard and Mr O'Neil. The evidence discloses that The Age articles were reviewed by the editors of The Age and the SMH (Mr Lavelle and Ms Davies) and by the group executive editor, Mr Chessell.

401 However, once The Age Company accepted its guilt, it relied solely on the evidence of Mr Lavelle and Ms Launders. Ms Launders, the general counsel and company secretary of Nine Entertainment, could obviously only give evidence on the basis of her knowledge of company systems, processes and records, and her belief in the accuracy of information provided to her by others on inquiry. There was no explanation of the absence from the witness box of Messrs Short, Bachelard, O'Neil, Chessell or Ms Davies, giving The Age Company the obvious benefit of its key decision makers with direct involvement in the impugned conduct not being exposed to cross-examination about its corporate intention.

402 The Age Company maintained claims of client legal privilege in respect of the instructions given to, and the advice received from, both internal and external lawyers. All that was said was the bare fact that the editors obtained, in some way, some form of legal advice from experienced in-house and external lawyers during the preparation of the articles and prior to their publication that they considered in deciding to publish. The result was that the legalling process was a 'black box' in an

inadequately identified path of reasoning to the beliefs of the respondent, as expressed by Mr Lavelle and Ms Launders, that were the crux of its assertion that its culpability was minimal: because The Age articles did not name Pell or identify the charges for which he was convicted, there was no breach of the suppression order.

403 The court was to be asked to incorporate that legalling process as an integral part of the path of reasoning in concluding that there was no intention to breach the suppression order. On the plea, The Age Company was unable to provide a credible explanation as to why the wrong decision being made was the result of an innocent error of judgment, while simultaneously maintaining that its editorial systems and processes were apparently operating as intended.

404 Careful consideration of The Age articles actually published satisfies me beyond reasonable doubt that The Age Company's decision makers did not believe at the time of publication, that they would be compliant with the suppression order. I do not accept that the wrong decision to publish was made conscientiously and properly. The erroneous reasoning was to regard the suppression order as inutile, because the 'word has got out widely' or because suppression orders were futile in the digital era of news reporting. It is clear that The Age Company considered the suppression order, not its articles and editorial, to be the 'wrong decision'.

405 Consider the following passage from the online editorial:

> We are legally blocked from telling you any details because the internationally prominent person found guilty of appalling crimes will face a related trial next year. The Victorian County Court has blocked publication of details, including the perpetrator's name and the charges, in the belief it could prejudice the jury in the second hearing.

406 The passage provides details that the person found guilty is internationally prominent, that their crimes were appalling, and that they will face a related trial next year. This was all information derived from the trial. The senior editors were aware of this information because it had been reported to them by their court reporter, who had been observing the trial, and who knew those facts to be correct from being present in the court room.

407 Pausing there, it is worth noting that this was the extent of involvement in the impugned reports by any court reporter employed by the guilty respondents. It is telling that the court reporters who were actually covering the cathedral trial appeared to have no difficulty in understanding the scope of the suppression order. None had any involvement in the preparation of any impugned reports.

408 In the second sentence of that passage, the editorial reframes the effect of the suppression order for the convenience of the message The Age Company wants to communicate, carrying the implication that the details prohibited from publication are the perpetrator's name and the charges, and that only publication of those details could prejudice the second jury.

409 The editorial opinion of The Age then descended to a personal attack on the integrity of judges generally going so far as to suggest that:

> Justices, blind to reality, are undermining freedom of speech and the public's right to know how well the system their taxes fund might be working.

410 The manner chosen by The Age Company to frustrate the efficacy of the suppression order amounted to a contempt of the most grave kind. It challenged, and carried the potential to diminish, the court's authority and standing. As I noted in the earlier context, undermining public confidence in the administration of justice is a most serious consequence. These examples — particularly the last, which amounted to suggesting that judicial officers who make suppression orders to protect an accused's right to a fair trial undermine the fabric of a free and just society — do precisely that. Publication of the three articles and the editorial was egregious journalism, constituting a serious and deliberate breach of the suppression order, and requiring significant weight to be given to the objectives of general and specific deterrence. I categorically reject the submission that the articles were measured, both in their content and tone.

411 The Age Company submitted that it had systems in place to ensure that suppression orders were obeyed. On this occasion, those systems did not fail. They were overridden by a consensus of the respondent's most senior personnel. Voices in

opposition, such as that of Ms Milovanovic, were ignored. The only inference open, having regard to all of the circumstances, is that The Age Company intended to disobey what it considered to be an unreasonable and ineffective order, imposed by a futile censor engaged in insidious overuse of such orders,[77] in order to advance an argument that it was in the public interest that information derived from the trial, sanitised by omission of name and charges, now be published. I have no doubt that The Age Company's offending was contumacious.

412 I am satisfied, having regard to the seniority and experience of the personnel who were involved in developing these articles for publication, that The Age Company must be convicted and punished by the imposition of a substantial fine that will make manifest the court's denunciation of its conduct. However, in quantifying an appropriate fine, further matters must be considered.

413 The reliance on systems, such as the existence of editorial oversight and legal advice discussed earlier in these reasons, provides no basis for mitigation of the appropriate penalty, because they were not relied on. Neither does the misguided contention that the articles provided no 'encouragement' of readers to conduct simple searches.

414 The Age Company contended that I should place weight on the fact that the swimmers trial was not actually prejudiced by its conduct. It is correct that there is, in this sense, the absence of an aggravating factor, but a fortuitous later development does not mitigate the culpability of the act of publication.

415 It further submitted that the evidence demonstrated that it was an exceptional corporate citizen, both by reference to its excellence in journalism and its extensive philanthropic deeds. It specifically pointed to several investigations it had undertaken jointly with the ABC's Four Corners program, which had sparked public interested and debate. I take those matters into account as I have with other respondents,

---

77 As was acknowledged by The Age Company's counsel, the contention that Victoria issues a disproportionate number of suppression orders advanced by The Age online editorial is misleading, and in reality a consequence of the high quality of the data systems recording suppression orders in Victoria compared to other states. See Jason Bosland, 'Debunking the myth: Why Victoria is not the suppression order 'capital' of Australia' (2020) 24(1) *Media and Arts Law Review* 11.

tempering the mitigating effect of such matters against its prior convictions. The Age Company admitted six prior convictions for contempt, the most recent of which was in 2008. I also take into account its apology and guilty plea.

416 As noted earlier, The Age article, The Age online article and the SMH article are materially identical and were derived from a single article prepared by Mr Bachelard and Mr O'Neil. Separate charges in respect of these publications bring the principles of totality, proportionality and double punishment into play, and have been taken into account in the sentencing exercise. In particular, The Age Company faced three charges for three separate publications. The Age online editorial, although in different and more troubling terms, was an integral part of the conduct of the respondent. Publication of The Age articles was in the ultimate control of Mr Chessell.

417 Another factor of particular significant is that The Age articles (other than the SMH article) were published to a metropolitan Melbourne audience by a masthead that asserts, probably with some justification, an entitlement to trust and respect within the Victorian community. The publications were viewed or purchased in excess of 315,000 times. Although the proportion of that readership occurring in Victoria is unknown, I am satisfied that a substantial majority of The Age's readers would be located in Victoria. That The Age used its position of trust and respect within the community to articulate such a clear stance against the court's order is a matter that weighs in favour of attributing proper weight to the objectives of general and specific deterrence.

418 A different view must be taken in respect of the SMH article, as it was published to a predominately Sydney audience by a different respondent. Considered in the light of all relevant circumstances, the publication of the SMH article is a contempt of lesser gravity than The Age publications. The penalty that I will impose on Fairfax Media Productions will also reflect that its publication of the SMH article resulted from the course of conduct that led to the publication of The Age article, The Age online article and The Age online editorial, and to the imposition of a significant penalty upon The Age Company in respect of that conduct.

Fairfax Media Publications

419 In addition to the SMH article, Fairfax Media Publications also published the three AFR articles. Evidence was received on the plea from Mr Coultan. The final decision that they be published was made by Mr Stutchbury, apparently after considering, in some unidentified way, legal advice that had been provided to this respondent.

420 An important distinction between the conduct of this respondent and others was that the AFR did not publish two of the three articles that were charged until after the special mention before the Chief Judge on 13 December 2018, a transcript of which had been received and read by Mr Coultan.

421 Fairfax Media Publications emphasised that its intention in publishing both the AFR online article 1 and the AFR online article 2 was merely to highlight an issue concerning the effectiveness of suppression orders, and to report on the Chief Judge's remarks at the special mention. It ought to have been apparent from the transcript that extreme care was required in so doing.

422 This respondent contended that the AFR online article 1 was entirely derivative of matters that were already in the public domain by reason of other media reporting in Australia. As stated earlier, that submission provides neither justification nor excuse. It is plain from the other media reporting that:

(a) there was a suppression order;

(b) information derived from the trial was being published; and

(c) strong opinion was being expressed against the efficacy of the court's suppression order, and its negative impact on the freedom of the press to publish what they considered the public had a right to know.

423 The decision makers at the AFR knew that information derived from the trial could not be published. Despite that, no satisfactory explanation emerged as to why the publication of information derived from the trial — in plain breach of the suppression order — could be sanitised by noting that it had already been published in

international publications that were accessible in Australia, and in mainstream media in Australia.

424 It was not an option for the respondent to reframe the terms of the suppression order, to suit their message. Only a moment's reflection is needed to see why that publication frustrated the efficacy of the suppression order. It increased the extent of the circulation of information derived from the trial, which was precisely what the order was intended to prevent. That consequence must be taken as accepted by reason of the respondent's plea of guilty. I do not accept Fairfax Media Publication's contention that such consequences can simply be discarded because that article contained no narration, retelling or recounting of the trial.

425 The AFR online article 2 and the AFR article were in largely identical form. While noting the reaction of the Chief Judge at the special mention to the media reporting on the jury's verdict to date, those articles nevertheless still reported that:

> [A]n Australian who has been convicted of a serious crime after a Victorian jury found the person guilty of charges this week.

426 The essential thrust of Fairfax Media Publications' contention was that its culpability in respect of these articles was ameliorated because it was reporting what had been said by the Chief Judge in court and what had been reported by the overseas and other media. That submission ignores the obvious fact that these articles nevertheless reported information derived from the trial. The only appropriate course, obviously adopted by a number of other major media outlets, was not to touch the story at all until the suppression order was revoked. It is fatuous to suggest that such information was not derived from the trial, but from other media reports of the trial, having regard to the content and expression of those other reports.

427 Fairfax Media Publications submitted that I should accept that it was not its intention to frustrate the purpose or efficacy of the suppression order by disclosing the identity of Pell, or the charges found proved against him. I reject that carefully limited submission. The focus must be on what was published not on what was not published. The respondent clearly did intend to publish information derived from the trial, which

had that effect. The submission continued that such contraventions were not intentional, flagrant, or contumacious, but it is necessary to further analyse the submission.

428 I accept that the AFR articles were more measured in their contents and tone than those of their sister publication, The Age, and there is clearly a greater focus on what was reported by other outlets than on editorialising its own position. In so doing, however, Fairfax Media Publications assumed an entitlement to republish further into the community information derived from the trial, and to spread comments made by others, without any disapproval, that were adverse to the authority of the court in making the suppression order. The notion of a 'write around' article provides no justification for this conduct. Contrary to the respondent's submission, the extent to which the AFR articles had a tendency to frustrate the purpose or efficacy of the suppression order is not attenuated by any prejudice that the court considers arose from earlier reports. It is to be assessed by reference to the content and circumstances of its own publications. In that regard, the AFR articles were subject to a high readership from within Victoria, the reports received in excess of 70,000 views/print sales.

429 As other respondents did, Fairfax Media Publications relied in mitigation on evidence of its editorial systems and on its reliance on legal advice. That reliance, it submitted, led to the wrong decision being taken. I am unpersuaded that there was reliance on these systems. As with other respondents, the safeguards of the systems appear to have been overridden. The decision to publish was made at the highest level, following, to some unknown degree, consideration of legal advice, of unknown content, obtained on undisclosed instructions. He respondent intended to convey the meanings carried by the articles. As with other respondents, Fairfax Media Publications failed to demonstrate a path of reasoning encouraged by its editorial systems and the provision of legal advice that resulted in an error of judgment rather than an intentional publication of material that would frustrate the efficacy of the suppression order, under the guise of a write around article.

430 I repeat what has been said in the context of other respondents: the process of legalling, as it was evidenced on the plea hearing, does not help Fairfax Media Publications. When reliance is placed on extensive legal training for all editorial staff, and where the text of the AFR articles received close and careful consideration at the most senior editorial level, the only inference that is available is that publication of information derived from the trial was intentional. All AFR articles were a product of the same continuing editorial process involving Mr Durkin, Ms Buffini, Mr Coultan, Mr Bailey, Mr Stutchbury and Ms Alick.

431 As with other respondents, the systemic precautions that apparently are in place to avoid non-compliance with suppression orders was overridden in the enthusiasm to publish on this topic. This decision to publish cannot be described as consciously and properly made, but erroneous, in all of the circumstances revealed on the evidence before me. For these reasons, I cannot accept Fairfax Media Publication's submission that it is unnecessary to accord significant weight to the elements of general and specific deterrence.

432 It is unnecessary to repeat my response to the general submissions, applicable to this respondent, that I ought to regard the lack of significant encouragement of readers to conduct simple searches, the fact that there was no prejudice to the swimmers trial, the impact on Fairfax Media Publication of the charges laid against its individual employees, the apology, costs and its guilty pleas.

433 The respondent admitted only two prior convictions for contempt, the last of which was in 1995. It relied on the evidence placed before the court concerning the Nine Entertainment group's status as a corporate citizen and its recognised public interest reporting, which included the AFR's participation in and reporting on the 'Panama Papers' investigation. I take all of these matters into account.

434 I accept Fairfax Media Publication's submission that I carefully heed the principles of totality, proportionality and double punishment. All of the AFR articles were prepared by Mr Durkin, and published through the same process of review and

directed to the same audience of AFR readers. There is overlap in the content between the three articles, and the manner in which the AFR articles frustrated the efficacy of the suppression order is substantially the same. I also acknowledge that AFR online article 2 is in substance the same article as the AFR article.

435 As stated earlier, I accept that the individual penalty to be imposed on the Fairfax Media Publications for publication of the SMH article must be tempered to rationally reflect that respondent's true culpability.

Mamamia

436 Mamamia's CEO and co-founder, Mr Lavigne, gave evidence on the plea that Mamamia is an online platform that publishes content targeting women aged 18 to 60 and is a privately owned company.

437 At the time the Mamamia online article was published, Mamamia employed approximately 70 staff, which included 25 journalists and editorial staff. The subject article was prepared by Ms Chambers under the supervision of an editor, Ms Stephens, in circumstances set out earlier in these reasons. Mr Lavigne described a system where if an editor believed it was necessary to obtain legal advice, that editor was required to escalate the issue to the Head of Content, Ms Wainwright.

438 Two failings in the systems of Mamamia stand out. First, apparently on the basis that what was proposed was a 'write around' article, a decision was taken by Ms Stephens and Ms Wainwright to publish, when they had no knowledge of, nor had enquired about, the actual terms of the suppression order, to determine whether it would be breached by the article. The second failing was the assumption that the extensive local coverage of the international media's response carried a reasonable implied assurance those local publications had not breached the suppression order, because they would have legalled what they published.

439 As conceded by its plea of guilty, Mamamia published information derived from the trial that had a tendency to frustrate the efficacy of the suppression order. Mamamia sought to distinguish a report of what actually occurred in the cathedral trial from a

report of what other media outlets were reporting had occurred. As earlier reasoned, it is not mitigation to submit that all the Mamamia online article did was republish what had already been reported. The article republished further into the community to a wider audience information derived from the trial. So much may have become apparent to the editorial staff if they had taken steps to obtain a copy of the suppression order, or sought legal advice.

440 I accept that Mamamia did not directly intend to frustrate the efficacy of the suppression order, but that is because it was careless about what was suppressed. The best explanation that was offered by Mamamia was that the view of Ms Stephens and Ms Wainwright at the time of publication was that the article carried a negligible legal risk because of its write around nature. Mr Lavigne correctly conceded that this was an 'absolutely incorrect' error of judgment.

441 Mamamia misunderstood the nature of the suppression order, believing that it was only the name of the offender and the charges that had been suppressed. Given the nature of the media's response that was the subject of the Mamamia online article, Ms Chambers, Ms Stephens and Ms Wainwright were careless in assessing the scope of the suppression order, not by reference to its terms, but by reference to the content of other media publications. Mr Lavigne accepted that it was inappropriate for his staff to assume that legal advice was unnecessary because the story had already been published by major media outlets. Although that conclusion was irresponsible, I do not infer from that error a deliberate decision on the part of Mamamia to defy the suppression order.

442 Both the decision to publish the Mamamia online article on 13 December 2018 and then to not remove it until 7 February 2019, after it received a letter from the applicant foreshadowing contempt charges, were wrong. Although Mamamia was unable to precisely identify the geographic location of the approximately 25,000 unique readers of the Mamamia online article, I am satisfied beyond reasonable doubt that a material number of the views originated from Victoria, having regard to the broad audience of the publication and the size of Victoria's population comparative to other states and

territories. The publication had the effect of spreading information derived from the trial to a wider or different audience of readers than the other impugned reports who were potentially members of the jury pool for the swimmers trial.

443 Although the article makes reference to the importance of upholding the administration of justice (rather than flagrantly undermining it as other reports did), the irony — although humourless — in the publisher's position is unmistakable, for two reasons.

444 First, Mamamia did not explain why the email sent to Ms Chambers by the County Court on the afternoon of 13 December 2018 — drawing the existence of the suppression order to her attention and providing her with a copy of the order and the transcript of the special mention before the Chief Judge — was not acted on. Mr Lavigne denied any knowledge of that email within Mamamia until a copy was provided to the respondent as part of the applicant's evidence on the plea. It is of considerable concern that an email from a court to a journalist regarding a suppression order was not received and/or escalated to senior editorial staff, and squarely brings into focus the inadequacy of Mamamia's editorial systems.

445 Secondly, it seems that despite their daily review of the media to identify suitable 'write around' publications, Mamamia was unaware of the AFR online article 2 published the following day, that commented specifically on the Chief Judge's reaction to the media reporting of the verdict.

446 That said, I accept that Mr Lavigne understood the gravity of Mamamia's offending and expressed sincere remorse and contrition for the mistakes that were made.

447 Lessons may have been learned from this process that will assist in its rehabilitation. At the time of publication, all editorial staff received legal training from external solicitors. Mamamia has since taken a number of steps to remedy and improve its editorial processes. Mamamia has engaged specialist media lawyers on a more extensive retainer to provide pre-publication advice on a rolling basis as required. Pre-publication advice is now mandatory for any story deemed legally sensitive, even

when it has been the subject of reporting by other news media outlets.

448 Mamamia relied on a number of other matters in mitigation that have already been discussed in respect of the respondents generally, such as the apology, contribution to the applicant's costs, the lack of actual prejudice to the swimmers trial, and the impact through the burden of stress on its employees. I have considered these matters in the manner discussed above.

449 I take into account that its guilty plea and its apology ought to be assessed in the light of its evidence that it operates a well-respected media business that is the recipient of multiple awards, and has also engaged in philanthropy, particularly an aid of or advancing the interests of women and girls. This work is not diminished by any prior convictions.

450 I consider that of all of the respondents being sentenced, Mamamia is the least likely to re-offend in the future.

Allure Media

451 I accept that the intention of Allure Media in publishing the Business Insider online article was to publish a 'write around' story. That said, and consistently with its plea of guilty, the article clearly reveals information derived from the cathedral trial, which conduct is not excused because the source of Mr Thomsen's information was other media publications, for reasons already explained.

452 As with other respondents, the nature of the developing media storm and the clear references to the existence of a suppression order in terms, exciting a strong editorial comment from several of the News Corp respondents and the Nine Entertainment respondents, was said to justify the article that republished information derived from the trial. However, Mr Thomsen could not clearly explain his reasoning that the article would not breach the suppression order, because Allure Media maintained claims of client legal privilege in respect of advice that he sought from Ms Alick. From the evidence before the court, I was not able to understand precisely why Mr Thomsen formed his opinion that the Business Insider online article would not breach the

suppression order if published, and the extent to which Ms Alick's advice may have contributed to that conclusion. As stated above, I cannot give any significant weight to that assertion, and I am unable to accept on the balance of probabilities that he innocently made an error of judgment.

453 The only inference that is open on the evidence is that Allure Media knew there was a risk of breaching the suppression order, but it took that risk in choosing to publish the impugned report. There was no explanation as to why any publication was deferred until after the hearing before the Chief Judge.

454 The article remained on the Business Insider website until 22 February 2019. Mr Thomsen's explanation for the delay in removing the article, that the applicant's correspondence had been sent to a previous business address of the Business Insider, is unpersuasive as a mitigating factor. The absence of any action by Allure Media because a letter was sent to a previous business address, apparently without a mail forwarding, does not inspire confidence in Allure Media's editorial systems, particularly given the widespread coverage of the Chief Judge's comments concerning the media reporting of the verdict. Nor does the fact that action was not taken by Allure Media until Mr Thomsen, then a redundant former employee, returned from an extended holiday interstate and drew the applicant's correspondence to a superior's attention.

455 Mr Thomsen's explanation also sits uncomfortably with other evidence before the court. Given that Allure Media received legal advice from Nine Entertainment's in-house counsel, it is curious that Fairfax Media Publications, who had received legal advice from the same internal lawyer, removed the AFR online article 1 and the AFR online article 2 on the same day, hours earlier.

456 For these reasons, I cannot accept Mr Thomsen's evidence that Business Insider was a risk adverse publication, although I will take into account in favour of this respondent that it is a publisher directed at a business-focused audience, and notwithstanding that a clear rationale for publication of this story to its readership emerged, I am

satisfied that it was careless in undertaking the risk.

457 Allure Media contended that in publishing the Business Insider online article, it complied with all known editorial procedures that required legal advice to be sought before publishing legally sensitive stories. The staff involved in publication were required to participate in legal training covering contempt by breach of suppression orders, which was delivered by in-house lawyers. The observations made above in relation to the reliance on legal advice by other respondents are apposite in this case. Allure Media's systems were either overridden by Mr Thomsen's deliberate judgment, or were inadequate. The option that the editorial decision to publish was an honest reliance on incorrect legal advice was not open on the material placed before the court by Allure Media.

458 The content of the article is inconsistent with the innocent error of judgment that Allure Media advances as its intention. The article referred to the conviction as being the subject of widespread reporting globally, with the name of the guilty person being featured heavily on social media in the preceding 24 hours. The article noted that 'Google searches for the person's name surged on Wednesday.' On the other hand, the article, as did others, contained a number of express warnings to readers about the risk of contempt liability for the publisher. There is a certain irony in these comments. I do not accept them as indicative of a sincere appreciation of the importance of suppression orders and the law of contempt.

459 These circumstances weigh in favour of the purposes of general and specific deterrence in sentencing Allure Media. However, there are mitigating factors deserving of some force.

460 There was no evidence of the extent of publication of the Business Insider online article in metropolitan Melbourne. In the absence of such evidence, I have not been persuaded by the applicant to the requisite standard that the Business Insider online article materially contributed, beyond the admission comprised by its plea of guilty, to frustrating the efficacy of the suppression order. I accept that the limited extent of

publication to the relevant audience is a significant mitigating factor.

461 No prior convictions for contempt were alleged against Allure Media.

462 Allure Media also adopted the submissions of others on the question of prejudice to the swimmers trial, or the impact on the corporate business of stress on individual respondents before those charges were withdrawn or dismissed, its apology to the court, its guilty plea and its contribution to the applicant's costs. It is unnecessary to repeat what has been earlier set out and I either take, or do not take, these considerations into account as mitigating factors in a like manner.

Radio 2GB Sydney

463 A particularly egregious feature of the broadcast of the 2GB Breakfast segment was that it not only alerted listeners to the availability of further information online concerning the identity of Pell and the charges he faced, but it actively encouraged them to undertake searches to locate those details. The presenter, Mr Smith, went 'off script' with the words:

> But I can also encourage you to get onto Google and start asking these questions: high profile Australian, worldwide reputation, conviction of an awful crime. And you'll find out who it is.

464 Radio Sydney 2GB is not excused by the fact that Mr Smith saw it upon himself to go off script. Rather, it highlights two matters. First, any systems in place for ensuring that the respondent's presenters stuck to scripts in sensitive matters comprehensively failed. Second, the fact that Mr Smith was able to ad-lib possible online search terms from the content of the impugned reports demonstrates how easy it was for any reader or listener, being presented generally with anonymised information derived from the cathedral trial — as is featured in all of the reports — to do the same.

465 It is irrelevant that the information that was published was derived 'indirectly' from the trial, as has been already discussed. As is clear from its plea of guilty, Radio Sydney 2GB published information derived from the trial.

466 In assessing why it did so, a number of factors are relevant. Firstly, the evidence

disclosed clear systemic failure. The 2GB Breakfast segment itself was not legalled prior to publication. There was evidence from Mr Byrnes of the existence of general legal advice concerning reporting on the conviction broadly, which for reasons already discussed does not assist me. In any event, that advice was not seen or considered before broadcast by Mr Smith or the program's Executive Producer, Mr Christenson, evidencing a lack of systems for properly bringing such matters to the attention of those involved in the production and broadcast of sensitive matters. Further, neither Mr Smith nor Mr Christenson considered it necessary to seek legal advice prior to broadcasting the 2GB Breakfast segment in light of the extensive local reporting on the jury's verdict, a matter that does not permit any favourable inference about training for such persons.

467 However, the highly sensitive nature of the story was evident to the respondent from the broadcast itself, which included statements such as 'I'm saying this very carefully because I've got to be'. Mr Byrnes believed that neither Mr Smith nor Mr Christenson considered that the suppression order would be breached by a broadcast on radio in Sydney, but it is not apparent how that view could have been formed, as neither of them saw the suppression order itself or any advice in respect of it. As was the case for a number of respondents who relied on evidence from executives instead of decision makers, Mr Byrnes' belief of the beliefs of others is unhelpful.

468 It is plain from the words of the 2GB Breakfast segment that Mr Smith was aware of the suppression order. Self-evidently, the broadcast included information derived from the trial. Mr Smith stated that despite the suppression order, Google searches would readily identify the very high profile figure being discussed.

469 I am satisfied beyond reasonable doubt that this was a contumacious breach of the suppression order. It may not have been Radio Sydney 2GB's corporate intention to frustrate the efficacy of the suppression order, as Mr Byrnes stated, but it is responsible for the conduct of Mr Smith, particularly when he and Mr Christenson were alive to the sensitivities involved. The respondent had sufficient information to be aware of the risk, yet had substantially inadequate procedures in place to prevent that risk from

materialising.

470 Mr Byrnes' statement of what Radio Sydney 2GB did not intend by the broadcast cannot be accepted. The respondent's suggestion that these defects were a result of human error, rather than any shortcomings in the systems themselves, is a non-sequitur. The purpose of systems of this kind is to protect against human error. Radio Sydney 2GB must accept responsibility for the conduct of its authorised decision makers (as to broadcast content) operating within such systems as it then had. The respondent was careless in permitting a contumacious breach by its employees. General and specific deterrence remain legitimate sentencing considerations.

471 Notwithstanding these aggravating factors, a relevant and significant circumstance affecting the assessment of culpability is that the 2GB Breakfast segment was of short duration, on Sydney radio, and broadcast at 5:41am on 13 December 2018 as part of the Alan Jones Breakfast Show. These surrounding circumstances significantly ameliorate the presenter's on-air conduct. A brief segment very early in the morning on Sydney radio would have an extremely limited audience in Victoria and its tendency to frustrate the purpose or efficacy of the suppression order, in the manner alleged by the applicant, would not be significant.

472 Although the existence of editorial systems alone is not a mitigating factor on this occasion, as they were ineffective, Mr Byrnes gave evidence of a number of improvements that have subsequently been made to those systems, with the objective of minimising the risk of future contempt. The Nine Radio network now has state-based content managers installed across its business, who are specifically tasked with overseeing day-to-day programming to add an additional level of editorial oversight. All programming staff are now included in the internal 'Suppression Orders' email distribution list and in that way receive copies of all suppression orders held by Nine Radio. Further, Mr Byrnes has communicated his expectation to all programming staff that all stories of a sensitive legal nature must be subject to legal advice, and presenters of all such stories are not to deviate from a script that has been legalled by adding editorial comment. The steps taken by Mr Byrnes to improve the systems operating at

Nine Radio are both necessary and commendable.

473 No prior convictions for contempt were alleged against Radio Sydney 2GB, who claimed a record of philanthropic work in the community, both in its own right and as part of the Nine Entertainment group.

474 As with other respondents, reliance was placed on the apology and guilty plea, its contribution to the applicant's costs, the want of prejudice to the swimmers trial, the stress for the organisation through charges laid against the individual employee, Mr Smith. I have taken these matters into account in the same manner as earlier discussed in respect of other respondents.

GTC

475 GTC pleaded guilty to three charges in respect of the Today Show segments, which were in all material respects identical, being based on a single script. Principles of totality and the avoidance of double punishment are relevant and I will take them into account.

476 Mr Wick, who has responsibility amongst other things for the Today Show, stated that the co-hosts or news presenters have no editorial control over what they present, and often receive scripts with limited advanced knowledge of their contents. They rely on a robust production process and the judgment of the show's producers. As with all other respondents, GTC mistakenly believed that sanitising the story by not naming Pell or identifying the charges of which he had been found guilty would avoid breaching the suppression order. By its plea of guilty, the respondent acknowledges its error.

477 GTC submitted that the segments were entirely derivative of matters drawn from the public domain. In other words, the segments were in the nature of a 'write around' discussed earlier, my assessment of the culpability of that style of publication in a written form is equally applicable here to a broadcast. Like other respondents, GTC invited the court to infer from these matters, and from the fact that legal advice was obtained, that it was not its intention to frustrate the efficacy or purpose of the

suppression order by disclosing information derived from the trial.

478 Clearly, GTC was mistaken in that assessment, as its plea of guilty now recognises. However, I am not persuaded that it has established that it lacked an intention to breach the suppression order for several reasons.

479 First, Mr Wick's evidence was based on information and belief. He had no contemporaneous direct knowledge of events and those who did, did not present themselves for cross-examination as to their intention. This created, as I have noted, a disconnection between the corporate intention, as expressed by a senior executive, and the corporate intention flowing from and evidenced by the conduct of its employees for which it is responsible.

480 Secondly, for reasons already explained, GTC is unable to rely on legal advice that has not been put into evidence, and has not shown a factually supported path of reasoning to a belief as to its intention.

481 Thirdly, GTC clearly wanted to join in the media frenzy following the jury's verdict. The reporter, Ms Ahern, first made the specific point that:

> Because of a legal ban imposed by the Victorian County Court, I'm unable to reveal the identity of this person, details of this case, or their crime.

Next, she stated:

> [W]e here at Nine believe that it is very important that we were able to tell this story and that we and other members of the Australian media are working very hard to be able to do so.
>
> The major newspapers around the country are obviously also very restricted in what they can report on, and they have taken to their pages to vent their anger and frustration today.

482 As with all other respondents, the language used by the news presenters, Ms Vella and Ms Knight, and the reporter, Ms Ahern, was liable to engender in the reasonable listener an interest in the identity of the high profile Australian and the awful crime for which he had been convicted.

483 The script included loaded phrases like 'legal ban imposed by the Victorian County

Court', 'we … are working very hard to be able to [tell this story]' and 'The major newspapers around the country … have taken to their pages to vent their anger and frustration'. Such language carried the tendency to diminish the court's authority and standing by undermining public confidence in the administration of justice, by suggesting a contest between the media and the courts over the proper balance between the proper administration of justice and freedom of speech when reporting on the cathedral trial. In doing so, the Today Show segments were irresponsible journalism. In broadcasting them, GTC's culpability was high.

484 Unlike Radio 2GB Sydney, whose broadcast was largely confined to metropolitan Sydney, the Today Show is a national broadcast. The audience of the 5:32am, 6:00am and 7:02am Today Show segments is estimated to be 22,704, 22,553 and 49,417 respectively. Although details of estimated audiences at a state level were not provided, I am satisfied beyond reasonable doubt that a material portion of the audience would have been viewers from metropolitan Melbourne. The size and locality of the audience is not the mitigating factor identified for other respondents.

485 The GTC respondent admitted to a prior conviction for breach of a suppression order in 2009.

486 GTC similarly relied on its apology, its pleas of guilty, its agreement to contribute to the costs of the applicant, the want of prejudice to the swimmers trial, and the impact the charges laid against individual employees had on the organisation as a whole. As with the other respondents, I have taken these matters into account in the same manner discussed above.

Penalty

HWT

487 The first respondent is convicted of breach of proceeding suppression order contempt in respect of the Herald Sun online article (charge one) and the Weekly Times online article (charge 25) and is fined $1,000 on each charge, a total of $2,000.

News Life Media

488 The fourth respondent is convicted of breach of proceeding suppression order contempt in respect of the News.com.au online article (charge five) and fined $400,000.

Queensland Newspapers

489 The fifth respondent is convicted of breach of proceeding suppression order contempt in respect of the Courier Mail article (charge nine) and is fined $1,000.

The Geelong Advertiser

490 The seventh respondent is convicted of breach of proceeding suppression order contempt in respect of the Geelong Advertiser online article (charge 13) and is fined $1,000.

Nationwide News

491 The ninth respondent is convicted of breach of proceeding suppression order contempt in respect of each of the Daily Telegraph article (charge 17) and the Daily Telegraph online article (charge 21).

492 On charge 17, the ninth respondent is fined $20,000, and on charge 21 is fined $1,000, a total of $21,000.

Advertiser Newspapers

493 The twelfth respondent is convicted of breach of proceeding suppression order contempt in respect of the Advertiser online article (charge 29) and is fined $1,000.

The Age Company

494 The fifteenth respondent is convicted of breach of proceeding suppression order contempt in respect of The Age article, (charge 33) and in respect of The Age online article, (charge 41) and is fined $125,000 on each charge.

495 The fifteenth respondent is convicted of breach of proceeding suppression order contempt in respect of The Age online editorial, (charge 47) and is fined $200,000.

496 The total of the fines imposed on this respondent is $450,000.

Fairfax Media Publications

497 The twentieth respondent is convicted of breach of proceeding suppression order contempt in respect of the SMH article, (charge 49) and is fined $2,000.

498 The twentieth respondent is convicted of breach of suppression order contempt in respect of each of the AFR online article 1 (charge 53), the AFR online article 2 (charge 59), and the AFR article (charge 65).

499 In respect of charge 53, the twentieth respondent is fined $75,000.

500 In respect of charge 59, the twentieth respondent is fined $75,000.

501 In respect of charge 65, the twentieth respondent is fined $10,000.

502 The total of the fines imposed on this respondent is $162,000.

Mamamia

503 The twenty-sixth respondent is convicted of breach of proceeding suppression order contempt in respect of the Mamamia online article (charge 71), and is fined $20,000.

Allure Media

504 The twenty-eighth respondent is convicted of breach of proceeding suppression order contempt in respect of the Business Insider online article (charge 75), and is fined $10,000.

Radio 2GB Sydney

505 The thirtieth respondent is convicted of breach of proceeding suppression order contempt in respect of the 2GB Breakfast segment (charge 79), and is fined $10,000.

GTC

506 The thirty-third respondent is convicted of breach of proceeding suppression order contempt in respect of the 5:32am Today Show segment (charge 83), and is fined $10,000.

507 The thirty-third respondent is convicted of breach of proceeding suppression order contempt in respect of the 6:00am Today Show segment (charge 85), and is fined

$10,000.

508 The thirty-third respondent is convicted of breach of proceeding suppression order contempt in respect of the 7:02am Today Show segment (charge 87), and is fined $10,000, a total of $30,000.

Costs

509 I will order that the respondents pay the applicant's costs fixed in the sum of $650,000.

CERTIFICATE

I certify that this and the 139 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 4 June 2021.

DATED this fourth day of June 2021.

Associate

SCHEDULE OF PARTIES

THE QUEEN (ON THE APPLICATION OF THE DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
THE HERALD AND WEEKLY TIMES PTY LTD	First Respondent
~~DAMON JOHNSTON~~	~~Second Respondent~~
~~CHARIS CHANG~~	~~Third Respondent~~
NEWS LIFE MEDIA PTY LTD	Fourth Respondent
QUEENSLAND NEWSPAPERS PTY LTD	Fifth Respondent
~~SAM WEIR~~	~~Six Respondent~~
THE GEELONG ADVERTISER PTY LTD	Seventh Respondent
~~ANDREW PIVA~~	~~Eighth Respondent~~
NATIONWIDE NEWS PTY LTD	Ninth Respondent
~~BEN ENGLISH~~	~~Tenth Respondent~~
~~LACHLAN HASTINGS~~	~~Eleventh Respondent~~
ADVERTISER NEWSPAPERS PTY LTD	Twelfth Respondent
~~MICHAEL OWEN-BROWN~~	~~Thirteenth Respondent~~
~~FAIRFAX MEDIA LIMITED~~	~~Fourteenth Respondent~~
THE AGE COMPANY PTY LTD	Fifteenth Respondent
~~ALEX LAVELLE~~	~~Sixteenth Respondent~~
~~BEN WOODHEAD~~	~~Seventeenth Respondent~~
~~PATRICK O'NEIL~~	~~Eighteenth Respondent~~
~~MICHAEL BACHELARD~~	~~Nineteenth Respondent~~
FAIRFAX MEDIA PUBLICATIONS PTY LTD	Twentieth Respondent
~~LISA DAVIES~~	~~Twenty-first Respondent~~
~~MICHAEL STUTCHBURY~~	~~Twenty-second Respondent~~
~~PATRICK DURKIN~~	~~Twenty-third Respondent~~

~~DANIELLE CRONIN~~	~~Twenty-fourth Respondent~~
~~FRANZISKA RIMROD~~	~~Twenty-fifth Respondent~~
MAMAMIA.COM.AU PTY LTD	Twenty-sixth Respondent
~~JESSICA CHAMBERS~~	~~Twenty-seventh Respondent~~
ALLURE MEDIA PTY LTD	Twenty-eighth Respondent
~~SIMON THOMSEN~~	~~Twenty-ninth Respondent~~
RADIO 2GB SYDNEY PTY LTD	Thirtieth Respondent
~~CHRIS SMITH~~	~~Thirty-first Respondent~~
~~RAY HADLEY~~	~~Thirty-second Respondent~~
GENERAL TELEVISION CORPORATION PTY LTD	Thirty-third Respondent
~~LARA VELLA~~	~~Thirty-fourth Respondent~~
~~CHRISTINE AHERN~~	~~Thirty-fifth Respondent~~
~~DEBORAH KNIGHT~~	~~Thirty-sixth Respondent~~